WORLD TRADE ORGANIZATION

WT/DS415/R
WT/DS416/R
WT/DS417/R
WT/DS418/R
31 January 2012
(12-0542)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Final Report of the Panel

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT THE SPECIAL SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX H

COMMUNICATION FROM THE PANEL

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Preserved Peaches	Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted 15 April 2003, DSR 2003:III, 1037
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Brazil – Desiccated Coconut	Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, 189
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925

Short Title	Full Case Title and Citation
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793
EC – Export Subsidies on Sugar (Thailand)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, 3127
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R and Corr.1, WT/DS395/R and Corr.1, WT/DS398/R and Corr.1, circulated to WTO Members 5 July 2011 [appeal in progress]
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3

Short Title	Full Case Title and Citation
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, 49
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China, WT/DS392/R, adopted 25 October 2010*
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, 4107
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, 779

Short Title	Full Case Title and Citation
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, circulated to WTO Members 31 March 2011 [appeal in progress]
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
US – Steel Safeguards	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R, and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273

Short Title	Full Case Title and Citation
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/R, DSR 2002:IV, 1473
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3

LIST OF ABBREVIATIONS USED IN THIS REPORT

Abbreviations	Explanation
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ADC	Apparent domestic consumption
Bags Division	Bags Division of FERSAN
CARICOM	Caribbean Common Market
Commission	Commission for the Regulation of Unfair Trade Practices and Safeguard Measures
DEI	Departmento de Investigaciones (Investigation Department)
Central America-Dominican Republic FTA	Free Trade Agreement between Central America and the Dominican Republic
DR-CAFTA	Free Trade Agreement between the Dominican Republic, Central America and the United States
DR-CAFTA FTA	Free Trade Agreement between the Dominican Republic, Central America and the United States
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
Definitive Resolution	Commission Resolution CDC-RD-SG-089-2010 of 5 October 2010
FERSAN	Fertilizantes Santo Domingo, C. por A.
Final public notice	Public notice of the Commission concerning the application of the Definitive Measure
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994
Final Technical Report	Final Technical Report of 13 July 2010 issued by the DEI
Initial Technical Report	Initial Technical Report of 20 November 2009 issued by the DEI
Initial Resolution	Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009
Law 146-00	Law No. 146-00 on tariff reform
Law 1-02	Law No. 1-02 on Unfair Trade Practices and Safeguard Measures
MFN tariff	Most-favoured-nation treatment tariff
Preliminary public notice	Public notice by the Commission concerning the application of the provisional measure
Preliminary Resolution	Commission Resolution CDC-RD-SG-061-2010 of 16 March 2010
Preliminary Technical Report	Preliminary Technical Report of March 2010 issued by the DEI
Regulations of Law 1-02	Implementing Regulations of Law No. 1-02 on Unfair Trade Practices and Safeguard Measures
WTO	World Trade Organization

I. INTRODUCTION

A. REQUEST FOR CONSULTATIONS

1.1 On 15 October 2010 Costa Rica and Guatemala, on 18 October Honduras and on 19 October El Salvador each separately requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 14 of the Agreement On Safeguards, concerning the provisional and final safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.[1]

1.2 On 22 October 2010, Panama requested, by separate communications, to be joined in the consultations requested by Costa Rica, Guatemala, Honduras and El Salvador with the Dominican Republic.[2] On 25 October Guatemala, and on 26 October Costa Rica, Honduras and El Salvador, also each requested to be joined in the consultations requested by each of the other complainants with the Dominican Republic.[3] The Dominican Republic accepted the requests to join consultations submitted by Costa Rica, El Salvador, Guatemala, Honduras and Panama.[4]

1.3 Consultations were held on 16 and 17 November 2010, but the parties failed to reach a mutually satisfactory solution. On 15 December Costa Rica and Guatemala and on 20 December Honduras and El Salvador (the complainants) in separate communications requested the Dispute Settlement Body (DSU) to establish a panel pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards.[5]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 7 February 2011, the DSB established a single panel pursuant to the requests of Costa Rica, El Salvador, Guatemala and Honduras, in accordance with Article 6 of the DSU. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Costa Rica in document WT/DS415/7, by El Salvador in document WT/DS418/7, by Guatemala in document WT/DS416/7 and by Honduras in document WT/DS417/7, and to make

[1] Requests for consultations submitted respectively by Costa Rica, Guatemala, Honduras and El Salvador, documents WT/DS415/1, WT/DS416/1, WT/DS417/1 and WT/DS418/1 (all of 21 October 2010) (request for consultations).

[2] Requests to join consultations, WT/DS415/2, WT/DS416/2, WT/DS417/2 and WT/DS418/2 (all of 27 October 2010).

[3] Requests to join consultations, documents WT/DS415/5, WT/DS417/5 and WT/DS418/5; WT/DS416/3, WT/DS417/3 and WT/DS418/3; WT/DS415/4, WT/DS416/5 and WT/DS418/4; and WT/DS415/3, WT/DS416/4 and WT/DS417/4 (all of 29 October 2010).

[4] Acceptance by the Dominican Republic of the requests to join consultations, documents WT/DS415/6, WT/DS416/6, WT/DS417/6 and WT/DS418/6 (all of 5 November 2010).

[5] Requests for the establishment of a panel, documents WT/DS415/7 (22 December 2010), WT/DS416/7 (22 December 2010), WT/DS417/7 (6 January 2011) and WT/DS418/7 (6 January 2011) (request for the establishment of the panel).

such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[6]

1.5 Pursuant to the complainants' joint request and in accordance with Article 8.7 of the DSU, on 11 March 2011 the Director-General composed the Panel as follows:

Chairman: Mr Pierre Pettigrew

Members: Ms Enie Neri de Ross
Ms Gisela Bolívar

C. PARTICIPATION OF THIRD PARTIES

1.6 China, Colombia, Costa Rica (concerning disputes WT/DS416, WT/DS417 and WT/DS418), El Salvador (concerning disputes WT/DS415, WT/DS416 and WT/DS417), the European Union, Guatemala (concerning disputes WT/DS415, WT/DS417 and WT/DS418), Honduras (concerning disputes WT/DS415, WT/DS416 and WT/DS418), Nicaragua, Panama, Turkey and the United States reserved the right to participate as third parties in the panel proceedings.

1.7 On 14 March 2011 Colombia requested the Panel to enhance its third party rights so as also to enable it to: have access to the written submissions, written versions of the oral submissions and evidence submitted at the second substantive meeting; attend the second substantive meeting of the Panel with the parties, and to present oral arguments and ask questions at that meeting; and receive copies of the summary of the arguments in the factual part of the report. Having heard the opinions of other third parties (the European Union, Nicaragua, Panama and the United States) and the parties, on 5 April the Panel rejected Colombia's request and said that it would explain the reasons for its decision in its report.

1.8 In its decision, the Panel took into consideration the following aspects: (i) Colombia was expressly excluded by the Dominican Republic from the application of the impugned measures, together with other developing country Members; (ii) in the Panel's view, Colombia did not make a case for the existence of any factual circumstance that would place it in a particular position with respect to the defendant compared with other third parties; (iii) in the Panel's view, Colombia also failed to make a case for the existence of reasons why its rights as a third party under the DSU and the working procedures adopted by the Panel would not be sufficient to enable it to protect its interests in the present dispute; (iv) the granting of additional rights could have led in the present case to delays in the timetable or the imposition of additional burdens on the parties to the dispute; (v) when consulted, none of the parties to the dispute supported Colombia's request for additional rights beyond those set out in the DSU and working procedures adopted by the Panel; (vi) none of the third parties expressed support for Colombia's request, other than to ask that if the Panel were to grant additional rights they should be extended to all third parties; and (vii) the Panel considered it important to avoid the risk that the granting of additional rights to one or more third parties should unduly blur the distinction established in the DSU between the rights of the parties and the rights of third parties.[7]

[6] Constitution of the Panel, document WT/DS415/8, WT/DS416/8, WT/DS417/8 and WT/DS418/8 (14 March 2011).

[7] The Panel took into account the earlier decisions of other panels in *EC – Export Subsidies on Sugar (Australia*), *EC – Export Subsidies on Sugar* (*Brazil*), *EC – Export Subsidies on Sugar* (*Thailand*), *US – Upland*

1.9 In accordance with the timetable adopted by the Panel, on 13 and 16 May 2011 it received written submissions from the following third parties: Colombia, the European Union, Nicaragua, Panama, Turkey and the United States. On 16 June the Panel met with the third parties in a closed session of the substantive meeting with the parties. At that meeting, Colombia, the European Union, Panama, Turkey and the United States made oral presentations. The Panel addressed questions to the third parties and received replies from Colombia, the European Union, Turkey and the United States on 30 June.

D. PANEL PROCEEDINGS

1.10 After consulting the parties, on 25 March 2011 the Panel adopted the working procedures and timetable for this dispute. At the request of the Dominican Republic, on 5 April the Panel adopted additional working procedures relating to the protection of business confidential information (BCI) that might be submitted during the procedure. At the request of the parties, the Panel decided that its proceedings would take place in the Spanish language; third parties had the option to present their submissions and arguments in any of the working languages of the World Trade Organization (WTO).

1.11 On 20 April 2011 the Dominican Republic requested the Panel to issue a preliminary ruling to the effect that Article XIX of the GATT 1994 and the Agreement on Safeguards were not applicable to the present dispute and that the dispute was therefore devoid of purpose. In the same communication the Dominican Republic requested the Panel to suspend its proceedings until it had issued its preliminary ruling and to postpone the deadlines provided for in the timetable, including the deadline for the Dominican Republic to present its first written submission. Having heard the opinion of the complainants, on 12 May the Panel informed the parties that it did not consider it appropriate to issue a preliminary ruling on whether GATT Article XIX and the Agreement on Safeguards were applicable to the present dispute. The Panel did not consider it appropriate to suspend the proceedings and postpone the deadline provided for in the timetable. The Panel stated that it would rule on the issues raised by the Dominican Republic in its final report, and therefore invited the parties and third parties to develop their arguments on the issues raised by the Dominican Republic.

1.12 In accordance with the timetable adopted by the Panel, the parties presented their first written submissions on 1 April and 3 May 2011, respectively. The parties presented their second written submissions on 7 July. The first substantive meeting of the Panel with the parties was held on 15 and 16 June; the second substantive meeting took place on 26 and 27 July. The Panel put questions to the parties and received replies from them on 30 June and 8 August, as well as comments on 15 August from each of the parties to the replies submitted by the other party. The complainants in turn put questions, through the Panel, to the Dominican Republic to which the latter replied.

1.13 The Panel submitted the descriptive (factual and argument sections) of its final report to the parties on 19 August 2011. On that same date the Panel informed Colombia, the European Union, Nicaragua, Panama, Turkey and the United States that the descriptive part would contain summaries of the arguments of each of them. On 31 August and 2 September the Dominican Republic and the complaining parties, respectively, submitted comments and asked for some aspects of the descriptive part of the report to be revised and clarified.

1.14 The Panel issued its interim report to the parties on 19 October 2011. On 2 November the complainants and the Dominican Republic submitted written comments and requested that certain

---

Cotton, EC – Tariff Preferences, US -1916 Act (EC), US -1916 Act (Japan), EC – Bananas III and US – Large Civil Aircraft (2nd complaint).

aspects of the interim report be revised. Neither of the parties requested a meeting with the Panel on the issues identified in their comments. On 16 November the parties submitted written comments on each other's comments.

1.15 The Panel issued its final report to the parties on 23 November 2011.

II. FACTUAL ASPECTS

A. APPLICABLE DOMESTIC LEGISLATION IN THE DOMINICAN REPUBLIC

1. Domestic legislation on safeguards

2.1 The Dominican Republic's domestic legislation on safeguards is contained in Law No. 1-02 on unfair trade practices and safeguard measures (*Law 1-02*)[8], and in the Implementing Regulations of Law No. 1-02 on unfair trade practices and safeguard measures (*Regulations of Law 1-02*).[9] These instruments constitute the implementation of the Safeguards Agreement and of Article XIX of the GATT 1994 at national level.[10]

2.2 In accordance with *Law 1-02*, the Commission for the Regulation of Unfair Trade Practices and Safeguard Measures (Commission) is the competent national authority responsible for investigations and for determining the application of safeguard measures.[11] The Commission's Investigation Department (DEI) submits the results of its investigations, together with proposals and recommendations, to the Commission, and is responsible for the registering, classifying, notifications, hearings, checking documentation, archiving and controlling of procedures used in each case.[12]

2.3 *Law 1-02* defines "safeguard measures" as measures designed to regulate imports on a temporary basis, and their objective is to prevent or remedy serious injury to the domestic industry and to facilitate adjustment for domestic producers.[13] According to *Law 1-02*, "safeguard measures" shall be applied when a product, irrespective of its origin, is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause injury to a domestic industry that produces like or directly competitive products. Measures are applied to the product irrespective of its origin.[14] According to the *Regulations of Law 1-02*, the term "safeguards", both in the *Regulations of Law 1-02* and in *Law 1-02*, shall have the same meaning as the term "safeguards" in the WTO Agreement on Safeguards.[15]

2.4 With respect to the form taken by safeguard measures in the Dominican Republic, *Law 1-02* provides that they may consist of tariff increases, tariff quotas or import ceilings.[16]

2.5 *Law 1-02*, establishes the rules governing the application of safeguard measures and procedures for notification and consultations relating to the WTO.[17] The obligation of and procedure

[8] Exhibit RDO-11.
[9] Exhibit RDO-26.
[10] Dominican Republic, reply to Panel questions Nos. 31 and 32.
[11] *Law 1-02*, Article 7, Exhibit RDO-11.
[12] Article 4, *Regulations of Law 1-02*, Exhibit RDO-11.
[13] Article 57 of *Law 1-02*, Exhibit RDO-11.
[14] Article 58 of *Law 1-02*, Exhibit RDO-11.
[15] Article 18, subsection xxviii, of the *Regulations of Law 1-02*, Exhibit RDO-26.
[16] Article 73 of *Law 1-02*, Exhibit RDO-11.

for notification to the WTO Committee on Safeguards are also set out in the *Regulations of Law 1-02*.[18]

2.6 *Law 1-02* and the *Regulations of Law 1-02* provide for the possibility of excluding products originating in a developing country from the application of safeguard measures where its share of total imports of the investigated product does not exceed 3 per cent of imports into the Dominican Republic, provided that the developing countries whose individual shares of imports account for less than 3 per cent collectively represent not more than 9 per cent of total imports of the product in question.[19]

2. Domestic legislation on tariffs

2.7 The Dominican Republic's domestic legislation on tariffs is contained in Law No. 146-00 on tariff reform (*Law 146-00*).[20] *Law 146-00* amends Law 14-93 of 26 August 1993 adopting the customs tariff of the Dominican Republic. The description and coding of goods are set out in Annex I of *Law 146-00*. The structure is based on the Nomenclature of the Single Spanish Version of the Commodity Description and Coding System.[21] *Ad valorem* duties payable on goods imported into the Dominican Republic are set out in Annex I of *Law 140-00*.[22] In accordance with that Annex, the most-favoured-nation tariff (MFN tariff) applicable to tubular fabric, classified under tariff line 5407.20.20, is 14 per cent *ad valorem*, while the MFN tariff applicable to polypropylene bags, classified under tariff line 6305.33.90, is 20 per cent *ad valorem*.[23]

2.8 In accordance with *Law 146-00*, the Tariff Studies Commission of the Ministry of Finance is responsible for recommending appropriate adjustments to the duties fixed in the Law to the executive power. The executive power subsequently sends the relevant recommendations to the National Congress, which ultimately makes the changes it considers appropriate in the duties.[24] *Law 146-00* provides that "in no case shall taxes be levied on foreign trade by administrative means".[25]

B. IMPUGNED MEASURES AND PRODUCTS AT ISSUE

2.9 The present dispute concerns the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures. More specifically, the impugned measures comprise:

(a) The provisional safeguard adopted through Commission Resolution CDC-RD-SG-061-2010 of 16 March 2010 (Preliminary Resolution)[26];

---

[17] Title IV (Articles 57 to 81) of *Law 1-02*, Exhibit RDO-11. See also, Dominican Republic, reply to Panel questions Nos. 31 and 32.

[18] Part IV, Chapter II, of the *Regulations of Law 1-02*, Exhibit RDO-26.

[19] Article 72 of *Law 1-02*, Exhibit RDO-11; Article 272 of the *Regulations of Law 1-02*, Exhibit RDO-26.

[20] *Law 146-00*, Exhibit CEGH-22.

[21] Article 1 of *Law 146-00*, Exhibit CEGH-22.

[22] Article 2 of *Law 146-00*, Exhibit CEGH-22.

[23] Fragments of *Law 146-00* adopting the Customs Tariff of the Dominican Republic, Exhibit CEGH-27.

[24] Article 5 of *Law 146-00*, Exhibit CEGH-22.

[25] Article 7 of *Law 146-00*, Exhibit CEGH-22.

[26] Preliminary Resolution, Exhibit CEGH-5.

(b) the definitive safeguard, adopted through Commission Resolution CDC-RD-SG-089-2010 of 5 October 2010 (Definitive Resolution)[27]; and

(c) the investigation carried out by the Commission and the DEI.

2.10 The provisional and definitive measures apply to imports of the following products:

(a) Tubular fabric classified under tariff line 5407.20.20 of the Customs Tariff of the Dominican Republic, and therein described as "woven fabric of synthetic polypropylene yarn", which is used for the manufacture of bags; and

(b) polypropylene bags, classified under tariff line 6305.33.90 of the Customs Tariff of the Dominican Republic, and described there as "bags or sacks for packaging", which are used for the packaging of food, agro-industrial and industrial products.

2.11 The Dominican Republic has bound the tariffs for the products corresponding to each of these tariff lines in the WTO at the level of 40 per cent *ad valorem*.[28] The impugned measures are not covered by any entry for "other duties or charges" made by the Dominican Republic in column 6 of its WTO schedule of concessions.[29]

C. PROCEDURE CARRIED OUT BY THE COMPETENT AUTHORITY

1. Initiation of the investigation

2.12 On 20 July 2009 the company Fertilizantes Santo Domingo, C. por A. (FERSAN) requested the Commission to open an investigation for the imposition of a definitive safeguard of 74.3 per cent for a period of three years and, on an emergency basis as a precautionary measure, the imposition of a provisional safeguard of 40 per cent on imports of polypropylene bags and tubular fabric under tariff lines 6305.33.10, 6305.33.90 and 5407.20.20 of the General Customs Tariff of the Dominican Republic.[30]

2.13 On the basis of the DEI's Initial Technical Report of 20 November 2009 (Initial Technical Report)[31], on 15 December the Commission issued Resolution CDC-RD-SG-046-2009 announcing that it was initiating an investigation for the application of safeguard measures to imports of polypropylene bags and tubular fabric under tariff lines 6305.33.10, 6305.33.90 and 5407.20.20 of the General Customs Tariff of the Dominican Republic, coming from all origins (Initial Resolution). On 17 December, the Commission published a notice of initiation of an investigation.[32]

[27] Definitive Resolution, Exhibit CEGH-9.
[28] Dominican Republic, request for a preliminary ruling, paragraph 42.
[29] Dominican Republic, reply to Panel question No. 183.
[30] Request for the initiation of an investigation submitted by FERSAN and reply to the application form for producers, WTO General Safeguard Investigation, Exhibit CEGH-12, p. 1.
[31] Initial report, Exhibit CEGH-3.
[32] Notice, General Safeguard Investigation Concerning Textiles of Synthetic Filament Yarn and Bags of Polyethylene and Polypropylene (15 December 2009), Exhibit CEGH-4.

2.14 On 18 December 2009 the Dominican Republic notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, that its competent authority had initiated a safeguards procedure.[33]

2.15 The investigation covered the period between the years 2006 to 2009.[34]

2. Preliminary determination

2.16 On the basis of the Preliminary Technical Report issued by the DEI (Preliminary Technical Report)[35], on 16 March 2010 the Commission issued its Preliminary Resolution through which it decided to continue the investigation and impose provisional measures of 38 per cent *ad valorem* for 200 days on imports of tubular fabric and polypropylene bags classified under tariff lines 5407.20.20 and 6305.33.90 of the Customs Tariff of the Dominican Republic, while excluding from the investigation polyethylene bags classified under tariff line 6305.33.10 on the grounds that they were not manufactured by the domestic producer.[36] In this Preliminary Resolution the Commission decided, pursuant to Article 9.1 of the Agreement on Safeguards, to exclude imports from Colombia, Indonesia, Mexico and Panama from the application of the provisional safeguard because they were developing countries which together accounted for 1.21 per cent of the imports under investigation.[37] On 25 March the Commission published the notice of application of the provisional measure (preliminary public notice).[38]

2.17 On 26 March de 2010, pursuant to Articles 6, 9.1, 12.1(b) and 12.1(c) of the Agreement on Safeguards, the Dominican Republic notified the WTO Committee on Safeguards of the adoption of the provisional safeguard.[39]

2.18 On 30 March 2010 the Commission adopted an Addendum to the Preliminary Resolution specifying that the provisional measure: (i) would apply from 1 April to 17 October 2010; and (ii) would not apply to goods "originating in" (the text of the Preliminary Resolution says "coming from") Colombia, Indonesia, Mexico and Panama.[40]

3. Final determination

2.19 On the basis of the DEI's Final Technical Report dated 13 July 2010 (Final Technical Report)[41], on 5 October the Commission issued its Definitive Resolution constituting the final decision on the investigation for the application of a definitive safeguard measure. Through this Resolution the Commission definitively adopted a duty of 38 per cent *ad valorem* on imports of tubular fabric and polypropylene bags classified under tariff lines 5407.20.20 and 6305.33.90, as from 18 October 2010 until 20 April 2012, subject to a six-monthly reduction timetable. In that Resolution the Commission decided, in accordance with Article 72 of *Law 1-02*, Article 272.I of the *Regulations*

[33] Notification, document G/SG/N/6/DOM/3 (14 January 2010), Exhibit CEGH-17.
[34] Dominican Republic, reply to Panel question No. 173.
[35] Preliminary Technical Report, Exhibit CEGH-7.
[36] Preliminary Resolution, Exhibit CEGH-5.
[37] Preliminary Resolution, Exhibit CEGH-5.
[38] Notice, General Safeguard Investigation Concerning Tubular Fabric and Polypropylene Bags (25 March 2010), Exhibit CEGH-8.
[39] Notification, document G/SG/N/7/DOM/1, G/SG/N/8/DOM/1, G/SG/N/11/DOM/1 (6 April 2010), Exhibit CEGH-18.
[40] Addendum to the Preliminary Resolution, Exhibit CEGH-6.
[41] Final Technical Report, Exhibit CEGH-10.

of Law 1-02, and Article 9.1 of the Agreement on Safeguards, to exclude imports originating in Colombia, Indonesia, Mexico and Panama from the application of the definitive safeguard because they were developing countries which together accounted for 1.21 per cent of the imports under investigation. According to the Definitive Resolution and the additional explanations provided by the Dominican Republic, the measure would be applied as follows:[42]

Date	Tariff line	Applicable rate	Origin
18 Oct 2010 to 18 Apr 2011	5407.20.20	14%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		38%	Duty applicable to all other origins
	6305.33.90	20%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		38%	Duty applicable to all other origins
19 Apr 2011 to 19 Oct 2011	5407.20.20	14%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		28%	Duty applicable to all other origins
	6305.33.90	20%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		28%	Duty applicable to all other origins
20 Oct 2011 to 20 Apr 2012	5407.20.20	14%	Duty applicable to all origins
	6305.33.90	20%	Duty applicable to all origins

2.20 As from 21 April 2012, imports of the products in question originating in the member countries of the Caribbean Common Market (CARICOM) and countries parties to the free trade agreement between Central America and the Dominican Republic (Central America-Dominican Republic FTA) and parties to the free trade agreement between the Dominican Republic, Central America and the United States (DR-CAFTA FTA) would be free of customs duties. In the case of all other origins, as of that date imports of tubular fabric classified under tariff line 5407.20.20 would be subject to the payment of the MFN tariff equivalent to 14 per cent *ad valorem*, and imports of polypropylene bags classified under tariff line 6305.33.90 would be subject to the payment of the MFN tariff equivalent to 20 per cent *ad valorem*.[43]

2.21 On 6 October 2010 the Commission published the notice of application of the definitive measure (final public notice).[44]

2.22 On 8 October 2010, pursuant to Articles 12.4 and 12.1(b) of the Agreement on Safeguards, the Dominican Republic notified the Definitive Resolution and the adoption of the definitive safeguard to the WTO Committee on Safeguards.[45]

[42] Definitive Resolution, Exhibit CEGH-9; complainants, reply to Panel questions Nos. 30 and 179; Dominican Republic, reply to Panel questions Nos. 30 and 179.

[43] Definitive Resolution, Exhibit CEGH-9; complainants, reply to Panel questions Nos. 30 and 179; Dominican Republic, reply to Panel questions Nos. 30 and 179.

[44] Notice, General Safeguard Investigation Concerning Tubular Fabric and Polypropylene Bags (6 October 2010), Exhibit CEGH-11.

2.23 On 19 April 2011, the Dominican Republic submitted to the Panel a copy of Resolution CDC-RD-SG-105-2011 of 13 April, in which the Commission indicated that in accordance with the reduction timetable contained in the Definitive Resolution, the safeguard applicable to imports of tubular fabric and polypropylene bags as of that date and until 19 October 2011 would be 28 per cent *ad valorem*. Resolution CDC-RD-SG-105-2011 confirms that the next reduction phase will begin on 20 October 2011 in accordance with the Definitive Resolution.[46]

2.24 On 27 October 2011 the Dominican Republic submitted to the Panel a copy of Resolution CDC-RD-SG-109-2011 of 17 October, through which the Commission decided to maintain the application of an *ad valorem* duty of 28 per cent on imports of tubular fabric and polypropylene bags until 20 April 2012. Resolution CDC-RD-SG-109-2011 explains that it is based on the Commission's faculty to analyse the performance of imports of the products in question and, prior to each reduction phase in the timetable of progressive liberalization, decide whether the reduction process should be speeded up or revised.[47] The Dominican Republic explained that, notwithstanding this revision, the safeguard measure applicable to imports of tubular fabric and polypropylene bags would expire on 20 April 2012 and that imports originating in Colombia, Indonesia, Mexico and Panama would continue to be exempted from the application of the measure.[48] In the light of the revision adopted through Resolution CDC-RD-SG-109-2011, the measure would be applied as follows:

Date	Tariff line	Applicable rate	Origin
18 Oct 2010 to 18 Apr 2011	5407.20.20	14%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		38%	Duty applicable to all other origins
	6305.33.90	20%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		38%	Duty applicable to all other origins
19 Apr 2011 to 20 Apr 2012	5407.20.20	14%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		28%	Duty applicable to all other origins
	6305.33.90	20%	Duty applicable to imports from Colombia, Indonesia, Mexico and Panama
		28%	Duty applicable to all other origins

[45] Notification, document G/SG/7/DOM/1/Suppl.1 and G/SG/N/8/DOM/1/Suppl.1 (13 October 2010), Exhibit CEGH-19. This document was replaced by documents G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1 and G/SG/N/11/DOM/1/Suppl.1 (18 October 2010), Exhibit CEGH-21.

[46] Resolution CDC-RD-SG-105-2011 issuing the decision on the six-monthly reduction timetable of the definitive safeguard established by Resolution No. CDC-RD-SG-089-2010 of 5 October 2010.

[47] Resolution CDC-RD-SG-109-2011 issuing the decision on the six-monthly reduction timetable of the definitive safeguard established by Resolution No. CDC-RD-SG-089-2010 of 5 October 2010.

[48] Communication from the Dominican Republic, 1 November 2011.

III. PARTIES' REQUESTS FOR RULINGS AND RECOMMENDATIONS

A. COMPLAINANTS

3.1 The complainants request the Panel to find that the impugned measures are inconsistent with the Dominican Republic's obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards.[49] More specifically, the complainants claim that:

(a) The domestic industry was defined in a manner that is inconsistent with Articles 3.1, 4.1(c) and 4.2(c) of the Agreement on Safeguards, and therefore the provisional and definitive measures are inconsistent with Articles 2.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994;

(b) the preliminary and final determinations do not contain reasoned and adequate findings regarding unforeseen developments and the effect of the obligations incurred under the GATT 1994, and are therefore inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the Agreement on Safeguards; consequently, the provisional and definitive measures are inconsistent with Articles 2.1, 4.2, 11.1(a) and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994;

(c) the preliminary and definitive determinations with respect to the increase in imports are inconsistent with Articles 2.1, 3.1, last sentence, 4.2(c) and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994, and therefore the provisional and definitive measures are inconsistent with Articles 2.1, 4.2 and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994;

(d) the preliminary and definitive determinations on serious injury to the domestic industry and critical circumstances (in the case of the provisional measure) are inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the Agreement on Safeguards (the last-mentioned provision with respect of the provisional measure) and with Article XIX:1(a) of the GATT 1994, and therefore the provisional and definitive measures are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2 and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994;

(e) the preliminary and definitive determinations with respect to the causal link between the increase in imports and the serious injury to the domestic industry are inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994, and therefore the provisional and definitive measures are inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(b),

[49] Complainants, first written submission, paragraph 477; second written submission, paragraphs 308-309.

4.2(c), 5.1 and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure) and with Article XIX:1(a) of the GATT 1994;

(f) the provisional and definitive measures do not comply with the principle of parallelism and exclude from their application imports that were included in the preliminary and definitive determinations, and therefore are inconsistent with Articles 2.1, 2.2, 3.1, 4.2(a), 4.2(b), 4.2(c), 9.1 and 6 of the Agreement on Safeguards (the last-mentioned provision with respect to the provisional measure); furthermore, by not excluding all developing parties whose share of imports does not exceed 3 per cent, the provisional and definitive measures are inconsistent with Article 9.1 of the Agreement on Safeguards; and

(g) by failing to notify the definitive measure in a timely manner, failing to afford an opportunity for consultations and failing to provide an opportunity to obtain an adequate means of trade compensation, the Dominican Republic acted inconsistently with Article XIX:2 of the GATT 1994 and Articles 8.1 and 12.3 of the Agreement on Safeguards.

3.2 In the event that the Panel considers that Article XIX of the GATT 1994 and the Agreement on Safeguards are not applicable to the present dispute, the complainants request the Panel alternatively to find as follows:[50]

(a) The exclusion of imports from Colombia, Indonesia, Mexico and Panama from the application of the duties provided for in the provisional and definitive measures is inconsistent with Article I:1 of the GATT 1994; and

(b) the provisional and definitive measures are duties and charges other than ordinary customs duties that are contrary to Articles II:1(b), second sentence, and II:1(a) of the GATT 1994.

3.3 In accordance with Article 19.1 of the DSU, the complainants request the Panel to recommend that the DSB request the Dominican Republic to bring the definitive safeguard measure into conformity with the relevant provisions of the Agreement on Safeguards and the GATT 1994.[51] The complainants also request the Panel to make suggestions for implementation concerning the definitive measure, and in particular to suggest to the Dominican Republic that it should not redo the investigation but rather immediately put an end to the definitive measure.[52]

[50] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 122 and 123; second written submission, paragraph 312.

[51] Complainants, first written submission, paragraph 478.

[52] Complainants, first written submission, paragraphs 462 and 476; second written submission, paragraph 313.

B. DOMINICAN REPUBLIC

3.4 The Dominican Republic rejects all the claims put forward by the complainants.[53] In addition, the Dominican Republic raises the following preliminary issues:[54]

(a) That the present dispute is devoid of purpose, since Article XIX of the GATT 1994 and the Agreement on Safeguards are not applicable to the impugned measures;

(b) that the present dispute concerns alleged violations of agreements that are not covered agreements, namely free trade agreements signed by the Dominican Republic, over which the Panel lacks jurisdiction;

(c) that the complainants' claim that the alleged lack of findings of unforeseen developments affects the determinations on the increase in imports, serious injury and the causal link does not fall within the Panel's terms of reference because it was not duly identified in the request for the establishment of the Panel;

(d) that the following claims by the complainants are not covered by the Panel's terms of reference since, although identified in the request for the establishment of the Panel, they were not identified in the request for consultations between the complainants and the Dominican Republic: (i) that the determination on the causal link is inconsistent with Article 4.1(a) of the Safeguards Agreement; (ii) that the alleged lack of opportunity to obtain an adequate means of trade compensation is inconsistent with Article 8.1 of the Agreements of Safeguards; (iii) that the lack of reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry is inconsistent with Articles 3.1, 4.2(c) and 5.1 of the Agreements on Safeguards; (iv) that the fact that the measures are not applied to products originating or coming from particular origins is inconsistent with Article I:1 of the GATT 1994; and (v) that the measures at issue are contrary to Articles II:1(a), and II:1(b), second sentence, of the GATT 1994; and

(e) that, by failing in their first written submission to develop certain complaints identified in the request for the establishment of the Panel, the complainants have withdrawn those complaints.

3.5 The Dominican Republic requests the Panel to find that Article XIX of the GATT 1994 and the Agreement on Safeguards are not applicable to the present dispute or, alternatively, to reject all the complaining parties' claims and arguments and find that the impugned measures are consistent with the GATT 1994 and the Agreement on Safeguards.[55]

[53] Dominican Republic, first written submission, sections 4.2 to 4.10.

[54] Dominican Republic, request for a preliminary ruling, paragraphs 1 and 55, and sections 3.4 and 3.5; first written submission, section 4.1.3, subheadings (A), (B), (C) and (D); second written submission, paragraph 128.

[55] Dominican Republic, first written submission, p. 189; second written submission, paragraph 128.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set out in the written submissions and oral statements presented to the Panel, are attached to this Report as an addendum in Annexes A, C, E and F (see List of Annexes, pages iv-vi above).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set out in the written submissions and oral statements presented to the Panel, are attached to this Report as an addendum in Annexes B and D (see above, List of Annexes, pages iv-vi).

VI. INTERIM REVIEW

6.1 On 19 October 2011 the Panel issued its Interim Report to the parties.[56] On 2 November, in accordance with the timetable and working procedures adopted by the Panel, the complainants and the Dominican Republic submitted comments and asked the Panel to revise certain aspects of the Interim Report. On 16 November, the complainants and the Dominican Republic submitted written comments on each other's comments and requests for revision. Neither of the parties requested a meeting with the Panel on the issues identified in their comments.

6.2 Where appropriate, the Panel amended specific aspects of its Interim Report in the light of the comments and requests of the Parties, as explained below. The Panel also made some revisions and corrections in the interests of greater clarity and precision. These changes are summarized in this section of the Report. Except where otherwise indicated, the numbers of the paragraphs and footnotes referred to in this section are those of the Final Report.

A. CHANGES IN THE DESCRIPTION OF THE FACTUAL ASPECTS

6.3 On 27 October 2011, after the Interim Report had been issued, the Dominican Republic submitted to the Panel a copy of Commission Resolution CDC-RD-SG-109-2011 of 17 October, through which the Commission decided to maintain the application of a duty of 28 per cent *ad valorem* to imports of tubular fabric and polyethylene bags until 20 April 2012. Resolution CDC-RD-SG-109-2011 modifies the calendar for the progressive liberalization of the impugned measures that had been adopted in the Definitive Resolution as described in the Interim Report. The complainants requested that the Panel put this new Resolution on record as an undisputed fact. The Dominican Republic did not comment on this request. The Panel has included a reference to Resolution CDC-RD-SG-109-2011 of 17 October, together with a description of the manner in which the definitive measure would be applied pursuant to this Resolution and the explanations provided by the Dominican Republic, in the new paragraph 2.24 in the factual aspects section.

6.4 In view of this new information, the Panel also made changes in the description of the facts in paragraphs 7.68 and 7.86 of its Report.

[56] See also above, paragraph 1.14.

B. CHANGES IN THE FINDINGS SECTION

6.5 The Dominican Republic requests that the text of paragraph 7.27 be amended so as to reflect more clearly and fully the arguments which it presented. The complainants consider that the changes requested by the Dominican Republic are unnecessary. In their view, the parties' full arguments are already reflected in the annexes to the Report; the section in paragraph 7.27 is merely a description of the main arguments, and does not seek to be exhaustive. The complainants add that the Panel is not obliged to refer to the totality of the arguments presented by the parties and that, in any case, some of the arguments to which the Dominican Republic refers are already included in the paragraph. Taking into account that the amendment requested reflects the Dominican Republic's written and oral arguments, the Panel has amended the relevant part of paragraph 7.27.

6.6 The Dominican Republic requests that the text of paragraph 7.31 be amended to reflect more clearly and fully the arguments which it presented. The complainants did not comment on this request. The Panel has amended the relevant part of paragraph 7.31.

6.7 The Dominican Republic asserts that the Interim Report does not reproduce any of its arguments to the effect that the impugned measures are not "other duties or charges" and therefore do not suspend obligations under Article II:1(b), second sentence, of the GATT 1994. The Dominican Republic therefore requests that a new paragraph containing those arguments and a reference to the relevant sections of its submissions and statements be added after paragraph 7.31. The complainants consider that it is unnecessary to add the paragraph requested by the Dominican Republic. In their opinion, paragraph 7.28 of the Report already contains a reference to the arguments identified by the Dominican Republic and that it would suffice to amend that paragraph in order to satisfy this request. The Panel does not consider it necessary to include a new paragraph, since paragraph 7.28 already cited the arguments made by the Dominican Republic as well as references to the relevant sections of its submissions and statements. However, in paragraph 7.28 the Panel has added the additional language suggested by the Dominican Republic insofar as it reflects arguments contained in its written submissions and statements.

6.8 The Dominican Republic requests that the text of paragraph 7.32 be amended in order to reflect its arguments more clearly. The complainants did not comment on this request. Taking into account that the requested amendment reflects the arguments presented by the Dominican Republic in its written submissions and statements, the Panel has amended paragraph 7.32.

6.9 The Dominican Republic requests that paragraph 7.61 be amended as so to reflect its arguments more accurately. The complainants did not comment on this request. Taking into account the arguments presented by the Dominican Republic in its written submissions and statements, the Panel has made some changes to paragraph 7.61.

6.10 The Dominican Republic requests that the text of paragraph 7.68 be amended so as to reflect more correctly the language contained in the Definitive Resolution. The complainants did not comment on this request. Taking into account the Dominican Republic's request, the Panel has made some changes in paragraph 7.68 in order to reflect the language contained in the Commission's preliminary and definitive Resolutions.

6.11 The Dominican Republic requests that it should be made clear in the third sentence of paragraph 7.69 that the argument mentioned therein is merely one of those which it presented on this point. The complainants consider that the amendment requested by the Dominican Republic does not contribute to greater clarity of the Report and on the contrary could lead to confusion or

misunderstanding with respect to the analysis by the Panel. The complainants reiterate that in their view the Panel is not obliged to refer to the totality of the arguments presented by the parties and that, in any case, the Dominican Republic itself has admitted that some of the arguments to which it refers are already included elsewhere in the Report. Taking into account that the requested amendment reflects the Dominican Republic's written and oral statements, the Panel has included the requested clarification in the third sentence of paragraph 7.69. The Panel has also included a reference to paragraph 7.27 in which, as the Dominican Republic indicates, the arguments to which reference is made are presented.

6.12 The complainants request that in a footnote to paragraph 7.86 reference be made to their argument whereby the impugned measures were adopted on the basis of the domestic legislation and multilateral rules on safeguards and not any other rules such as, for example, *Law 146-00*, which is the domestic legislation governing the imposition of customs tariffs in the Dominican Republic. The Dominican Republic considers that this reference would be inappropriate since the paragraph in question concerns the analysis by the Panel and not the arguments of the parties, and also because this argument is already reflected in paragraph 7.38 of the Report. The Panel has introduced the requested reference in its findings, as it reflects facts that were established during the proceedings.

6.13 The Dominican Republic requests that the citation of a sentence contained in paragraph 7.87 of the Interim Report be deleted. In the opinion of the Dominican Republic, the reference to this sentence, taken from its opening statement at the first meeting of the Panel, is a partial citation and does not correctly reflect the arguments it presented. The complainants reject this request. In their opinion, the requested change would undermine the analytical underpinning of the Panel's finding. They add that the Panel correctly understood the Dominican Republic's statement. They argue that the Dominican Republic is seeking to adduce arguments already presented during the proceedings, which is inconsistent with the purpose of the interim review stage. Taking into account the arguments presented by the Dominican Republic in its submissions and statements, the Panel has made some changes in paragraph 7.87.

6.14 Again with respect to paragraph 7.87 of the Interim Report, the Dominican Republic requests that the Panel delete the assertion to the effect that it had stated that the purpose of the impugned measures is to isolate at least temporarily and partially the domestic market from international prices of the products. The complainants did not comment on this request. In the view of the Panel, the wording to which the Dominican Republic objects reflects the manner in which the Dominican Republic described the situation of the domestic industry, which it sought to remedy through the imposition of the impugned measures. In accordance with the description contained in the Dominican Republic's written submissions, part of the injury incurred by the domestic industry was due to the fact that it could not raise sale prices owing to competition from imported products. It therefore follows that the impugned measures did indeed have the purpose of isolating, at least temporarily and partially, the domestic market from international prices of the products. In any case, the Dominican Republic's assertion that there is no explicit statement in its written submissions to the effect that this was the purpose of the impugned measures is correct. The Panel has therefore deleted the phrase to which the Dominican Republic objects.

6.15 The Dominican Republic requests that a text be added following paragraph 7.103 in order to reflect its arguments more fully. The complainants did not comment on this request. Taking into account that the requested amendment reflects the Dominican Republic's written and oral arguments, the Panel has included a new paragraph numbered as 7.104.

6.16 The Dominican Republic requests that a text be added to paragraph 7.164 so as to reflect more fully its arguments concerning the definition of the domestic industry. The complainants consider that the amendment requested by the Dominican Republic is unnecessary. In their view, the section that includes paragraph 7.164 merely contains a description of the main arguments, and therefore does not seek to be exhaustive. The complainants add that the Panel is not obliged to refer to the totality of the arguments presented by the parties. Taking this request into account, the Panel has added two sentences to paragraph 7.164 in order to reflect the language contained in the Dominican Republic's written submissions.

6.17 The Dominican Republic requests that the text of paragraph 7.184 be amended so as to reflect more accurately the language of the Preliminary Resolution. The complainants consider that the Dominican Republic's request is groundless and not based on the text of the Preliminary Resolution. The Panel has made a change in paragraph 7.184 in order to reflect the wording of the Commission's Preliminary Resolution.

6.18 The Dominican Republic requests that the text of paragraph 7.189 be amended by deleting the first two sentences of the paragraph on the grounds that they contain incorrect assertions. The complainants consider that the Dominican Republic's request is groundless. In their opinion, the Dominican Republic claims that the Report reflects a finding which the competent authority did not make. The complainants add that through its request the Dominican Republic is seeking to adduce arguments already presented during the proceeding as well as new arguments that were not previously presented, all of which has nothing to do with the purpose of the interim review stage. Taking into account the Dominican Republic's request, and to ensure that the Report reflects the Panel's findings more clearly, the first two sentences of paragraph 7.189 have been deleted. In the Panel's opinion this amendment does not alter the substance of the findings contained in the paragraph. In view of the foregoing, the Panel has also made changes in paragraphs 7.189, 7.190, 7.193 and 7.198.

6.19 The Dominican Republic requests that the text of paragraph 7.250 be amended so as to reflect its arguments more accurately. The complainants did not comment on this request. Taking into account that the requested amendment reflects the Dominican Republic's written and oral arguments, the Panel has made the requested change in paragraph 7.250.

6.20 The complainants request that the text of paragraph 7.310 be amended to reflect more accurately the findings previously reached by the Panel. The Dominican Republic did not comment on this request. The Panel has made the requested change in paragraph 7.310 in order to reflect the findings contained in earlier paragraphs of the Report.

6.21 The complainants request the Panel to make a legal finding on their claim that the competent authority acted inconsistently with obligations under the covered agreements with respect to the determination of a causal relationship between the increase in imports and the serious injury. In their opinion, such a finding is necessary in order to reach a positive solution to the dispute. The complainants note that the Panel relied on the precedent of the report in *Argentina – Preserved Peaches* to confine itself to issuing a factual finding on the assessment made by the competent authority without issuing legal findings. To support their reuest the complainants cite as precedents the reports of the Appellate Body in *Argentina – Footwear (EC)* and the Panel in *Chile – Price Band System*. The Dominican Republic rejects this request and considers that the Panel acted correctly. In the Dominican Republic's view, the Panel does not need to issue legal findings on the determination of causality for it to be possible to reach a positive solution to the dispute. The Panel notes that it indicates in paragraphs 7.327 and 7.328 of its Report that, having concluded that in its determinations of the existence of serious injury the Dominican Republic acted inconsistently with its obligations

under the covered agreement, it would be impossible then to find that the competent authority demonstrated the existence of a causal link between the increased imports and a serious injury whose existence had not been demonstrated. Accordingly, the Panel does not consider it necessary to issue any finding as to whether the Dominican Republic demonstrated that the increase in imports *caused* serious injury to the domestic industry. In so doing the Panel is adopting the same line of reasoning as the panel in *Argentina – Preserved Peaches*, whose report is later than the two precedents cited by the complainants. The Panel points out, in any case, that both the Appellate Body in *Argentina – Footwear (EC)* and the panel in *Chile – Price Band System* noted that a causal link cannot be shown to exist if it has previously been demonstrated that substantive requirements such as the demonstration of the existence of serious injury had not been fulfilled. In *Argentina – Footwear (EC)* the Appellate Body also expressed surprise at the panel's decision to evaluate the existence of a causal link after having determined that there had been neither an increase in imports nor serious injury. Taking the foregoing into account, the Panel does not see any need to issue the additional finding requested by the complainants.

C. CHANGES IN THE CONCLUSIONS AND RECOMMENDATIONS SECTION

6.22 The complainants request the Panel to make additional suggestions for implementation and, in particular, to suggest that the Dominican Republic immediately withdraw the definitive measure. In their opinion, the withdrawal of the definitive measure would be a realistic and viable implementation option that would not cause the Dominican Republic major difficulties. The Dominican Republic rejects this request. In the Dominican Republic's opinion, it is up to the Member concerned to decide how to implement the DSB's recommendations and, while removal of the definitive measure would be a realistic and viable implementation option, the complainants have not made the case that it is the only possible option. The Dominican Republic adds that the violations found by the Panel are neither fundamental nor of general import and therefore not such as to vitiate the investigation as a whole *ab initio*. The Panel notes that in paragraph 8.3 of the Report it recommends to the Dominican Republic that, in light of the findings contained in the Report, it should bring its measures into conformity with its obligations under the GATT 1994 and the Agreement on Safeguards. Under Article 19.1 of the DSU, panels have the faculty to "suggest ways in which the Member concerned could implement the recommendations", when they see fit, but are not obliged to do so. In the present case, it is true, as the complainants point out, that the findings of inconsistency made by the Panel refer to fundamental aspects of the determinations that led to the imposition of the impugned measures. In these circumstances, the withdrawal of the definitive measure is an obvious way in which the Dominican Republic could bring its measures into conformity with its obligations under the GATT 1994 and the Agreement on Safeguards. In any case, it is for the Dominican Republic in the first place to determine how it will implement the Panel's recommendation. Taking the foregoing into account, the Panel does not consider it appropriate to suggest to the Dominican Republic the immediate withdrawal of the definitive measure.

D. MINOR CORRECTIONS AND ADDITIONAL REFERENCES

6.23 As a consequence of the comments by the parties, minor typographical corrections have been made in paragraphs 1.1, 1.4, 1.6, 2.1, 3.4(c), 7.1, 7.38, 7.39, 7.66, 7.68, 7.74, 7.113, 7.115, 7.116, 7.275, 7.276, 7.294, 7.299, 7.313, 7.337, 7.341, 7.380, 7.382, 7.385, 7.391, 7.422 and 8.1(g), as well as in footnote 74 to paragraph 7.10, footnote 186 to paragraph 7.114, footnote 192 to paragraph 7.119, footnote 301 to paragraph 7.210, footnote 422 to paragraph 7.324 and footnote 516 to paragraph 7.432.

6.24 The Panel also made material corrections in paragraphs 1.13, 2.2, 2.3, 2.23, 3.1(f), 3.2, 3.4(d), 7.10, 7.16, 7.17, 7.38, 7.39, 7.106, 7.108, 7.119, 7.138, 7.159, 7.163, 7.171, 7.185, 7.193, 7.219, 7.220, 7.224, 7.225, 7.235, 7.259, 7.267, 7.290, 7.294, 7.300, 7.301, 7.331, 7.347, 7.349, 7.352, 7.357, 7.417 and 7.427, as well as in footnote 12 to paragraph 2.2, footnote 45 to paragraph 2.22, footnote 74 to paragraph 7.10, footnote 104 to paragraph 7.32, footnote 265 to paragraph 7.179, footnote 292 to paragraph 7.197, footnote 310 to paragraph 7.221, footnote 312 to paragraph 7.224, footnote 318 to paragraph 7.230, footnote 319 to paragraph 7.231, footnotes 327 and 330 to paragraph 7.235, footnote 441 to paragraph 7.338 and footnote 509 to paragraph 7.426.

6.25 The Panel also updated the information in the table of cases cited and the list of abbreviations used in this Report, as well as in paragraphs 1.14 and 1.15 and footnote 160 to paragraph 7.86.

VII. FINDINGS

A. PRELIMINARY CONSIDERATIONS

7.1 The matter before this Panel is the consistency of the provisional and definitive measures imposed by the Dominican Republic on imports of tubular fabric and polypropylene bags and the investigation underpinning these measures with various provisions of the Agreement on Safeguards and the GATT 1994. In addition, the complainants challenge specific procedural failings by the Dominican Republic.[57]

7.2 Article 11 of the DSU establishes that the function of panels is to assist the DSB in discharging its responsibilities under the Understanding and the covered agreements. Article 3.4 of the DSU provides that "recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter …".

7.3 Before beginning its assessment of the issues raised in the present dispute, the Panel considers it worthwhile to describe the legal framework that will apply in this Report with regard to the standard of review, the interpretation of treaties and the burden of proof. The Panel will then go on to consider the Dominican Republic's claim that the impugned measures are not covered by Article XIX of the GATT 1994 or by the Agreement on Safeguards and therefore the dispute raised by the complainants, at least as concerns the claims put forward under those agreements, is devoid of purpose.

1. Standard of review

7.4 Subject to the reservation that the Panel will consider below the question of the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the present dispute, it should be pointed out that neither the GATT 1994 nor the Agreement on Safeguards contain specific additional provisions on the applicable standard of review. It should therefore be recalled that, as the Appellate Body stated in *EC – Hormones*, where there is no specific standard of review for the WTO multilateral trade agreement concerned, the provisions of Article 11 of the DSU are applicable.[58]

7.5 Article 11 of the DSU establishes in an overall manner the *standard of review* to be followed by WTO panels. Thus, each panel should make "an objective assessment of the matter before it", including an objective assessment of the facts and the applicability of and the conformity with the

[57] Complainants, first written submission, paragraph 28.
[58] Appellate Body Report, *EC – Hormones*, paragraph 116.

relevant covered agreements. The obligation imposed by Article 11 of the DSU includes the consideration of all aspects of the matter, both factual and legal, and implies *inter alia* that the panel should consider the issues raised by the parties, without overstepping its terms of reference. Article 11 further provides that panels should also make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.6 For the purposes of this dispute, and once again subject to the reservation that the Panel will consider below the question of the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards, it should be pointed out that the Appellate Body has analysed the scope of the *standard of review* in the specific context of disputes raised under the Agreement on Safeguards.[59] In *US – Cotton Yarn*, the Appellate Body summarised the fundamental elements of this standard of review as follows:

> Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarised as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgment for that of the competent authority.[60]

7.7 As indicated by the Appellate Body, the standard of review applicable to panel findings on determinations by an investigating authority is not a *de novo* review, which would involve repeating the analysis of the evidence carried out by the national authority, nor is it a *total deference* which would simply involve following that authority's determination.[61] Panels should rather:

> examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.[62] A panel's examination of an investigating authority's conclusions

---

[59] See, for example, Appellate Body Reports, *Argentina – Footwear (EC)*; *US – Lamb*; and *US – Wheat Gluten.*

[60] Appellate Body Report, *US – Cotton Yarn*, paragraph 74 (italics in the original). Although the *US – Cotton Yarn* case did not refer to the Agreement on Safeguards, the Appellate Body's statement is relevant as it summarises the findings contained in earlier reports concerning the standard of review for panels under the Agreement on Safeguards.

[61] Appellate Body Report, *US – Tyres (China)*, paragraph 123. See also, Appellate Body Reports, *EC – Hormones*, paragraph 117; *Argentina – Footwear (EC)*, paragraph 119; and *US – Cotton Yarn*, paragraph 69.

[62] (Footnote from the original) See Appellate Body Report, *Argentina – Footwear (EC)*, paragraphs 119-121; Appellate Body Report, *US – Cotton Yarn*, paragraphs 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paragraphs 183 and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, paragraph 55; Appellate Body Report, *US – Lamb*, paragraphs 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, paragraph 299; Appellate Body Report, *US – Wheat Gluten*, paragraphs 160 and 161; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paragraph 93; and Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paragraph 516.

> must be critical, and be based on the information contained in the record and the explanations given by the authority in its published report.[63] As the Appellate Body has explained, what is "adequate" will depend on the facts and circumstances of the particular case and the claims made.[64, 65]

7.8 The Appellate Body has added that, with regard to its obligations under the Agreement on Safeguards, as well as those established in Article XIX of the GATT 1994, the competent authority must provide a "reasoned and adequate explanation of how the facts support their determination".[66] This means in practice that the Panel's objective assessment of the determinations of the competent authority may have, in principle, two aspects, one formal and the other substantive. The formal aspect is whether the competent authority has evaluated "all relevant factors"; the substantive aspect is whether the competent authority has given a reasoned and adequate explanation for its determination.[67] Thus, the fact that a panel must not carry out a *de novo* review does not mean that it cannot conclude that the competent authority in a specific case has not provided a reasoned or adequate explanation for its determination. Such a conclusion does not mean that the panel has engaged in a *de novo* review, nor that it has substituted its own conclusions for those of the competent authority.[68]

7.9 The examination of the reasoned and adequate explanation provided by the competent authority should be based on the report published by the authorities.[69] In this connection, Article 3.1, last sentence, of the Agreement on Safeguards provides that "[t]he competent authorities will publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." With respect to this Report, the Appellate Body has indicated that:

> Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to "set forth" "findings and reasoned conclusions" for their determinations. The European Communities and Norway argue that panels could not fulfil this responsibility if they were left to "deduce for themselves" from the report of that competent authority the "rationale for the determinations from the facts and data contained in the report of the competent authority".[70]

7.10 The Panel notes in this connection that, under the domestic legislation of the Dominican Republic, the Commission is the competent authority for carrying out investigations and determining the application of safeguards. The Commission's Initial Resolution initiating the investigation for the possible application of measures refers to the Initial Technical Report issued by the DEI, the published version of which "is an integral part" of the Resolution.[71] The Commission's

---

[63] (Footnote from the original) See Appellate Body Report, *US – Lamb*, paragraph 106.

[64] (Footnote from the original) Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paragraph 93.

[65] Appellate Body Report, *US – Tyres (China)*, paragraph 123.

[66] Appellate Body Report, *US – Steel Safeguards*, paragraph 276. See also Appellate Body Reports, *US – Lamb*, paragraph 103; and *US – Line Pipe*, paragraph 217.

[67] Appellate Body Report, *US – Lamb*, paragraph 103. See also, Appellate Body Report, *US – Cotton Yarn*, paragraph 72.

[68] Appellate Body Report, *US – Lamb*, paragraph 107.

[69] See, for example, Appellate Body Reports, *US – Steel Safeguards*, paragraphs 289 and 326; and *US – Tyres (China)*, paragraph 123.

[70] Appellate Body Report, *US – Steel Safeguards*, paragraph 288 (italics in the original).

[71] Initial Resolution, Exhibit CEGH-2, pp. 3 and 8.

Preliminary Resolution imposing the provisional measure refers to the Preliminary Technical Report issued by the DEI, which "is an integral part" of the Resolution.[72] Likewise, the Commission's Definitive Resolution imposing the definitive measure refers to the Final Technical Report issued by the DEI, which "is an integral part" of the Resolution.[73] The Panel notes in any case that, under the domestic legislation of the Dominican Republic, the DEI does not have the power to issue determinations and its technical reports contain only "proposals and recommendations" to the Commission.[74] In view of the foregoing, when examining the basis for the determinations of the Dominican Republic's competent authority, the Panel will in principle base itself on the Commission's resolutions, supplemented by the findings and conclusions contained in the DEI's technical reports which underpin those resolutions.[75] These documents taken together constitute the "published report" of the competent authority to which the Appellate Body has referred.

7.11 In carrying out its objective assessment of the matter before it, the Panel will solely address the claims necessary to resolve the matter at issue between the parties.[76] The Panel will take into account the arguments presented by the parties and third parties in their various written submissions and oral statements in the course of the proceedings.

2. Interpretation of the relevant rules of the agreements

7.12 In its objective assessment of the matter before it, the Panel is called upon to clarify the scope of some provisions of the covered agreements cited by the parties, and in particular of the Agreement on Safeguards and the GATT 1994. In this connection, Article 3.2 of the DSU provides that panels should clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". As the Appellate Body has noted, these customary rules of interpretation are part of customary general international law and are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[77]

7.13 Article 31.1 of the Vienna Convention provides that: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In accordance with Article 31.2 of the Vienna Convention, the context for the purposes of the interpretation of a treaty comprises the text of the agreement concerned, including its preamble and annexes.

7.14 Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to

[72] Preliminary Resolution, Exhibit CEGH-5, paragraph 23.
[73] Definitive Resolution, Exhibit CEGH-9, paragraph 17.
[74] See Article 4 of the *Regulations of Law 1-02*, Exhibit RDO-11. This is confirmed by the language used in the technical reports. For example, when examining the factors that would demonstrate the existence of a causal link between the increase in imports and the injury to the domestic industry, the DEI states in its Final Technical Report that "it analysed [these elements] in order to enable the Plenary of the Commission to decide whether or not it is appropriate to apply a definitive safeguard measure". Final Technical Report, Exhibit CEGH-10, p. 91.
[75] Panel reports, *Argentina – Preserved Peaches*, paragraph 7.6; and *Argentina – Footwear (EC)*, paragraph 8.128.
[76] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 17-20.
[77] Appellate Body Report, *US – Gasoline*, pp. 16-18. See also, for example, Appellate Body Report, *India – Patents (US)*, paragraph 46.

determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

7.15 Article XVI of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) provides that the legal texts of the WTO are equally authentic in the English, French and Spanish language versions.[78] Accordingly, and in accordance with Article 33 of the Vienna Convention, in case of discrepancy between the language contained in the text of each of the different versions, the Panel must seek the meaning which simultaneously gives effect to all the terms of the treaty as used in each of the authentic languages.[79]

3. Burden of proof

7.16 Although the DSU does not contain any express provision governing the burden of proof, by application of the general principles of law the WTO dispute settlement system has traditionally recognised that the burden of proof lies with the party asserting a fact, whether that party be the complainant or the defendant.[80] Accordingly, in a proceeding the burden of proving that the impugned measure is inconsistent with the relevant provisions of covered agreements initially lies with the complainant. Once the complainant has made a *prima facie* case for such inconsistency, the burden shifts to the defendant, who must in turn rebut the alleged inconsistency.[81] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[82] In the words of the Appellate Body:

> As a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary.[83]

7.17 The Appellate Body has added in this connection that precisely how much and precisely what kind of evidence will be required for the complaining party to establish its case will necessary vary from measure to measure, provision to provision, and case to case.[84] In any case, it should be borne in mind that, in the context of the WTO dispute settlement system:

> A *prima facie* case must be based on "evidence and legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim

[78] See also Explanatory Note to paragraph 2(c)(i) of the GATT 1994.

[79] See, for example, Appellate Body Reports, *Chile – Price Band System*, paragraph 271; *EC – Bed Linen (Article 21.5 – India)*, footnote 153 to paragraph 123; *US – Softwood Lumber IV*, footnote 50 to paragraph 59; *EC – Tariff Preferences*, paragraph 147; and *US – Upland Cotton*, footnote 510 to paragraph 424.

[80] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-17.

[81] Appellate Body Report, *EC – Hormones*, paragraph 98.

[82] Appellate Body Report, *EC – Hormones*, paragraph 104.

[83] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paragraph 66 (italics in the original).

[84] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

> of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[85]

7.18 In the matter before us, and by application of the foregoing criteria, it is up to the complainants to make out a *prima facie* case for the violations of the provisions of the WTO covered agreements they have invoked; if the complainants succeed in making a *prima* facie case for their claims, it will then be up to the Dominican Republic to rebut them.

4. Provisional measure

7.19 The measures impugned by the complainants include the provisional measure which is no longer in force at this date. The complainants argue that the panel in *Chile – Price Band System* stated that Article 19.1 of the DSU allows a panel to make *findings* regarding an expired provisional safeguard measure, if such findings are necessary to secure a positive solution to the dispute. In that same case, however, the panel concluded that it would not formulate *recommendations* with regard to the expired measure. In the complainants' view, in the present dispute the Panel should make findings on the provisional measure because that will help to secure a positive solution to the dispute within the meaning of Article 3.7 of the DSU. They note that the Panel's findings on the provisional measure could serve as a basis for private operators to bring actions before the Dominican Republic authorities which could enable them to recover the duties wrongly paid through the application of the provisional safeguard.[86]

7.20 The Dominican Republic argues that, to secure a positive solution to the dispute, there is no need for the Panel to issue findings on the provisional measure that was retroactively replaced by the definitive measure.[87] The Dominican Republic points out that the panel in *Chile – Price Band System* stated that a panel may make findings on an expired provisional measure only if such findings are necessary to secure a positive solution to the dispute. The Dominican Republic contends that in the present case it does not understand how making findings on the provisional measure would contribute to a positive solution to the dispute.[88]

7.21 The Panel notes that the impugned provisional measure was in force until 17 October 2010. As from 18 October it was replaced by the definitive measure. During the period of application of the provisional measure, the customs authorities of the Dominican Republic required payment of the 38 per cent duty in accordance with the system commonly applicable to the collection of customs duties, without allowing the possibility of posting bonds or other types of guarantee.[89] This means that the provisional measure was in force when Costa Rica and Guatemala each separately requested the holding of consultations with the Dominican Republic in the present case (15 October 2010), but not when Honduras and El Salvador each separately requested consultations (on 18 October and 19 October, respectively). The impugned measure was not in force when Costa Rica and Guatemala (on 15 December 2010) or when Honduras and El Salvador (on 20 December 2010) each separately

[85] Appellate Body Report, *US – Gambling*, paragraph 140 (italics in the original; footnotes not reproduced).

[86] Complainants, reply to Panel question No. 37.

[87] Dominican Republic, first written submission, paragraphs 410, 413-415 and 435.

[88] The Dominican Republic points out that the panel in *Guatemala – Cement II* found that since it had already made findings that gave rise to a recommendation concerning the totality of the definitive measure, it did not consider it necessary to further address claims concerning the provisional measure that could only result in a ruling concerning only part of the definitive measure. Dominican Republic, reply to Panel question No. 38.

[89] Complainants, reply to Panel question No. 188; Dominican Republic, comments on the complainants' reply to Panel question No. 188.

requested the DSB to establish a panel to examine the dispute. Nor, therefore, was the impugned provisional measure in force at the time when the DSB established the Panel and its terms of reference (7 October 2011).

7.22 The Panel is mindful of the fact that there is nothing in the WTO agreements to prevent a panel from issuing findings regarding expired provisional safeguard measures insofar as such findings are necessary to secure a positive solution to the dispute.[90] In the present case, the Panel notes that each of the principal claims put forward by the complainants in their request for the establishment of the panel with respect to the definitive measure was also put forward with respect to the provisional measure. In the case of those claims, insofar as the complainants succeed in making the case that the impugned measures are inconsistent with any of the provisions of the covered agreements, that finding would affect both the impugned definitive measure and the provisional measure. In that case, it would not in principle be necessary for the Panel to issue separate findings regarding the expired provisional measure; any such findings would not be necessary for helping to secure a positive solution to the dispute for the parties.

B. WHETHER ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS ARE APPLICABLE TO THE PRESENT DISPUTE

1. Main arguments of the parties

(a) Dominican Republic

7.23 The Dominican Republic affirms that, in the exercise of the functions provided for in Article 11 of the DSU, the Panel should rule on whether or not the covered agreements which the complainants claim to have been breached are applicable to the present dispute.[91] In the opinion of the Dominican Republic, for the Panel to be able to assess the consistency or inconsistency of the impugned measures with the specific provisions invoked by the complainants, it must first determine that the measures in question fall within the scope of the provisions invoked by the complainants.[92]

7.24 The Dominican Republic argues in this connection that the provisions invoked by the complainants, more specifically Article XIX of the GATT 1994 and the Agreement on Safeguards, are not applicable to the present dispute as the impugned measures are not covered by those rules.[93] Accordingly, in its view the dispute raised by the complainants is devoid of purpose, at least insofar as those rules are concerned.[94] The Dominican Republic adds that the applicability of the provisions invoked by the complainants depends on objective criteria set out in the rules themselves and based on the content of the measures at issue, and is not determined by subjective criteria such as the classification of the measures under domestic law, the name given to the various instruments in the domestic legislation of each WTO Member, or their form or nomenclature, the lawmakers' intentions or the statements made by the Dominican authorities.[95]

---

[90] See, for example, panel report, *Chile – Price Band System*, paragraphs 7.112-7.115.

[91] Dominican Republic, request for a preliminary ruling, paragraphs 15-25.

[92] Dominican Republic, request for a preliminary ruling, paragraph 24. See also, Dominican Republic, opening statement at the first meeting of the Panel, paragraph 3.

[93] Dominican Republic, request for a preliminary ruling, paragraphs 25 and 35.

[94] Dominican Republic, request for a preliminary ruling, paragraphs 1, 14, 26, 27 and 55.

[95] Dominican Republic, opening statement at the first meeting of the Panel, paragraphs 6-12. See also, Dominican Republic, reply to Panel questions Nos. 31 and 32; second written submission, paragraph 5.

7.25 The Dominican Republic asserts that Article XIX:1(a) of the GATT 1994 has two parts. The first part establishes certain conditions that must be fulfilled for a WTO Member to be able to adopt the course of action described in the second part. In the view of the Dominican Republic, if a Member does not take the course of action provided for in the second part of Article XIX:1(a) of the GATT 1994 - that is to say, if it does not suspend in whole or in part the obligation incurred in respect of such product or withdraw or modify the concession - it is not legally bound to fulfil the conditions set out in the opening part of the provision, nor to satisfy the disciplines and procedural requirements contained in the rest of Article XIX of the GATT 1994.[96]

7.26 The Dominican Republic also contends that the word "obligation" used in Article XIX of the GATT 1994 is confined to: (i) the tariff concessions and the obligations relating to such concessions in accordance with Article II:1 of the GATT 1994; and (ii) the elimination or reduction of quantitative restrictions pursuant to Article XI of the GATT 1994. Accordingly, in its opinion Article XIX of the GATT 1994 and the Agreement on Safeguards only cover those measures which suspend, withdraw or modify tariff concessions or obligations relating to such concessions or which impose quantitative restrictions.[97]

7.27 The Dominican Republic adds that, even assuming that other provisions of the GATT 1994 could be included in the term "obligation" of Article XIX, which it denies, "this could not in any way include GATT Article I establishing the most-favoured-nation principle (along with GATT Article XIII)".[98] This stems from: (i) the text of Article 2.2 of the Agreement on Safeguards, according to which safeguards should be applied in a non-discriminatory manner, so that the interpretation whereby the term "obligations" in Article XIX, second sentence, could refer to GATT Article I:1 would lead to a conflict between GATT Article XIX and Article 2.2 of the Agreement on Safeguards, contrary to the principle of harmonious interpretation; (ii) the fact that Article 9.1 of the Agreement on Safeguards establishes a mandatory exemption from the application of a safeguard measure for certain countries by virtue of special and differential treatment, but does not authorize the "suspension" of GATT Article I:1 within the meaning of GATT Article XIX; (iii) the text of the Ministerial Declaration launching the Uruguay Round, which would suggest that the term "obligation" in Article XIX does not refer to GATT Article I, and the general negotiating history of Article XIX and the Agreement on Safeguards, as well as the practice of the Contracting Parties to the GATT 1947 showing a rejection of discriminatory or selective safeguard measures; (iv) the fact that the *obligation* that may be suspended in accordance with the last part of Article XIX:1(a) of the GATT 1994 refers to the obligation which, according to the first part of the Article, has resulted in the increase in imports which has caused a serious injury, and the most-favoured-nation principle is not capable of causing such an increase; (v) the fact that the application of Article 9.1 of the Agreement on Safeguards does not qualify a specific measure as a safeguard measure in accordance with Article 1 of the Agreement on Safeguards, but rather presupposes the existence of a safeguard; and (vi) that to consider that a safeguard measure within the meaning of GATT Article XIX may consist in the suspension of GATT Article I:1 would lead to an absurd result, since by virtue of Articles 2.2 and 9.1 of the Agreement on Safeguards read together, the sole content of such a measure would be the exclusion of certain countries from its scope.[99]

---

[96] Dominican Republic, opening statement at the first meeting of the Panel, paragraphs 21-22. See also, request for a preliminary ruling, paragraph 38; reply to Panel questions Nos. 41, 61 and 172.

[97] Dominican Republic, reply to Panel question No. 60.

[98] *Ibid.*

[99] Dominican Republic, reply to Panel questions Nos. 60-61; second written submission, paragraphs 9-13. See also, Dominican Republic, opening statement at the first meeting of the Panel,

7.28 The Dominican Republic contends that the provisional measure and the definitive measure consisted in the adoption of a "38 per cent [*ad valorem*] tariff" on imports of tubular fabric and polypropylene bags, which was progressively reduced. These measures constituted neither a surcharge, nor a second tariff, nor an additional or alternative tariff, but rather an increase in the MFN tariff, in accordance with Article 73 of *Law 1-02*, replacing the previously applicable MFN tariff. At no time did these measures violate the Dominican Republic's obligation under Article II of the GATT 1994, through its schedule of concessions, not to impose tariffs above 40 per cent *ad valorem* on the products in question; nor did the measures result in duties other than ordinary customs duties, and therefore they did not suspend obligations under Article II:1(b), second sentence, of the GATT 1994. Nor did they result in a restriction of any other kind on imports of tubular fabric or polypropylene bags, such as quantitative restrictions, or suspend in whole or in part any other obligation incurred by the Dominican Republic with respect to those products.[100]

7.29 The Dominican Republic affirms that the complainants knew before the adoption of the impugned measures that they would not exceed the bound tariff and that therefore Article XIX of the GATT 1994 would not be applicable. Although when adopting these measures the Dominican Republic decided to adhere to the burdensome requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards, it did not have any obligation to do so.[101]

7.30 In the view of the Dominican Republic, the fact that Article XIX of the GATT 1994 is not applicable to the present dispute also results from the Article's object and purpose, which are to enable a Member temporarily to rebalance the level of its concessions when faced with specific unforeseen developments. The impugned measures did not affect the level of tariff concessions accepted by the Dominican Republic in the WTO. Its proposed interpretation is also supported by other provisions of the Agreement on Safeguards, such as Articles 11.1(c) and 8.1. The Dominican Republic affirms that the negotiating history of Article XIX of the GATT 1994 and the Agreement on Safeguards confirms that these provisions only apply to measures involving the suspension of an obligation under the GATT 1994 or the withdrawal or modification of a concession. It argues that the interpretation put forward by the complainants would affect the "inherent and essential flexibility of the WTO system of tariff concessions", under which Members may freely raise their tariffs up to a level below the bound rate.[102]

7.31 The Dominican Republic affirms that the impugned measures "are safeguard measures within the meaning of Law 1-02" and were adopted in compliance with this domestic legislation, Article 73 of which authorizes increasing tariffs without referring to the suspension of obligations or a withdrawal or modification of concessions within the meaning of the GATT 1994. In its opinion, "not

---

paragraphs 50-52; reply to Panel question No. 174; opening statement at the second meeting of the Panel, paragraphs 16-21.

[100] Dominican Republic, request for a preliminary ruling, paragraphs 30, 41-43 and 46; first written submission, paragraphs 39-41; opening statement at the first meeting of the Panel, paragraphs 4 and 45-48. See also, second written submission, paragraphs 15-25; opening statement at the second meeting of the Panel, paragraphs 22-30; reply to Panel questions Nos. 33 and 180-183; comments on the complainants' reply to the Panel questions, paragraphs 2-10.

[101] Dominican Republic, opening statement at the first meeting of the Panel, paragraphs 16-18 and 54; closing statement at the first meeting of the Panel, paragraphs 7 and 14-15; reply to Panel questions Nos. 49 and 51.

[102] Dominican Republic, request for a preliminary ruling, paragraphs 44 (citing the Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 94) and 45; opening statement at the first meeting of the Panel, paragraphs 28-32; closing statement at the second meeting of the Panel, paragraphs 5-7; reply to Panel questions Nos. 41, 68 and 70.

every safeguard adopted under Law 1-02, constitutes a safeguard measure within the meaning of Article XIX of GATT and the Agreement on Safeguards".[103]

7.32 From the foregoing the Dominican Republic concludes that the course of action that was adopted through the impugned measures does not constitute any of the actions covered by Article XIX of the GATT 1994. Given that the impugned measures are not those covered by Article XIX of the GATT 1994, pursuant to Article 1 of the Agreement on Safeguards the rules established in that Agreement are likewise inapplicable. Lastly, the Dominican Republic adds that the investigation leading to the adoption of the impugned measures is likewise not subject to Article XIX of the GATT 1994 or the Agreement on Safeguards.[104]

(b) Complainants

7.33 The complainants reject the Dominican Republic's arguments and request the Panel to find that the impugned measures are indeed subject to examination under Article XIX of the GATT 1994 and the Agreement on Safeguards.[105]

7.34 The complainants affirm that the impugned measures should be considered as safeguards on the basis of a harmonious reading of Article XIX of the GATT 1994 with the Agreement on Safeguards and on the design, architecture and structure of the measures themselves, which claim to be a response to the need to remedy serious injury and facilitate adjustment.[106]

7.35 The complainants assert that the impugned measures suspend obligations of the Dominican Republic under Articles I:1 and II:1(b), second sentence, of the GATT 1994 relating to the products in question. The complainants reject the Dominican Republic's argument to the effect that the term *obligation* in Article XIX of the GATT 1994 refers solely to obligations relating to tariff concessions under Article II:1 and the elimination or reduction of quantitative restrictions under Article XI of the GATT 1994. In their view, the impugned measures involve the suspension of the most-favoured-nation principle provided for in Article I:1 of the GATT 1994, since they selectively exclude imports from specific origins (namely, Colombia, Indonesia, Mexico and Panama) under cover of Article 9.1 of the Agreement on Safeguards, thus granting those imports an advantage, favour, privilege or immunity not accorded immediately and unconditionally to the imports of the like product from the other WTO Members. The complainants affirm that the impugned measures also suspend the application of Article II:1(b), second sentence, of the GATT 1994 insofar as they impose a tariff surcharge other than ordinary customs duties that is not recorded in the Dominican Republic's schedule of concessions.[107]

---

[103] Dominican Republic, reply to Panel questions Nos. 31 and 32. See also, second written submission, paragraph 4; opening statement at the first meeting of the Panel, paragraphs 13-15; closing statement at the first meeting of the Panel, paragraphs 4 and 6-7; reply to Panel questions Nos. 46, 48, 49, 176 and 186.

[104] Dominican Republic, request for a preliminary ruling, paragraphs 39 and 47-48; opening statement at the first meeting of the Panel, paragraphs 39-44; reply to Panel question No. 62. See also, second written submission, paragraphs 26-48.

[105] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 4 and 7.

[106] Complainants, reply to Panel questions Nos. 39, 40, 41, 54, 55 and 172. See also, opening statement at the second meeting of the Panel, paragraph 9.

[107] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 42(v) and 109-111 and 122-123; opening statement at the first meeting of the Panel, paragraphs 17 and 133-147; reply to Panel questions Nos. 26, 27, 39, 40, 41, 45, 55, 72 and 73. See also, second written submission,

7.36 The complainants also point out that, in accordance with Article 11.1(a) of the Agreement on Safeguards, the coverage of Article XIX of the GATT 1994 and the Agreement on Safeguards includes not only measures which a Member "takes" but also all actions undertaken by a Member with a view to the adoption of safeguard measures, regardless of whether such measures are taken in the form of a suspension of obligations or the withdrawal or modification of tariff concessions.[108]

7.37 Alternatively, and even assuming that the impugned measures do not result in the suspension of any obligation under the GATT 1994, the complainants add that they would still be safeguards within the meaning of Article XIX for the following reasons:[109] (i) given that the purpose of the WTO safeguard mechanism is to provide an instrument for preventing or remedying a serious injury to the domestic industry in certain circumstances and for facilitating adjustment, any measure that goes beyond what is necessary for that objective, in extent or temporal scope, infringes Articles 5 and 7 of the Agreement on Safeguards even if the measure is not inconsistent with the general obligations of the GATT 1994[110]; (ii) the use of the words *shall be free* in Article XIX:1(a) of the GATT 1994 implies that, in the circumstances described in that provision, a Member has the faculty to suspend a WTO concession or obligation but may also choose to impose a measure to remedy serious injury that does not suspend a concession or obligation[111]; (iii) after having initiated, conducted and concluded a safeguard investigation in accordance with Article XIX of the GATT 1994 and the Agreement on Safeguards, and having adopted measures as a result of that investigation, the Dominican Republic cannot try to avoid its obligations under those provisions on the grounds that the measures are not safeguard measures[112]; (iv) if a safeguard measure had to consist in the suspension of a concession or obligation, at the time when, as a result of its progressive liberalization in accordance with Article 7.4 of the Agreement on Safeguards, the measure came to be lower than the bound tariff, it would cease to be a safeguard and the Member applying it could suspend its liberalization or refuse to continue granting any compensation[113]; (v) in accordance with Article 3.1 of the Agreement on Safeguards, if a Member conducts a safeguard investigation, the ensuing measure will have to be considered a safeguard regardless of whether it is below or above the bound tariff[114]; and (vi) if the interpretation

---

paragraphs 14-33 and 256-307; opening statement at the second meeting of the Panel, paragraphs 11-21 and 77-80; closing statement at the second meeting of the Panel, paragraphs 5-19; reply to Panel questions Nos. 53, 55, 60, 61, 76, 174-175, 180-181 and 185-186; comments on the Dominican Republic's reply to Panel questions Nos. 174 and 181-182.

[108] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 42 (iii) and 84-91. See also, reply to the Dominican Republic's request for a preliminary ruling, paragraph 86; second written submission, paragraphs 34-38; reply to Panel question No. 172.

[109] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 42 (iv), 92-93 and 108; opening statement at the first meeting of the Panel, paragraphs 10-11; reply to Panel question No. 41.

[110] Complainants, opening statement at the first meeting of the Panel, paragraphs 18-21. See also, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 102-104; second written submission, paragraphs 42-46; reply to Panel question No. 172.

[111] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 94-96. See also, reply to Panel questions Nos. 41 and 74; second written submission, paragraph 41.

[112] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 97-104.

[113] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 105-106; opening statement at the first meeting of the Panel, paragraph 27.

[114] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraph 107.

proposed by the Dominican Republic were to be adopted, the impugned measures would escape multilateral control by the WTO.[115]

7.38 In the complainants' view, the impugned measures are the result of an investigation that was initiated, conducted and concluded by the Dominican Republic under Article XIX of the GATT 1994 and the Agreement on Safeguards and its domestic legislation on safeguards, that is to say, *Law 1-02* and the *Regulations of Law 1-02*. As is clear from the text itself of the Commission's Initial Resolution, Preliminary Resolution and Definitive Resolution, in the investigation that led to the imposition of the impugned measures and in the decisions adopted (such as the decision to exclude certain countries from the application of the measures and the establishment of a timetable for their progressive liberalization), the competent authority of the Dominican Republic invoked as their basis the multilateral rules and domestic legislation on safeguards and not any other rules, such as for example *Law 146-00*, the domestic legislation governing the imposition of customs tariffs. This is allegedly confirmed by statements and declarations made by the Dominican Republic, such as the press release issued at the conclusion of the investigation and the explanations provided in the WTO Committee on Safeguards.[116]

7.39 The complainants argue that both the impugned measures and other related acts (such as the initiation of the investigation and the Resolution of April 2011 on the gradual removal of the definitive measure) were notified by the Dominican Republic to the WTO Committee on Safeguards under the multilateral procedures provided for safeguard measures applied pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards. In none of these notifications did the Dominican Republic indicate that the notified measures were not safeguards; on the contrary, the Dominican Republic referred to the notified measures respectively as the "provisional safeguard measure" and the "definitive safeguard measure".[117]

7.40 The complainants add that, even if the Panel were to conclude that Article XIX of the GATT 1994 and the Agreement on Safeguards are not applicable to the impugned measures, it would still have to consider the claims put forward by the complainants with regard to other aspects, such as those relating to the investigation in itself, the notifications to the WTO Committee on Safeguards, and the lack of consultations under the Agreement on Safeguards, as well as the alternative claims under Articles I:1 and II:1(b), second sentence, of the GATT 1994.[118]

2. Main arguments of the third parties

(a) Colombia

7.41 Colombia contends that the use of the words "shall be free" in Article XIX of the GATT 1994 means that Members who are in the circumstances described in that Article have the "faculty" to

[115] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 97-101; second written submission, paragraphs 44-46.

[116] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 42(i), 43 and 48-73; opening statement at the first meeting of the Panel, paragraphs 13-15; reply to Panel question No. 40.

[117] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 42(ii) and 75-83; opening statement at the first meeting of the Panel, paragraph 15. See also, reply to Panel questions Nos. 45 and 53.

[118] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraphs 6 and 112-123; opening statement at the first meeting of the Panel, paragraphs 10-11 and 132. See also, reply to Panel question No. 56; opening statement at the second meeting of the Panel, paragraphs 22-26.

suspend in whole or in part a concession incurred with respect to a product, or to withdraw or modify it. Regardless of whether or not a safeguard investigation ends in the suspension of concessions granted under Article II of the GATT 1994, the procedure will be governed by the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards. Colombia also argues that the preamble to the Agreement on Safeguards reflects the intention of the WTO Members to establish multilateral control over safeguard measures and to limit the measures that escape such control. Therefore, if the Member applying a measure itself initially describes it as a safeguard, the WTO and the other Members have to consider it as such. On this basis, Colombia suggests that Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the impugned measures, adding that the Panel should rule on this point before going any further with its substantive analysis.[119]

7.42 Lastly, Colombia suggests that the word "obligation" in Article XIX of the GATT 1994 should be construed as referring to any obligation under the GATT 1994 other than those established in Article I and Article II:1(a).[120]

(b) United States

7.43 The United States suggests that Article XIX:1(a) of the GATT 1994 does not contain any definition or description of the word "obligation" other than that they are obligations incurred "under this Agreement" (the GATT 1994). The obligations include tariff concessions under Article II:1 of the GATT 1994, as well as the obligation relating to quantitative restrictions in Article XI:1 of the GATT 1994. In the view of the United States, the word "obligation" could also include the obligation under Article I:1 of the GATT 1994, as otherwise Article 2.2 of the Agreement on Safeguards would be superfluous and would create a conflict between Article 9.1 of the Agreement on Safeguards and the most-favoured-nation principle in Article I:1 of the GATT 1994.[121]

7.44 The United States adds that, in the circumstances of the present dispute, if the impugned measures did not suspend obligations under the GATT 1994, it is not clear that they would necessarily be safeguards. In any case, the United States stresses that the Dominican Republic appears to have considered the measures to be safeguards, for example when notifying them to the WTO and by invoking Article 9.1 of the Agreement on Safeguards to exclude certain countries from their application. The exclusion of those countries means that the Dominican Republic suspended its obligations contained in Article I:1 of the GATT 1994.[122]

(c) Nicaragua

7.45 Nicaragua rejects the Dominican Republic's argument that the impugned measures are not subject to the obligations of Article XIX of the GATT 1994 and the Agreement on Safeguards. In Nicaragua's opinion, this argument is inconsistent with those provisions and impairs the rights accruing to Members under the WTO Agreement.[123]

[119] Colombia, third party written submission, paragraphs 15-22. See also, reply to Panel question No. 23.

[120] Colombia, reply to Panel question No. 2, paragraph 15. See also, *Ibid*. paragraphs 2-16.

[121] United States, reply to Panel question No. 2, paragraphs 6-9.

[122] United States, reply to Panel question No. 3. See also, United States, third party statement, paragraphs 4-6; reply to Panel question No. 25.

[123] Nicaragua, third party written submission, paragraphs 7-9.

(d) European Union

7.46 The European Union contends that the determination as to whether a measure is a safeguard provided for in Article XIX of the GATT 1994 is an objective one that must be made taking into consideration the structure and design of each measure. The subjective purpose of the Member applying the measure may offer a useful indication, but will never be dispositive since otherwise the applicability of the Agreement on Safeguards would be at the discretion of the Member applying the measure. In the opinion of the European Union, the circumstance that the measures in question are aimed at preventing or remedying injury caused by an increase in imports is a necessary but not alone a sufficient condition for determining the applicability of the Agreement on Safeguards.[124]

7.47 The European Union suggests that a distinction should be drawn between the question of whether a measure is a safeguard provided for in Article XIX of the GATT 1994 and the question of whether a measure is consistent with the requirements imposed by Article XIX. If that distinction is not made, it would never be possible to determine whether a measure is inconsistent with Article XIX of the GATT 1994. The European Union proposes that a measure may be considered a safeguard of the kind provided for in Article XIX of the GATT 1994 when it combines the following two features: (i) it seeks to remedy injury caused by an increase in imports; and (ii) it involves the suspension of an obligation or the withdrawal or modification of a concession under the GATT 1994. In the view of the European Union, to deny the relevance of the second of these features would be to fail to recognize the specific function of Article XIX in the context of the GATT 1994, namely, to authorize emergency measures that would otherwise be prohibited by the GATT 1994.[125]

7.48 The European Union points out that its comments do not necessarily mean that the impugned measures fall outside the scope of the Agreement on Safeguards. Firstly, because, as the complainants argue, the impugned measures entail the suspension of obligations incurred by the Dominican Republic under the GATT 1994, insofar as they do not apply to imports of like products originating in all WTO Members. In this connection, the European Union asserts that one may deduce from the ordinary meaning of the wording of Article XIX:1(a) of the GATT 1994 that the word *obligation* is not confined to tariff concessions under Article II:1 nor the provision on quantitative restrictions under Article XI of the GATT 1994, but also includes the obligations of Article I:1.[126] Secondly, because as the complainants also maintain, by the application of Article 11.1(a) of the Agreement on Safeguards, that Agreement is not confined to safeguards which the Member has adopted but also applies to investigations initiated with a view to the possible imposition of a safeguard, even where subsequently such a measure is not imposed as a consequence of the investigation. With regard to the second point, however, the European Union adds that if the Panel were to conclude that the impugned measures are not covered by the Agreement on Safeguards (because they do not suspend any obligation under the GATT 1994), a finding that any of the procedural requirements is inconsistent with the Agreement on Safeguards could not lead the Panel to go on to conclude that the provisional measure or the definitive measure are therefore inconsistent with the Agreement on Safeguards.[127]

[124] European Union, third party written submission, paragraphs 4 and 7.

[125] European Union, third party written submission, paragraphs 8-9. See also, reply to Panel questions Nos. 3 and 6.

[126] European Union, third party written submission, paragraph 15; reply to Panel questions Nos. 2 and 7.

[127] European Union, third party written submission, paragraphs 13-14; reply to Panel question No. 7.

7.49 On the other hand, the European Union disagrees with the complainants' argument that the impugned measures also entail a suspension of Article II:1(b) of the GATT 1994; in its opinion, the intention of the Dominican authorities was to increase the rate of the applicable ordinary customs duty, and not to apply other duties or charges in addition to the ordinary customs duty.[128]

3. Assessment by the Panel

(a) Introductory comment

7.50 The question before this Panel concerning the applicability of the covered agreements may be described as follows: Are the impugned measures in this case measures of the type provided for in Article XIX of the GATT 1994? If the answer is yes, by application of Article 1 of the Agreement on Safeguards, whereby "safeguard measures" shall be understood to mean "those measures provided for in Article XIX of the GATT 1994", the impugned measures will be considered safeguards for the purposes of Article XIX of the GATT 1994 and the Agreement on Safeguards. In that case, both Article XIX of the GATT 1994 and the Agreement on Safeguards will be applicable to the present dispute.

7.51 Before taking up the substantive analysis of the question, the Panel notes that an unusual situation arises in the present case.

7.52 Firstly, the main argument cited by the complainants to support their assertion concerning the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to this dispute is that the impugned measures constitute a suspension of obligations of the Dominican Republic under Articles I:1 and II:1(b), second sentence, of the GATT 1994.

7.53 As reflected in the discussion between the parties and the views given by the third parties, the Panel notes at the outset that in none of the previous disputes raised in the WTO dispute settlement system have the parties alleged that the impugned measures described as safeguards suspended obligations other than those contained in Article II or Article XI of the GATT 1994. This is reflected in the language used by the Appellate Body in its report in *Argentina – Footwear (EC)*:

> [I]t must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*.[129]

7.54 Recognized authorities in this field also refer to the fact that the safeguards provided for in GATT Article XIX allow Members to take action which would otherwise be incompatible with their obligations under GATT Articles II and XI, i.e. the levying of tariffs above the bound level and the imposition of quantitative restrictions.[130]

7.55 The question of whether the invocation of the clause of GATT Article XIX allows a Member to escape the most-favoured-nation treatment obligation in GATT Article I, and in particular whether, under GATT Article XIX, safeguard measures must be applied to imported products in a

[128] European Union, third party written submission, paragraph 16.
[129] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 95 (italics in the original).
[130] See, for example, P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2008), p. 685; O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (Martinus Nijhoff Publishers, 1985), pp. 57-58.

non-discriminatory manner and regardless of their origin or may be applied selectively, has been extensively discussed by commentators.[131] Much of this work refers to the GATT situation prior to the entry into force of the Uruguay Round Agreements.

7.56 Secondly, it also appears unusual that a Member should refuse that a measure which it has taken be described as a safeguard despite the fact that the measure: (i) was taken by the Member with the stated objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports; (ii) was the result of a procedure based, *inter alia*, on the rules and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards; and (iii) was notified as a safeguard measure by the Member taking it to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.57 In addition, the Panel notes as a matter of fact that, in the present dispute, even at their highest the impugned measures were duties equivalent to 38 per cent *ad valorem*, below the level of 40 per cent *ad valorem* bound by the Dominican Republic for the two products in its schedule of concessions. Additionally, the tariff applied by the Dominican Republic prior to the imposition of the impugned measures, and which will re-enter into force as from 21 April 2012 when the impugned definitive measure expires, which is the equivalent respectively of 14 per cent *ad valorem* for tubular fabric and 20 per cent *ad valorem* for polypropylene bags, is significantly lower than the 40 per cent *ad valorem* level bound by the Dominican Republic. The circumstance that a Member applies a tariff lower than the binding in its schedule of concessions is not unusual. In the present case, this circumstance meant that in practice, when adopting measures to remedy a possible situation of serious injury to the domestic industry caused by an increase in imports, the Dominican Republic did not see fit to withdraw or modify its tariff commitments with respect to the products in question under its schedule of concessions.

7.58 In any case, the Panel notes that, in the light of Article 11 of the DSU, its functions include making an objective assessment of the applicability of the provisions of the covered agreements invoked in the dispute. The Panel agrees with the parties that the determination on applicability must be a prior step to the analysis of whether the impugned measures are consistent with the obligations contained in the cited provisions.[132]

7.59 In order to reach a conclusion on the applicability of the covered agreements invoked, the Panel's starting point must be the text of the relevant provisions, in the context of the terms of the treaty and taking into account the object and purpose of the agreements.

7.60 Having taken the foregoing into account, the Panel will consider the complainants' argument that the impugned measures constitute a suspension of obligations of the Dominican Republic under Articles I:1 and II:1(b), second sentence, of the GATT 1994.[133] The complainants have stated in this

[131] See, for example, the account of the discussion on this legal issue in J. H. Jackson, W. J. Davey and A. O. Sykes, Jr., *Legal Problems of International Economic Relations* (West Publishing Co., 1995). See also, J. H. Jackson, *World Trade and the Law of GATT* (The Michie Company, 1969), pp. 564-565, Exhibit RDO-28.

[132] See, for example, complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraph 33; Dominican Republic, request for a preliminary ruling, paragraph 24. See also, for example, Appellate Body Reports, *China – Auto Parts*, paragraph 139; *Canada – Autos*, paragraph 151; and *US – Shrimp*, paragraph 119.

[133] None of the parties has indicated that the impugned measures constitute withdrawal or modification of a tariff concession incurred by the Dominican Republic by virtue of its obligations under Articles II:1(a) and II:1(b), first sentence, of the GATT 1994.

connection that if the Panel were to conclude that the impugned measures are safeguards because they involve the suspension of obligations of the Dominican Republic under the GATT 1994, they would not request additional findings concerning the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards.[134]

(b) Whether the impugned measures suspend obligations contained in Article I:1 of the GATT 1994

7.61 The complainants assert that the impugned measures suspend the most-favoured-nation treatment obligation in Article I of the GATT 1994, in that they selectively exclude imports from specific origins (namely, Colombia, Indonesia, Mexico and Panama), thereby granting those imports an advantage, favour, privilege or immunity not accorded immediately and unconditionally to imports of like products from the other WTO Members. The Dominican Republic replies that Article XIX of the GATT 1994 does not authorize suspending the obligation in Article I of the GATT 1994, but only permits the suspension of tariff concessions and obligations and the obligations relating to such concessions, under GATT Article II:1, and the prohibition on imposing quantitative restrictions under GATT Article XI, so that even if they impugned measures suspend the obligation contained in Article I this does not imply that they fall within GATT Article XIX and the Agreement on Safeguards.

7.62 Article I:1 of the GATT 1994 describes the obligation of most-favoured-nation treatment as follows:

> 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. (Supplementary note to the Article not reproduced.)

7.63 Article XIX:1(a) of the GATT 1994 provides:

> 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*, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, *in respect of such product*, and to the extent and for such time as may be necessary to prevent or remedy such injury, *to suspend the obligation in whole or in part or to withdraw or modify the concession*. (Without italics in the original.)

7.64 Thus, the text of Article XIX:1(a) does not expressly limit the obligations of the GATT 1994 that may be suspended by invoking that provision. The paragraph contains two references to the word *obligation*. First, it refers to the obligations incurred by a Member under the GATT 1994, including

[134] Complainants, reply to Panel question No. 41.

tariff concessions, which have had the effect of increasing imports. Second, it refers to the obligation in respect of the product in question which the Member is authorized to suspend in whole or in part, including the possibility of withdrawing or modifying the tariff concession. The Panel agrees with the Dominican Republic that the language of the Article suggests that the words *obligation* and *concession* in the final part of the paragraph ("*obligación*" and "*concesión*" in Spanish and "*engagement*" and "*concession*" in French) refer to the words *obligations* and *concessions* in the first part ("*obligaciones*" and "*concesiones arancelarias*" in Spanish and "*engagements*" and "*concessions*" in French).[135] This is suggested by the parallelism in the terms and the use of the word *the* in the final part of the paragraph in "*the* obligation" and "*the* concession". Otherwise, and if there was no link between the two expressions, the last part of the paragraph could have said "the contracting party shall be free, in respect of such product … to suspend *an* obligation in whole or in part or to withdraw or modify *a* concession".

7.65 According to one of the first studies published on the GATT legal system, the preparatory work of the GATT 1947 suggests that the most-favoured-nation treatment was not among the GATT obligations that could be suspended by invoking the safeguard clause of Article XIX. The author of this study, however, also stated that the expression "obligation incurred under the GATT" is as broad as the GATT itself. In the author's words, while the preparatory work of the GATT suggests that the expression covers both tariff concessions and the prohibition on quantitative restrictions, "the language seems even broader".[136]

7.66 Now, with the entry into force of the WTO Agreement the obligations contained in Article XIX of the GATT 1994 cannot be read in isolation but rather always together with and in the context of the provisions of the Agreement on Safeguards. As the Appellate Body has observed, unlike the earlier GATT system, the WTO Agreement constitutes a single instrument that was accepted by the WTO Members as a "*single undertaking*"[137] (in Spanish, "*todo único*", and in French, "*engagement unique*"). Accordingly, the obligations under the WTO agreements are generally cumulative and Members must comply with all of them simultaneously.[138] The Appellate Body has also noted that both the provisions of Article XIX of the GATT 1994 and those of the Agreement on Safeguards are part of one and the same treaty, the WTO Agreement.[139] As a result of the agreements reached during the Uruguay Round, both the GATT 1994 and the Agreement on Safeguards are part of Annex 1 of one and the same agreement (WTO Agreement). Accordingly, Article XIX of the GATT 1994 and the Agreement on Safeguards are an inseparable package of rights and disciplines that must be considered simultaneously.[140]

---

[135] Dominican Republic, reply to Panel question No. 61.

[136] J. H. Jackson, *World Trade and the Law of GATT* (The Michie Company, 1969), p. 559.

[137] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

[138] Appellate Body Report, *Korea – Dairy*, paragraph 74.

[139] They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. … [Yet] a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously … an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.

Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 81 (italics in the original).

[140] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 16 (quoting the Panel Report in *Brazil – Desiccated Coconut*, paragraph 227); *Korea – Dairy Products*, paragraph 74; and *Argentina – Footwear (EC)*, paragraph 81. The Appellate Body reached similar conclusions with respect to the Agreement on

7.67 With regard to whether safeguard measures must generally comply with the most-favoured-nation obligation in Article I of the GATT 1994, Article 2.2 of the Agreement on Safeguards provides that: "Safeguard measures shall be applied to a product being imported irrespective of its source."

7.68 In any case, it is an undisputed fact that both the provisional measure and the definitive measure exclude imports originating in Colombia, Indonesia, Mexico and Panama from their application and therefore result in more favourable treatment for those imports. In the case of both measures, the Commission's Resolutions justify this exclusion on the grounds of Article 9.1 of the Agreement on Safeguards and Article 72 of *Law 1-02*, insofar as the countries mentioned are developing countries which together represent barely 1.21 per cent of the investigated imports.[141] This means that the impugned measures were not applied to the relevant products being imported "irrespective of their source", but rather in fact excluded imports originating in four countries. This aspect of the measures is inconsistent with the general most-favoured-nation treatment provided for in Article I:1 of the GATT 1994, in that the Dominican Republic accorded products originating in these four countries an advantage, favour, privilege or immunity without immediately and unconditionally extending it to like products originating in the territories of all other contracting parties. The Panel notes in this respect that the Dominican Republic has admitted that the exclusion of imports originating in Colombia, Indonesia, Mexico and Panama from the application of the measure "may be problematic".[142]

7.69 The Dominican Republic has not put forward any argument to rebut the fact that the impugned measures are inconsistent with the general most-favoured-nation treatment of Article I:1 of the GATT 1994. In its opinion, however, even if the measures suspended general most-favoured-nation treatment, this would not be enough for the Panel to conclude that they constituted a suspension of obligations within the meaning of Article XIX:1(a) of the GATT 1994. The Dominican Republic asserts, among other arguments[143], that interpreting the suspension of obligations in the final part of Article XIX:1(a) of the GATT 1994 as covering a suspension of the general most-favoured-nation obligation in Article XIX:1 of the GATT 1994 would lead to a conflict between Article XIX:1(a) of the GATT and the Agreement on Safeguards, which expressly prohibits the discriminatory application of safeguards.

Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and GATT Article VI in its Report in *US -1916 Act*. In this last case the Appellate Body noted:

> Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement.* As its full title indicates, the *Anti-Dumping Agreement* is an "Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994". Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement* …
>
> Appellate Body Report, *US – 1916 Act*, paragraph 114 (italics in the original).

[141] Although the preliminary and definitive Resolutions refer to Article 82 of *Law 1-02*, in its written submissions the Dominican Republic refers to Article 72, which it says is the correct article. In the case of the definitive Resolution issuing the final decision and imposing the impugned definitive measure, the Commission also cited the *Regulations of Law 1-02*. Definitive Resolution, CEGH-9, paragraph 42.

[142] Dominican Republic, closing statement at the first meeting of the Panel, paragraph 17; reply to Panel question No. 52.

[143] See paragraph 7.27 of this Report.

7.70 The Panel is not convinced by this argument. The Agreement on Safeguards expressly authorizes certain waivers, particularly under Article 9, of the general most-favoured-nation treatment and the requirement that safeguard measures should not be applied in a discriminatory manner. Article 9.1 of the Agreement on Safeguards provides:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. (Footnote not reproduced.)

7.71 The Dominican Republic has expressly invoked Article 9 of the Agreement on Safeguards as the legal justification under the WTO agreements for excluding imports from Colombia, Indonesia, Mexico and Panama from the application of the impugned measures.[144]

7.72 Taking into account the foregoing, the Panel does not consider it correct to affirm that if Article XIX:1(a) of the GATT 1994 is interpreted to include the possibility of suspending the general most-favoured-nation treatment obligation in Article I:1 of the GATT 1994, this would necessarily lead to a conflict between GATT Article XIX:1(a) and the Agreement on Safeguards.

7.73 In conclusion, the Panel considers that the impugned measures have in fact meant a suspension of the most-favoured-nation treatment in Article I:1 of the GATT 1994 and therefore represent the suspension of an obligation incurred by the Dominican Republic under GATT 1991 within the meaning of Article XIX:1(a) of the GATT 1994.

(c) Whether the impugned measures suspend obligations contained in Article II:1(b), second sentence, of the GATT 1994

7.74 Once the Panel has concluded that the impugned measures have in fact meant a suspension of the most-favoured-nation treatment obligation in Article I:1 of the GATT 1994 with respect to the products concerned, there is no need to consider further whether those measures also constitute the suspension of obligations incurred by the Dominican Republic under Article II:1(b), second sentence, of the GATT 1994. For the fact that, by invoking Article XIX of the GATT 1994 or the Agreement on Safeguards, the impugned measures suspended in whole or in part at least one obligation incurred by the Dominican Republic under the GATT 1994 with respect to the products concerned is sufficient, in the circumstances of the present case, to establish the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to this dispute.

7.75 Nevertheless, the Panel will also consider whether the impugned measures also constitute a suspension of obligations of the Dominican Republic under Article II:1(b), second sentence, of the GATT 1994.

7.76 The complainants affirm that the impugned measures also suspend the application of Article II:1(b), second sentence, of the GATT 1994 in that they impose a tariff surcharge other than ordinary customs duties that is not recorded in the Dominican Republic's schedule of concessions. As mentioned above, the Dominican Republic replies that Article XIX of the GATT 1994 only authorizes the suspension of tariff concessions and obligations relating to those concessions under Article II:1 of

[144] See, for example, Preliminary Resolution, Exhibit CEGH-5, paragraph 51; and Definitive Resolution, Exhibit CEGH-9, paragraph 42.

the GATT 1994 and the prohibition on imposing quantitative restrictions under Article XI of the GATT 1994. The Dominican Republic also contends that the impugned provisional measure and definitive measure consisted in the adoption of an *ad valorem* tariff of 38 per cent which constituted an ordinary customs duty not exceeding the Dominican Republic's binding in the WTO and that it did not suspend obligations under Article II:1(b) of the GATT 1994.

7.77 Article II:1(b) of the GATT 1994 provides as follows:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from *ordinary customs duties* in excess of those set forth and provided therein. Such products shall also be exempt from all *other duties or charges of any kind* imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. (Without italics in the original.)

7.78 In other words, Article II:1(b) of the GATT 1994 in principle prohibits: (i) the levying of ordinary customs duties in excess of the ceilings set forth in the Schedule of the importing Member concerned (first sentence); and (ii) the levying of other duties or charges of any kind imposed on or in connection with importation (second sentence), in excess of those imposed on the date of entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date. The Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 provides that the importing Member had to record in its schedule of concessions the *other duties or charges* applied on the date of entry into force of the GATT 1994 or which had to be applied directly and mandatorily under legislation in force on that date.[145] Article II:2 contains a list of measures which may be imposed on the importation of any product, irrespective of the content of Article II:1(b), which include: (i) charges equivalent to internal taxes levied on like domestic products or in respect of articles from which the imported product has been manufactured; (ii) anti-dumping or countervailing duties; and (iii) fees or other charges commensurate with the cost of services rendered.

7.79 The use of the expression "*all other* duties or charges of any kind imposed on or in connection with the importation" in Article II:1(b), second sentence, suggests that the prohibition covers any duty or charge of any kind on or in connection with the importation that is not an ordinary customs duty.[146] In other words, the category of *other duties or charges* under Article II:1(b), second sentence, is a residual one covering all duties or charges on or in connection with the importation that are not ordinary customs duties[147] and which are not expressly provided for in Article II:2 of the GATT 1994.

[145] See Dominican Republic, reply to Panel question No. 182.

[146] Save for certain exceptions, such as duties or charges applied or mandatorily required to be applied on the date of the agreement. See in this connection the provisions of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

[147] Complainants, reply to Panel question No. 181; Dominican Republic, reply to Panel question No. 181.

7.80 It is therefore necessary to consider whether the impugned measures may be categorized as "ordinary customs duties" within the meaning of Article II:1 of the GATT 1994 or whether on the contrary, and as the complainants affirm, they are "other duties or charges".

7.81 The expression "ordinary customs duties" appears in the Spanish text as "*derechos de aduana propiamente dichos*" and in French as "*droits de douane proprement dits*". Applying the interpretative rule of Article 33 of the Vienna Convention, it must be presumed that the terms of the agreement have the same meaning in each authentic text (Spanish, English and French). In addition, if a comparison of the various authentic texts reveals a difference in meaning, the meaning that best reconciles the texts, bearing in mind the object and purpose of the agreement, should in principle be adopted.

7.82 In Spanish, the word "*propiamente*" used in "*propiamente dichos*" is related to the word "*propiedad*" [property], in the sense of "*atributo o cualidad esencial*" [essential attribute or quality] of something.[148] Hence, a "*derecho de aduana propiamente dicho*" would be a duty that possesses the essential attributes or qualities of customs duties. "*Proprement*" in the French expression "*proprement dits*" relates to the strict meaning in which an expression is used.[149] In other words, while a Member may impose various duties at the border, the expressions customs duty "*propiamente dicho*" and customs duty "*proprement dit*" emphasize that the scope of the provision is limited to customs duties in the strict sense of the term (*stricto sensu*).

7.83 The expression used in the text in English suggests a slightly different shade of meaning. "Ordinary" is defined as "Belonging to or occurring in regular custom or practice; normal, customary, usual". The contrary is "Extraordinary".[150] In Spanish, "*Ordinario*" is defined as "*Común, regular y que sucede habitualmente*" [Common, regular and usually occurring]. The contrary would be "*extraordinario*" [extraordinary] or "*inusual*" [unusual].[151] In French, "*Ordinaire*" is defined as "*Conforme à l'ordre normal, habituel des choses*" [in conformity with the normal, usual order of things] or "*courant, habituel, normal, usuel*" [current, customary, normal, usual]. The contrary would be "*anormal*" [abnormal], "*exceptionnel*" [exceptional] or "*extraordinaire*" [extraordinary].[152]

7.84 In its report in *Chile – Price Band System*, the Appellate Body made it clear that what determines whether "a duty imposed on an import at the border" constitutes an ordinary customs duty is not the form which that duty takes.[153] Nor is the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers.[154] The Appellate Body also explained that a Member may periodically change the rate at which it applies an "ordinary customs duty", provided it remains below the rate bound in the Member's schedule.[155] This change in the applied rate of duty could be made, for example, through an act of the Member's legislature or executive at any time. However, one essential feature of "ordinary customs duties" is that any change in them is discontinuous and unrelated to an underlying scheme or formula.[156] The

[148] *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), p. 1252.
[149] *Le Nouveau Petit Robert* (Dictionnaires Le Robert, 2000), pp. 2022-2023.
[150] *Shorter Oxford English Dictionary*, 6th Ed. (Oxford University Press, 2007), vol. 2, p. 2021.
[151] *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), pp. 695, 878 and 1105.
[152] *Le Nouveau Petit Robert* (Dictionnaires Le Robert, 2000), pp. 1732-1733.
[153] Appellate Body Report, *Chile – Price Band System*, paragraph 216.
[154] Appellate Body Report, *Chile – Price Band System*, paragraphs 271-278.
[155] Appellate Body Report, *Chile – Price Band System*, paragraph 232 (in which it quotes the Appellate Body Report, *Argentina – Textiles and Apparel*, footnote 56 to paragraph 46).
[156] Appellate Body Report, *Chile – Price Band System*, paragraphs 232-233.

Appellate Body noted that the price band system impugned in that case contained an inherent variability and had the effect of impeding the transmission of international price developments to Chile's market in the way in which *ordinary customs duties* normally would, also generating in its application a lack of transparency and predictability with respect to market access conditions.[157]

7.85 All in all, using a meaning that seeks to reconcile the texts of the GATT 1994 in the various official languages, we could conclude that the expression "ordinary customs duties" in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute "customs duties" in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs. This would be compatible with the object and purpose of the GATT 1994 which, as the Appellate Body said in *Chile – Price Band System*, seeks to ensure that the application of customs duties gives rise to transparent and predictable market access conditions and does not impede the transmission of international price developments to the domestic market of the importing country. To reach a conclusion in this respect, the Panel must consider the design and structure of the measures concerned.

7.86 In the present case, while the impugned measures are duties levied in customs, considering their design and structure they are "extraordinary" or "exceptional" and not "ordinary" measures. The Definitive Resolution whereby the Commission issued its final decision and imposed the impugned definitive measure speaks of a "*tariff* of the order of thirty-eight per cent (38%) ad-valorem" (emphasis added) applied "definitively". However, the same Resolution states that the measure shall be applied only for a period of 18 months, that the duty is subject to a six-monthly reduction process and that in practice the measure does not at all replace - but rather coexists with - the MFN tariff. In other words, the impugned measures do not constitute the ordinary tariff that is normally applicable nor do they replace that tariff by a new tariff applied under the most-favoured-nation treatment.[158] Instead, the impugned measures replace the ordinary tariff temporarily and only for imports originating in certain Members. For imports originating in other Members (Colombia, Indonesia, Mexico and Panama) the MFN tariff remains applicable.[159] Moreover, although from the formal standpoint the measure does not constitute a tariff surcharge, it is designed in such a way that, at least for a period, it has resulted *de facto* in the collection of an additional duty above the MFN tariff rate.[160]

7.87 The Dominican Republic has stated that, "as long as the increased tariff is in force, the MFN tariff normally applicable is not in force".[161] In the opinion of the Panel, this confirms that the measures are something distinct from the normally applicable tariff. As they are temporary and extraordinary measures coexisting with the MFN tariff applicable to imports from certain origins, and taking into account the fact that they are not any of the measures listed in Article II:2 of the

[157] Appellate Body Report, *Chile – Price Band System*, paragraphs 246-251.

[158] Furthermore, as the complainants point out, the impugned measures were adopted on the basis of the domestic legislation and multilateral rules on safeguards and not of some other rules, such as *Law 146-00*, which is the domestic legislation governing tariff matters in the Dominican Republic. See paragraph 7.38 of this Report.

[159] Dominican Republic, reply to Panel question No. 177.

[160] As of 16 March 2010 (date of entry into force of the provisional measure) the measures resulted in duties of between 28 per cent *ad valorem* and 38 per cent *ad valorem*, whereas the MFN tariff applicable to imports originating in Colombia, Indonesia, Mexico and Panama remained 14 per cent *ad valorem* for tubular fabric and 20 per cent *ad valorem* for polypropylene bags.

[161] Dominican Republic, opening statement at the first meeting of the Panel, paragraph 47. See also, opening statement at the second meeting of the Panel, paragraph 25.

GATT 1994, the impugned measures represent a duty or charge on imports that is distinct from the "ordinary customs duty".

7.88 Thus, in the light of the current terms used in Article II:1(b) of the GATT 1994, since the impugned measures are not "ordinary customs duties" nor any of the measures provided for in Article II:2 of the GATT 1994, by definition they must be other "duties or charges … imposed on or in connection with the importation". Furthermore, it is undisputed that the impugned measures are not recorded in the Dominican Republic's schedule of concessions and do not correspond to duties or charges that the Dominican Republic applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date.[162] Consequently, since they result in the levying of such duties or charges, the impugned measures have suspended the obligations of the Dominican Republic under Article II:1(b), second sentence, of the GATT 1994 with respect to the import duties imposed on the imported products concerned.

(d) Conclusion

7.89 For the reasons explained above, the Panel concludes that the complainants have demonstrated that the impugned measures have resulted in a suspension of obligations incurred by the Dominican Republic under the GATT 1994. That being so, and taking into account also that the impugned measures were taken by the Dominican Republic with the objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports, were the result of a procedure based, *inter alia*, on the provisions and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards and were notified by the Dominican Republic as safeguard measures to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel concludes that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination it has to make of the claims raised in the present dispute.

7.90 Considering that the impugned measures have suspended obligations of the Dominican Republic under the GATT 1994, the question as to whether a measure may be considered a safeguard and examined under Article XIX of the GATT 1994 and the Agreement on Safeguards even assuming that it did not suspend any obligation under the Agreement or withdraw or modify concessions, is a purely theoretical issue that is of no practical relevance for resolving the present dispute. The complainants raised this alternative issue solely in the event that the Panel were to consider that the impugned measures did not result in a suspension of obligations within the meaning of Article XIX:1(a) of the GATT 1994.[163] Consequently, the Panel will not take up the analysis of this point.

7.91 As a final consideration, the Panel notes that the Dominican Republic has affirmed that the interpretation put forward by the complainants could affect the "inherent and essential flexibility of the WTO system of tariff concessions", whereby Members may freely increase their tariffs to a level below the bound rate.[164] In the Panel's opinion, the findings given above do not affect the flexibility which WTO Members enjoy under the provisions of the GATT 1994 freely to change their tariffs by

[162] The Dominican Republic has confirmed that the impugned measures are not covered by anything recorded in "other duties or charges" that it applied or had to apply on the date of entry into force of the GATT 1994. Dominican Republic, reply to Panel question No. 183.

[163] Complainants, opening statement at the first meeting of the Panel, paragraphs 10-11; reply to Panel question No. 41.

[164] Dominican Republic, closing statement at the second meeting of the Panel, paragraphs 5-7.

adopting new ordinary customs duties that remain under the rate bound in their schedule of concessions. Nor does it affect the WTO Members' faculty to impose emergency measures on the importation of specific products, and as a result suspend in whole or in part obligations they have incurred under the GATT 1994 with respect to those products, including the possibility of withdrawing or modifying concessions, consistently with Article XIX of the GATT 1994 and the Agreement on Safeguards.

C. PRELIMINARY OBJECTIONS RAISED BY THE DOMINICAN REPUBLIC

1. Jurisdiction of the Panel to settle the dispute on the basis of agreements that are not covered agreements

(a) Main arguments of the parties

7.92 In its request for a preliminary ruling, the Dominican Republic asked the Panel to decline jurisdiction in the present dispute on the ground that, among other things, the complainants challenged the application by the Dominican Republic of a tariff in excess of the preferential tariff of 0 per cent *ad valorem* provided for in two free trade treaties (FTAs) signed with the complainants (the Central America-Dominican Republic FTA and the DR-CAFTA FTA).[165] According to the Dominican Republic, pursuant to Articles 3.2 and 7.2 of the DSU, the Panel is not competent to analyse the infringement of a concession granted outside the scope of the WTO (in this specific case, under two FTAs). The Dominican Republic argues that the complainants are trying to make abusive and improper use of rights provided by the DSU.[166]

7.93 For their part the complainants consider that the Dominican Republic's preliminary objection concerning the Panel's lack of jurisdiction is irrelevant and groundless. They point out that they did not request, either in the request for the establishment of the Panel or in their first written submission, that the Panel rule on the infringement of international undertakings other than those contained in the WTO agreements.[167]

7.94 In response to a Panel question, each of the parties stated that in its opinion there were no limitations under the covered agreements for a Member to impugn a measure through the WTO dispute settlement mechanism if it considered that that measure, as well as being inconsistent with commitments incurred by another Member under an FTA, was inconsistent with obligations under the covered agreements.[168] The parties also said that the provisions of the Central America-Dominican Republic FTA and the DR-CAFTA FTA were not relevant to the present dispute because they were not part of the covered agreements, and agreed that the complainants were not alleging infringement of the provisions of those agreements.[169]

---

[165] Dominican Republic, request for a preliminary ruling, paragraph 50.

[166] To support its argument the Dominican Republic cited as case-law the Appellate Body Report, *México – Taxes on Soft Drinks* and the Panel Report, *EC and Certain Member States – Large Civil Aircraft*. Dominican Republic, request for a preliminary ruling, paragraphs 51-54.

[167] Complainants, reply to the Dominican Republic's request for a preliminary ruling, paragraph 8; closing statement at the first meeting of the Panel, paragraph 3.

[168] Dominican Republic, reply to Panel question No. 78; complainants, reply to Panel question No. 78.

[169] Dominican Republic, reply to Panel question No. 80; complainants, reply to Panel question No. 80.

(b) Main arguments of the third parties

7.95 The United States, Turkey and the European Union submitted comments on this point. All three considered that there was no restriction under the WTO agreements for a member to be able to impugn a measure before the WTO dispute settlement mechanism if it considered that that measure was inconsistent with obligations of the WTO covered agreements as well as being inconsistent with commitments incurred by another member under an FTA.[170]

(c) Assessment of the Panel

7.96 As may be seen from the above arguments, the parties agree that the complainants are not putting forward claims alleging the inconsistency of the impugned measures with provisions of the above-mentioned FTAs. Both parties also agree that the provisions of the Central America-Dominican Republic FTA and the DR-CAFTA FTA are not relevant for the present dispute.

7.97 In view of the foregoing, the Panel does not see a need to make any additional comment on this point. In any case the Panel notes the Dominican Republic's request that the Panel "confine itself to making an objective assessment of the matter before it on the basis of the relevant covered agreements alone, in accordance with Article 11 of the DSU, and refrain from making findings that are not strictly necessary for resolving the present dispute in the light of the covered agreements".[171]

7.98 The Dominican Republic has requested the Panel, in the event that it concludes that Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute, to resolve other preliminary issues relating to its terms of reference before considering the merits of the complainants' claims.[172]

2. Other preliminary objections put forward by the Dominican Republic

(a) Main arguments of the parties

7.99 The preliminary issues raised by the Dominican Republic concerning the terms of reference relate to: (i) certain claims developed by the complainants in their first written submission which were allegedly not identified in the requests for the establishment of the panel; (ii) certain claims developed by the complainants in their first written submission which allegedly were not identified in the requests for consultations; and (iii) certain claims identified in the requests for the establishment of the panel which were not developed in the complainants' first written submission. The Dominican Republic considers that the Panel's terms of reference do not include consideration of the merits of these claims.[173] These issues are identified below.

7.100 First, with respect to the claim concerning unforeseen developments and GATT obligations, the Dominican Republic states that: (i) the complainants put forward this claim in their requests for consultations and the establishment of the panel but in neither of these requests did they indicate that, as a consequence of the lack of reasoned and adequate findings on the unforeseen developments and

[170] United States, reply to Panel question No. 9; Turkey, reply to Panel questions Nos. 9 and 10; European Union, reply to Panel questions Nos. 9 and10.
[171] Dominican Republic, reply to Panel question No. 187, paragraph 47.
[172] Dominican Republic, first written submission, paragraphs 44-91.
[173] Dominican Republic, first written submission, paragraphs 50, 51, 53 and 86.

GATT obligations, the findings on the increase in imports, serious injury and the causal link were also affected, as the complainants argue in their first written submission; (ii) Article 2.1 of the Agreement on Safeguards, which the complainants invoke in their first written submission, was not included in the request for the establishment of the panel; and (iii) Article 4.2(b) of the Agreement on Safeguards, identified in the request for the establishment of the panel, was not included in the request for consultations. Accordingly, the Dominican Republic considers that these issues are not covered by the Panel's terms of reference.[174]

7.101 Second, with respect to the claim concerning the causal link, the Dominican Republic states that the complainants do not identify Article 4.1 of the Agreement on Safeguards in the requests for consultations, although they mention it as a basis for their claim in their requests for the establishment of the panel and their first written submission. The Dominican Republic therefore considers that Article 4.1 of the Agreement on Safeguards is not part of the Panel's terms of reference in the context of the claim concerning the causal link.[175]

7.102 Third, the Dominican Republic contends that in their requests for consultations the complainants did not identify the claim that the Dominican Republic had not afforded an opportunity for an adequate means of trade compensation in accordance with Article 8.1 of the Agreement on Safeguards. The Dominican Republic therefore considers that Article 8.1 of the Agreement on Safeguards is not part of the Panel's terms of reference.[176]

7.103 Fourth, the Dominican Republic states that specific claims identified in the requests for consultations and in the requests for the establishment of the panel were not developed in the complainants' first written submission. The Dominican Republic therefore considers that the complainants have withdrawn them. Those claims are: (i) the alleged failure of the Commission to provide a reasoned and adequate explanation as to why it classified specific information as confidential and why it did not ask for non-confidential summaries of that information, inconsistently with the obligations in Articles 3.1 and 3.2 of the Agreement on Safeguards; (ii) the alleged failure of the Commission to provide reasoned and adequate findings on the necessity of the measures to facilitate the adjustment of the domestic industry, inconsistently with the obligations in Article 3.1, 4.2(c) and 5.1 of the Agreement on Safeguards; (iii) the alleged inconsistency of the impugned measures with Article I:1 of the GATT 1994; and (iv) the alleged inconsistency of the impugned measures with Articles II:1(a) and II:1(b), second sentence, of the GATT 1994. The Dominican Republic also states that the last three claims are also outside the Panel's terms of reference as they were not identified in the requests for consultations.[177]

7.104 The Dominican Republic contends that the impairment of the right of defence would only be relevant when considering the possible shortcomings of a request for the establishment of a panel in the light of Article 6.2 of the DSU, but not with respect to the lack of consultations. Nevertheless, the Dominican Republic argues that its right of defence was adversely affected. With regard to the claims which were included in the request for the establishment of the panel but which were not identified in the request for the holding of consultations, the Dominican Republic points out that the modification of the essence of the claims is a relevant criterion as regards not only the inclusion of new measures

[174] Dominican Republic, first written submission, paragraphs 60-62 and 65-69.
[175] Dominican Republic, first written submission, paragraph 73.
[176] Dominican Republic, first written submission, paragraphs 74-85.
[177] Dominican Republic, first written submission, paragraphs 86-90.

but also the inclusion of new legal grounds, and asserts that, in the present case, the inclusion of new claims modified the essence of the complainants' claims.[178]

7.105 The complainants reject the preliminary objections put forward by the Dominican Republic.

7.106 On the aspects of the claim concerning unforeseen developments and GATT obligations, which were allegedly not identified in the requests for the establishment of the panel, the complainants argue that both the implications that would stem from non-compliance with the requirement to demonstrate unforeseen developments as well as the relevance of Article 2.1 of the Agreement on Safeguards may be deduced from the requests for the establishment of the panel, and in particular from subparagraphs (e) and (f) of those requests, even though they were not raised independently.[179]

7.107 With regard to the issues that were allegedly not identified in the requests for consultations but were identified in the requests for the establishment of the panel, the complainants state that this inclusion did not alter the essence of the claims identified in the request for consultations. They also state that, in accordance with earlier decisions taken by panels and the Appellate Body on this subject, there does not need to be a precise and exact identity between the legal grounds for a request for consultations and those for a request for the establishment of a panel, provided the latter may reasonably be derived from the former. In addition, they state that the Dominican Republic has not shown that its right of defence has been affected.[180]

7.108 On the alleged withdrawal of certain claims that were not developed in their first written submission, the complainants state that the Dominican Republic's argument is inappropriate because, in accordance with earlier decisions taken by panels and the Appellate Body on this subject, there is no obligation to develop all the claims in the first written submission to the Panel, and the complaining party has the possibility to develop its arguments in its second written submission. They also point out that the claims to which the Dominican Republic objects are contained in the requests for the establishment of the panel, and therefore form part of the Panel's terms of reference. They observe that they have withdrawn their claim concerning the consideration of certain information as confidential without non-confidential summaries having been requested, inconsistently with Articles 3.1 and 3.2 of the Agreement on Safeguards. With the exception of this last claim, they state that they have not withdrawn the other three claims, which they have developed in the course of the proceedings.[181]

[178] Dominican Republic, reply to Panel questions Nos. 84, 88, 89 and 92; opening statement at the first meeting of the Panel, paragraphs 2-15.

[179] Complainants, reply to Panel question No. 82.

[180] Complainants, reply to Panel questions Nos. 82, 85 and 86 (in which they cite the Panel Reports, *Brazil – Aircraft*, paragraph 7.10; *EC – Fasteners (China)*, paragraph 7.24; and *US – Poultry (China)*, paragraph 7.46; and Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paragraph 138; and *US – Upland Cotton*, paragraph 293). See also, complainants, opening statement at the first meeting of the Panel, paragraph 34; second written submission, paragraphs 49 and 50.

[181] Complainants, reply to Panel questions Nos. 82, 85 and 86 (in which they refer to decisions of the Appellate Body in *EC – Bananas III* and the Panel in *China – Publications and Audiovisual Products*). In particular, with regard to the claim concerning the necessity of the measure within the meaning of Articles 5.1, 3.1, last sentence, and 4.2 of the Agreement on Safeguards, the complainants state that, having made a prima facie case that the preliminary and final determinations are inconsistent with the non-attribution requirement in Article 4.2(b), second sentence, of the Agreement on Safeguards, they have also established

(b) Main arguments of the third parties

7.109 None of the third parties made comments on these preliminary objections put forward by the Dominican Republic.

(c) Assessment of the Panel

7.110 With regard to the complainants' claim that the impugned measures are inconsistent with Articles I:1, II:1(a) and II:1(b), second sentence, of the GATT 1994, the Panel observes that this claim was put forward alternatively, only in the event that the Panel were to conclude that the impugned measures are not subject to Article XIX of the GATT 1994 and the Agreement on Safeguards.[182] Since the Panel has concluded that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination of the impugned measures, there is no need to analyse this alternative claim of the complainants and therefore it is not necessary for the Panel to rule on the preliminary issue raised by the Dominican Republic with regard to this claim.

7.111 The Panel will analyse the other preliminary issues raised by the Dominican Republic, insofar as they are relevant, in the corresponding sections of its report.[183]

D. WHETHER THE PROVISIONAL MEASURE AND THE DEFINITIVE MEASURE ARE INCONSISTENT WITH ARTICLE XIX OF THE GATT 1994 AND WITH VARIOUS PROVISIONS OF THE AGREEMENT ON SAFEGUARDS

7.112 The Panel having concluded that Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute, it will now consider the various claims made by the complainants under these provisions with respect to the provisional and definitive measures.

1. Whether the competent authority acted inconsistently with obligations under the covered agreements as regards the determination of unforeseen developments and the effect of GATT obligations

(a) Main arguments of the parties

(i) Complainants

7.113 The complainants claim that, with respect to the provisional and definitive measures, the competent authority failed to evaluate the unforeseen developments and the effect of the GATT 1994 obligations said to have occasioned the alleged increase in imports causing serious injury and that the Dominican Republic therefore violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, last sentence, 4.2(c), and 11.1(a) of the Agreement on Safeguards. Consequently, the complainants assert that the determinations relating to increased imports, serious injury and causality, as well as the imposition of the provisional and definitive measures, are inconsistent with Article XIX:1(a) of the

---

prima facie that the measures are not necessary to prevent or remedy serious injury and adjustment and are therefore also inconsistent with Article 5.1. Complainants, reply to Panel questions Nos. 82, 85 and 86.

[182] Complainants, second written submission, paragraphs 254-255; opening statement at the first meeting of the Panel, paragraphs 6 and 39.

[183] See paragraphs 7.151, 7.328 and 7.441 of the present Report.

GATT 1994 and Articles 2.1, 4.2 and 11.1(a) of the Agreement on Safeguards, and with Article 6 of the Agreement on Safeguards with respect to the provisional measure.[184]

7.114 The complainants note that the question of the obligation to demonstrate the existence of unforeseen developments is one that has already been decided by the Appellate Body, so that there can be "no talk" of the Dominican Republic's intention to reopen the debate in this respect.[185] They maintain that the Dominican Republic failed to fulfil this obligation. In particular, they assert that China's accession to the WTO and its implications for trade cannot constitute an unforeseen or unexpected development for the Dominican Republic, since at the time when the WTO Agreement entered into force for the Dominican Republic (9 March 1995) the negotiations relating to China's accession were already under way, having begun in 1987. In addition, they point out that there are no findings in the reports of the competent authority to show that this event would have been unforeseen for the Dominican Republic, only that it was unforeseen for the domestic industry. The complainants add that, even assuming that China's accession was an unforeseen development for the Dominican Republic and that the latter made a reasoned and adequate finding in this respect, the Dominican Republic failed to establish a logical connection between China's accession and the alleged increase in imports.[186]

7.115 With respect to the tariff reductions resulting from the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs, the complainants consider that the Dominican Republic's decision to sign the first of these agreements in 1998 and the second in 2004 could not have been an unforeseen development for the Dominican Republic at the time that it entered into obligations under the WTO in 1995. In particular, they point out that in acceding to the WTO in 1995, the Dominican Republic assumed the rights and obligations embodied in the WTO Agreement, including those in Article XXIV of the GATT 1994, and hence the possibility of signing free trade agreements in conformity with that article could not have been an unforeseen development for the Dominican Republic. They also assert that, inasmuch as the purpose of free trade areas is to achieve liberalization more extensive than that available within the framework of the WTO, it is unacceptable for tariff reductions under such agreements to be regarded as unforeseen developments. According to

[184] Complainants, first written submission, paragraphs 195-196 and 235-236; second written submission, paragraph 169.

[185] The complainants also note the statement by the Appellate Body that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" and point out in this connection that the Dominican Republic has failed to give any cogent reason for departing from the Appellate Body's view. Complainants, opening statement at the first meeting of the Panel, paragraphs 48-52 (where the Appellate Body Reports *Argentina – Footwear (EC)*, paragraph 83, and *US – Stainless Steel (Mexico)*, paragraph 160, are cited).

[186] Complainants, first written submission, paragraphs 206 and 223; second written submission, paragraphs 176-181; opening statement at the second meeting of the Panel, paragraph 42. In this connection, the complainants point out that the Dominican Republic made *ex post* reference to an annex to the Final Technical Report which only contained the value of imports of diverse origins, so that it could not serve as proof that China's admission to the WTO resulted in an increase in imports. Likewise, they claim that if the said annex were to prove such a connection, it could also be (groundlessly) asserted that the increase in imports from the other countries identified therein showed that their membership of the WTO formed part of unforeseen developments that gave rise to the increase in imports. Complainants, second written submission, paragraph 181.

the complainants, these tariff reductions were not only predictable but the very purpose of the trade agreements freely signed by all the parties, including the Dominican Republic.[187]

7.116 At the same time, the complainants add that there are no findings or conclusions based on these alleged unforeseen developments, while the Initial Technical Report and the Preliminary Technical Report do no more than describe the arguments put forward by the company FERSAN in this respect. They also point out that the statement in the final public notice (to the effect that the tariff reductions of the regional agreements in question "could partially explain the unforeseen developments") is an *ex post* explanation, as the notice in question was published one day after the adoption of the Definitive Resolution, and does not explain which developments the Commission had in mind, while the expression employed (*could explain*) is not the same as a demonstration of a *logical connection* between the tariff reductions and the alleged increase in imports. In fact, according to the complainants, the statements of the Dominican Republic indicate that it was its regional commitments, "and not the effect of the GATT obligations", that gave rise to the Dominican Republic's concerns about increased imports.[188]

7.117 Finally, the complainants claim that the Commission did not provide a reasoned and adequate explanation of how the effect of the GATT obligations impacted on the alleged increase in imports that caused serious injury to the domestic industry. In this respect, they point out that there are no findings in which the relevant obligations assumed by the Dominican Republic under the GATT are identified and where it is explained how these obligations could have resulted in the alleged increase in imports. According to the complainants, the references made *ex post* by the Dominican Republic do not identify any explicit finding to the effect that the alleged increase in imports was the result of obligations incurred by the Dominican Republic under the GATT.[189]

(ii) Dominican Republic

7.118 The Dominican Republic maintains that the "unforeseen developments" clause in Article XIX of the GATT 1994 does not constitute a binding obligation and, consequently, does not have to be demonstrated in order for a safeguard measure to be invoked.[190]

7.119 The Dominican Republic notes that the Agreement on Safeguards makes no reference to unforeseen developments, and so in this respect waives Article XIX of the GATT 1994.[191] It also

[187] Complainants, second written submission, paragraphs 186-188; opening statement at the second meeting of the Panel, paragraph 43. The complainants add that it would be wrong if these voluntary acts, subsequent to an international commitment, could later be claimed to be "unforeseen developments", since that interpretation would mean that merely by signing a trade agreement any Member would automatically fulfil the unforeseen developments requirement and thus be entitled to impose safeguard measures for any increase in imports. Complainants, second written submission, paragraph 188.

[188] Complainants, first written submission, paragraphs 207-208, 222 and 224-225; second written submission, paragraphs 189-190. The complainants also note that the tariff reduction in question applies only to imports from Central America and the United States and does not explain the increase in imports from other sources.

[189] Complainants, first written submission, paragraphs 227 and 233-234; second written submission, paragraphs 191-193; opening statement at the second meeting of the Panel, paragraph 45.

[190] Dominican Republic, first written submission, paragraphs 282-283.

[191] In particular, the Dominican Republic indicates that the words "applied in accordance with this Agreement" in Article 11.1(a) mean that the more specific and subsequent provisions of the Agreement on Safeguards are those that govern the application of safeguard measures and take precedence over contrary

claims that the negotiating history reveals that the intention of the Uruguay Round negotiators was not to maintain "unforeseen developments" as a legally binding requirement. In this connection, it argues that the fact that the negotiators dropped the clause relating to unforeseen developments contained in a 1989 draft of the Agreement on Safeguards, which had made the demonstration of an "unforeseen, pronounced and substantial increase in the amount of the product imported" a condition of the imposition of a safeguard measure, shows that the negotiators did not have the intention of including this factor in the Agreement on Safeguards as an independent and binding requirement.[192] In addition, it notes that other panels have concluded that the omission of "unforeseen developments" from the Agreement on Safeguards was intentional and have expressed their disagreement with the Appellate Body's view that "unforeseen developments" are a requirement for the application of a safeguard measure.[193]

7.120 The Dominican Republic adds that its interpretation finds support in the national legislation of other Members and points out in this respect that the relevant legislation of the United States and the European Union does not require the demonstration of "unforeseen developments" for the application of a safeguard measure. It also claims that previous decisions of panels and the Appellate Body regarding "unforeseen developments" are ambiguous and lack guidelines, so that no Member is in a position to know with certainty what to demonstrate and how to demonstrate it in the light of the rules in force.[194]

7.121 Finally, the Dominican Republic maintains that the text of the Agreement on Safeguards contains terminology that suggests that it was negotiated as "an exhaustive set of rules for the application of safeguard measures", and given that the Agreement makes no reference to the "unforeseen developments" clause, that clause is not relevant within the context of the Agreement. In particular, it points out that Article 1 of the Agreement on Safeguards "establishes rules for the application of safeguard measures"; Article 11.1(a) narrows the scope to "action [that] conforms with the provisions of that Article [Article XIX of the GATT 1994] applied in accordance with this Agreement"; the preamble refers to "a comprehensive agreement"; the applicability of Article 8.3 only requires that the safeguard measure should conform to the provisions of the Agreement on Safeguards and makes no reference to GATT Article XIX; and Article 2.1, which lays down the conditions for the application of a safeguard measure, exactly repeats the wording of Article XIX of the GATT 1994 but omits the clause relating to unforeseen developments.[195]

---

provisions of Article XIX of the GATT 1994. Dominican Republic, first written submission, paragraphs 260-262.

[192] Dominican Republic, first written submission, paragraphs 265-266. The Dominican Republic also claims that the fact that Article 8.3 of the Agreement on Safeguards does not refer to other provisions of the covered agreements or to Article XIX of the GATT implies that if "unforeseen developments" were regarded as a requirement for the application of a safeguard measure, the right to suspend measures would be prohibited even if they were in violation of the covered agreements. The Dominican Republic argues that this confusion cannot be ascribed to the intentions of the negotiators. *Ibid*., paragraph 268.

[193] Dominican Republic, first written submission, paragraphs 269-270 (where the panel reports in *Korea – Dairy*, paragraph 7.42, *Argentina – Footwear (EC)*, paragraph 8.66, and *Argentina – Preserved Peaches*, paragraph 7.24, are cited).

[194] Dominican Republic, first written submission, paragraphs 271 and 275-276. For example, the Dominican Republic suggests that the reports of various panels and of the Appellate Body subsequent to the latter's reports in *Korea – Dairy* and *Argentina – Footwear (EC)* do not offer clear guidance as to how the existence of "unforeseen developments" can adequately be demonstrated. *Ibid*., paragraph 275.

[195] Dominican Republic, first written submission, paragraphs 277-280.

7.122 Nevertheless, in the event that the Panel were to decide that the demonstration of unforeseen developments constitutes a binding obligation, the Dominican Republic claims that it fulfilled that obligation and that it therefore did not act inconsistently with Article XIX:1(a) of the GATT 1994 nor with Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards. In particular, it points out that both the Preliminary Technical Report and the Final Technical Report offer a reasoned and adequate explanation with regard to unforeseen developments. Likewise, the Dominican Republic notes that, as is clear from its schedule of bound tariffs, it has granted a tariff concession of 40 per cent on the products corresponding to tariff lines 5407.20.20 and 6305.33.90 and that it has therefore demonstrated, as a matter of fact, that it has incurred obligations under the GATT with respect to tubular fabric and polypropylene bags.[196]

(b) Main arguments of third parties

(i) Colombia

7.123 Colombia agrees with the Dominican Republic that the standard of application of the concept of "unforeseeability" is not clear and, in fact, makes safeguard measures difficult to use. It also considers that, in view of the lack of clarity with respect to the unforeseen developments rule, the Panel's examination cannot be *de novo* or involve a judgment that goes beyond the elements reasonably available to the Member at the time the disputed measure was applied, since otherwise essential legal principles of due process and substantive justice could potentially be infringed.[197]

(ii) Panama

7.124 Panama considers that the unforeseen developments referred to in Article XIX of the GATT must be demonstrated as a matter of fact for it to be possible to apply a safeguard measure. In the present case, Panama is of the opinion that the Dominican Republic failed to fulfil this obligation, as well as to demonstrate the existence of a logical connection between unforeseen developments and the conditions laid down in Article XIX of the GATT 1994.[198]

(iii) European Union

7.125 The European Union considers that there is no basis for the position taken by the Dominican Republic with regard to the non-applicability of the "unforeseen developments" clause. It points out in this respect that the Appellate Body has determined that the first part of Article XIX:1(a) of the GATT 1994 "describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied", and notes that the Dominican Republic has failed to offer any "convincing reason" why the Panel should depart from the Appellate Body's interpretation. The European Union is also of the opinion that the increase in imports due to certain FTAs cannot be regarded as an "unforeseen development", since that increase was not the "effect" of the obligations incurred by the Dominican Republic under the GATT, as required by Article XIX:1(a), but rather the "effect" of obligations incurred by the Dominican Republic under the FTA agreements in question.

[196] Dominican Republic, first written submission, paragraphs 284-292. See also, *ibid*., paragraph 299 (where the Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 91, is cited).

[197] Colombia, third party written submission, paragraphs 47-50; third party statement, paragraphs 20-24; reply to Panel question No. 17.

[198] Panama, third party written submission, paragraphs 23-24.

The European Union therefore considers that this development could not provide a basis for the imposition of safeguard measures.[199]

(c) Assessment of the Panel

7.126 The argument put forward by the complainants raises two questions. Firstly, whether the findings relating to unforeseen developments were reasoned and adequate and how did this situation cause the alleged increase in imports. Secondly, whether the findings concerning the relevant obligations incurred by the Dominican Republic under the GATT 1994 were reasoned and adequate and how did these obligations result in the alleged increase in imports.

(i) Unforeseen developments

7.127 Article XIX:1(a) of the GATT 1994 reads as follows:

> 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, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

7.128 The Appellate Body has made it clear that Article XIX of the GATT 1994 and the Agreement on Safeguards must be applied cumulatively, because the "unforeseen developments" condition is one whose existence must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with Article XIX.[200] Unforeseen developments must be demonstrated before the safeguard measure is applied and the demonstration must feature in the published report of the competent authority. This public report must examine the reason why the factors mentioned therein may be regarded as "an unforeseen development" and offer an explanation for it.[201] The public report must also provide an explanation of how the "unforeseen developments" resulted in the increase in imports causing the serious injury in question.[202]

7.129 The dispute settlement system of the WTO does not establish a system of precedents, and therefore the reasoning of the Appellate Body in a particular case is not binding on panels set up to examine other cases. However, the reports adopted by the Dispute Settlement Body create legitimate expectations among the Members of the WTO.[203] As the Appellate Body has pointed out, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be

---

[199] European Union, third party written submission, paragraphs 26-35; third party statement, paragraph 9.

[200] Appellate Body Report, *Korea – Dairy*, paragraph 85. This finding was subsequently confirmed by panels and the Appellate Body. See Appellate Body Reports, *Argentina – Footwear (EC)*; and *US – Lamb*; and Panel Reports, *US – Line Pipe*; *Chile – Price Band System*; *US – Lamb*; *US – Steel Safeguards*; and *Argentina – Preserved Peaches*. See also paragraph 7.66 of the present Report.

[201] Appellate Body Report, *US – Lamb*, paragraphs 72-73. See also, paragraph 7.10 of the present Report.

[202] Appellate Body Report, *US – Steel Safeguards*, paragraphs 316-323.

[203] See, for example, Appellate Body Report, *Japan – Alcoholic Beverages II*, page 18.

expected from panels, especially where the issues are the same".[204] In the present dispute, the Dominican Republic does not offer any convincing arguments why the Panel should depart from the interpretation adopted by the Appellate Body.

7.130 The Dominican Republic identifies two "unforeseen developments": (i) the entry of China into the WTO and the effect that this had on international trade; and (ii) the process of tariff reduction accompanying the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs.[205] Both parties agree that the time at which these developments had to be unforeseen is that at which the relevant tariff concessions were granted, that is, the time at which the Dominican Republic acceded to the WTO, i.e. 9 March 1995.[206]

7.131 The Panel notes that neither the Commission's Definitive Resolution nor its Preliminary Resolution make reference to or offer any finding or explanation concerning the unforeseen developments. Paragraph 27 of the Definitive Resolution merely transcribes the text of Article XIX:1(a) of the GATT 1994.[207] The Dominican Republic asserts that the findings and conclusions with respect to the events that allegedly constituted unforeseen developments are contained in the Preliminary Technical Report and the Final Technical Report of the DEI, which form part of the Preliminary Resolution and the Definitive Resolution, respectively.[208] However, these DEI technical reports do not in fact contain the findings and reasoned conclusions to which the Dominican Republic refers.

7.132 The relevant portion of the DEI's Final Technical Report reads as follows:

> The DEI believes that China's incursion into the multilateral trading system and the effect that had on international trade were undoubtedly something that could not have been foreseen by the domestic industry when the Dominican Republic signed up to the measures set out in Article XIX of the GATT 1994.[209]

7.133 This passage simply indicates that China's entry into the WTO and the effect that had on international trade were events that "could not have been foreseen by the domestic industry", but does not show that they were developments unforeseen by the Dominican Republic.[210] Moreover, the

---

[204] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paragraph 188. See also Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 160.

[205] Dominican Republic, reply to Panel question No. 197. Although initially the Dominican Republic appeared to assert that the financial and economic crisis of 2008 and the increase in the costs of production were also factors that constituted "unforeseen developments", it later made clear that only the entry of China into the WTO and its effect on international trade, together with the process of tariff reduction that accompanied the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs, constituted "unforeseen developments".

[206] Dominican Republic, reply to Panel question No. 113; complainants, second written submission, paragraph 176.

[207] Definitive Resolution, Exhibit CEGH-9, paragraph 27.

[208] Dominican Republic, first written submission, paragraph 291.

[209] Final Technical Report, Exhibit CEGH-10, page 66. We believe that in referring to "China's incursion into the multilateral trading system", the competent authority meant "China's entry into the WTO". See: Dominican Republic, reply to Panel question No. 197.

[210] The Dominican Republic maintains that its negotiators represent the domestic industry in market access negotiations, so that the two may be regarded as *equivalent* where the foreseeing of particular developments is concerned. Dominican Republic, first written submission, paragraph 293. However, Article XIX:1(a) of the GATT 1994 makes it clear that the question to be answered is whether the development was *unforeseen* or *unexpected* for the *importing Member*. In this respect, the Appellate Body has pointed out

Technical Report does not analyse or explain why, at the time that the Dominican Republic acceded to the WTO in 1995, it could not have foreseen the entry of China into the WTO and its effect on international trade. Thus, this statement does not deal with the question of why China's entry into the WTO and its effect on international trade could not have been foreseen by the Dominican Republic at the time it acceded to the WTO in 1995.

7.134 Furthermore, nowhere in the resolutions or in the reports of the competent authority is it explained how the increase in imports of polypropylene bags and tubular fabric was the result of the entry of China into the WTO and of the effect that had on international trade. In reply to a question on this point, the Dominican Republic makes reference to Part V of the public version of the Initial Technical Report and to Statistical Annex II to the public version of the Final Technical Report.[211] The relevant passage of Part V of the Initial Technical Report states that "as indicated by FERSAN in the application for a safeguard investigation … the increase in imports is determined [*inter alia* by] China's entry into the WTO".[212] This passage is restricted to a description of arguments submitted by the company applying for the investigation and fails to show that the competent authority had analysed or explained that the increase in imports was a consequence of the unforeseen developments in question. Likewise, Statistical Annex II to the Final Technical Report contains the "Value of imports of tubular fabric and polypropylene bags" from 14 different sources, including China, for the period 2006-2009[213], but does not explain how these imports were a consequence of China's entry into the WTO and the effect that had on international trade.

7.135 With regard to the tariff reduction process commencing with the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs, the resolutions of the Commission do not contain any findings in this respect; however, the Dominican Republic cites certain passages in the Preliminary Technical Report, in the Final Technical Report and in the final public notice.[214]

7.136 The relevant part of the Final Technical Report states:

> In the opinion of the DEI, the arguments put forward by FERSAN in the preliminary stage, particularly in connection with the process of tariff reduction that followed the entry into force of the DR-CAFTA and the Agreements with Central America, [….].[215]

7.137 This passage describes the arguments put forward by the company FERSAN and does not demonstrate the existence of unforeseen developments within the meaning of GATT Article XIX:1(a).

---

that the text of Article XIX:1(a) of the GATT 1994 establishes that an importing Member has the right to impose a safeguard measure "in situations when, as a result of obligations incurred under the GATT 1994, [*that*] *importing Member* finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation.". Appellate Body Report, *Korea – Dairy*, paragraph 86 (italics added).

[211] Dominican Republic, reply to question No. 114 from the Panel.

[212] Initial Technical Report, Exhibit CEGH-3, pages 20-21 (footnote omitted).

[213] Final Technical Report, Exhibit CEGH-10, page 104.

[214] Dominican Republic, first written submission, paragraph 291; reply to question No. 114 from the Panel. See also: Dominican Republic, first written submission, paragraphs 294-295.

[215] Final Technical Report, Exhibit CEGH-10, page 64 (original underlining and brackets).

7.138 As for the Preliminary Technical Report, the relevant part reads as follows:

> IV. ANALYSIS OF IMPORTS AND UNFORESEEN DEVELOPMENTS IN TERMS OF ARTICLE XIX OF THE GATT 1994
>
> …
>
> According to **FERSAN**, the unusual increase in imports was a consequence of obligations assumed in the Free Trade Agreement with Central America whose tariff reduction period had been completely used up by 2004, reducing to zero the tariff of the countries parties to the Agreement.
>
> …
>
> **FERSAN** maintains that the unforeseen development was caused [*inter alia*] by … the reduction to zero of the tariff on imports covered by the Central America-Dominican Republic bilateral FTA …
>
> …
>
> In the opinion […], FERSAN's arguments, particularly those relating to the tariff reduction process that followed the entry into force of the DR-CAFTA and the Agreements with Central America, could partially explain the unforeseen developments, insofar as the products under investigation fell from tariff rates of 20 per cent and 14 per cent, respectively, to a zero (0) tariff rate as a result of being in Basket A, which carries the obligation to reduce the tariff immediately.[216]

7.139 The first two fragments of the citation describe the arguments put forward by FERSAN and do not constitute a demonstration of the existence of unforeseen developments within the meaning of Article XIX of the GATT 1994. Likewise, as the complainants point out[217], the use of square brackets in the last paragraph of the passage makes it impossible clearly to discern whether the statement corresponds to a finding of the competent authority or reflects an argument made by one of the interested parties.[218] In other words, the description of the arguments put forward by FERSAN in the Preliminary Technical Report is not accompanied by any finding or reasoned conclusion on the part of the competent authority.

7.140 Thus, in their public version, the technical reports cited by the Dominican Republic do not make it possible to establish the findings and conclusions of the competent authority concerning the tariff reduction process that followed the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs as an "unforeseen development". The Dominican Republic has referred in this respect to the confidential version of the Final Technical Report[219], which is said to contain the finding of the competent authority with respect to this event as an unforeseen development.

---

[216] Preliminary Technical Report, Exhibit CEGH-7, pages 59, 65, 70 and 74 (original emphasis and brackets, footnotes omitted).

[217] Complainants, first written submission, paragraph 210.

[218] However, the complainants have not made any claim with respect to the treatment of confidential information.

[219] Dominican Republic, first written submission, paragraph 292.

7.141 Article 3.1 of the Agreement on Safeguards states that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". Moreover, according to Article 4.2(c), the competent authorities shall publish "promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined". The Appellate Body has indicated that "unforeseen developments" is one of the pertinent issues of fact that must be demonstrated for a safeguard measure to be validly applied.[220] In view of these provisions, it is in the published report of the competent authority that this Panel must examine whether the Dominican Republic provided findings and reasoned conclusions concerning the existence of unforeseen developments in accordance with Article XIX:1(a) of the GATT 1994.

7.142 Moreover, Article XIX:1(a) of the GATT 1994 allows a safeguard measure to be applied only if, *as a result of obligations incurred under the GATT 1994*, an importing Member is confronted with an unforeseen development that it did not foresee or expect when it incurred these obligations. In the present case, the argument put forward by FERSAN attributing the alleged increase in imports to obligations that the Dominican Republic incurred within the context of regional agreements fails to explain how these obligations were related with obligations incurred by the Dominican Republic under the GATT 1994.

7.143 The Dominican Republic has also cited fragments of the final public notice.[221] In this respect, the complainants argue that the statements contained in the final public notice are *ex post* explanations.[222] In the final public notice, the Commission states that "the tax reduction process that followed the entry into force of the DR-CAFTA and the Agreements with Central America could partially explain the unforeseen developments".[223] Therefore, even if the statements contained in the final public notice were taken into account, they do not equate, in the Panel's opinion, to a finding or reasoned conclusion on the part of the competent authority that the tariff reduction process following the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs was regarded as an unforeseen development. Moreover, like the arguments of the company FERSAN cited in the technical reports, the statement contained in the final public notice attributes the alleged increase in imports to obligations that the Dominican Republic incurred under regional agreements and does not explain how these obligations were related with obligations incurred by the Dominican Republic under the GATT 1994.[224]

7.144 To sum up, neither the resolutions nor the technical reports on which they are based nor the final public notice to which the Dominican Republic has referred contain a reasoned and adequate explanation by the competent authority of how the entry of China into the WTO and the effect that had on international trade or the process of tariff reduction that followed the entry into force of the

[220] Appellate Body Report, *Korea – Dairy*, paragraph 85.

[221] Dominican Republic, reply to Panel question No. 114. See also, complainants, first written submission, paragraph 225.

[222] Complainants, first written submission, paragraph 225.

[223] Notice, General Safeguard Investigation of Tubular Fabric and Polypropylene Bags (6 October 2010), Exhibit CEGH-11.

[224] The Panel also notes that the final public notice cited by the Dominican Republic itself states that its purpose is to make public certain information contained in the Definitive Resolution. Notice, General Safeguard Investigation of Tubular Fabric and Polypropylene Bags (6 October 2010), Exhibit CEGH-11. In other words, there is no reason to believe that the final public notice could contain findings or reasoned conclusions different from or additional to those contained in the Definitive Resolution. See also, Dominican Republic, replies to Panel questions Nos. 29 and 34; *Law 1-02*, Exhibit RDO-11, Article 36; *Regulations implementing Law 1-02*, Exhibit RDO-26, Article 271.

DR-CAFTA and Central America-Dominican Republic FTAs constituted an unforeseen development within the meaning of Article XIX:1(a) of the GATT 1994.[225]

(ii) "Effect of the obligations incurred under the GATT 1994"

7.145 With respect to "the obligations incurred under the GATT", in *Argentina – Footwear (EC)* the Appellate Body explained the meaning of the expression "as a result of … the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" as follows:

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …", we believe that *this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.[226]

7.146 From the above, in the opinion of the Panel, it is clear that as a matter of fact the importing Member must have incurred obligations under the GATT 1994, for example, tariff concessions, with respect to the product in question. It then falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry. These findings and conclusions must be reflected in the report of the competent authority.

7.147 All the parties agree that, under its bound tariff schedule, the Dominican Republic granted a tariff concession of 40 per cent *ad valorem* on the products of tariff lines 5407.20.20 and 6305.33.90. There is therefore no doubt that, as a matter of fact, the Dominican Republic incurred obligations under the GATT 1994 with respect to tubular fabric and polypropylene bags. In any event, the Panel must consider whether the Dominican Republic, in its report, identified these obligations, or other obligations incurred under the GATT 1994, as obligations linked with the increase in imports said to have caused serious injury to its domestic industry.

7.148 The Definitive Resolution of the Commission does not make reference to this point. The relevant passage in the Preliminary Technical Report, to which the Dominican Republic refers, indicates only that the DEI established the following:

> Nevertheless, [……] in relation to the fact that the Dominican Republic is not making efficient use of the MFN rate for tariff lines 6505.33.10 and 6305.33.90 to which a 20 per cent rate is being applied, while that for subheading 5407.20.20 is 14 per cent, with a WTO bound rate of 40 per cent, on the basis of which they conclude that this

[225] In view of this finding, the Panel does not consider it necessary to address the argument of the complainants that the process of tariff reduction beginning with the entry into force of the DR-CAFTA and Central America-Dominican Republic FTAs could not have been a development unforeseen by the Dominican Republic.

[226] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 91 (original brackets, italics added). See also, Appellate Body, *Korea – Dairy*, paragraph 84.

> was a unilateral decision by the Dominican Republic, not to make use of the WTO bound rate as it was legitimately entitled to do.[227]

7.149 It is not clear from this passage that the competent authority considered the tariff concession with respect to the products in question to be the obligation of the Dominican Republic under the GATT 1994 that caused the alleged increase in the imports in question. This passage does not contain any finding in this respect.[228] Consequently, and in the absence of any indication in the resolutions of the Commission, or in any other relevant document, it is not possible to conclude that the report of the competent authority contains a reasoned and adequate explanation of how the Dominican Republic incurred obligations under the GATT with respect to tubular fabric and polypropylene bags, within the meaning of Article XIX:1(a) of the GATT 1994. In the light of this finding, the Panel does not consider it appropriate to address the additional argument of the complainants that neither did the Commission determine whether the alleged increase in imports was a consequence of the relevant obligations under the GATT 1994.

(iii) Conclusion

7.150 For the reasons set forth above, the Panel concludes that the complainants have made the case that the Commission's published report does not contain any explanation with respect to the existence of unforeseen developments and the effect of the GATT 1994 obligations, as required by GATT Article XIX:1(a). In not providing such an explanation, the competent authority has failed to comply both with the obligation contained in Article 3.1, last sentence, of the Agreement on Safeguards - in the sense of setting forth in its published report its findings and reasoned conclusions reached on all pertinent issues of fact and law - and with the obligation contained in Article 4.2(c) of the Agreement on Safeguards, in the sense of accompanying its published report with a demonstration of the relevance of the factors examined. Moreover, in imposing a safeguard measure without having provided any explanation with respect to the existence of unforeseen developments and the effect of the GATT 1994 obligations, in a manner inconsistent with GATT Article XIX:1(a), the competent authority also failed to comply with the obligation contained in Article 11.1(a) of the Agreement on Safeguards. Consequently, with respect to the provisional and definitive measures, the Dominican Republic acted inconsistently with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the Agreement on Safeguards.

7.151 In connection with this claim, the complainants also made certain consequential claims, with respect to which no specific arguments were set forth; consequently, even on the assumption that all these claims were properly brought before it[229], the Panel will refrain from making findings in this respect.[230]

7.152 It having been concluded that the Dominican Republic acted in a manner inconsistent with obligations under the covered agreements with regard to the determination of unforeseen developments and the effect of GATT obligations, in principle it would not be necessary for the Panel

---

[227] Preliminary Technical Report, Exhibit CEGH-7, page 74 (original brackets).

[228] The confidential version of this passage confirms that the competent authority did not refer to the tariff concession with respect to the products in question as an obligation of the Dominican Republic under the GATT 1994 that produced the alleged increase in the imports in question. See: Preliminary Technical Report (confidential version), Exhibit RDO-9, page 86.

[229] See paragraphs 7.98-7.111 of the present Report.

[230] The Panel notes in this respect that in *Chile – Price Band System*, the Appellate Body observed that a panel cannot make findings on matters that are not before it because the complainant has not articulated a claim or submitted arguments. See: Appellate Body, *Chile – Price Band System*, paragraph 173.

to make any finding concerning the other substantive claims advanced by the complainants with respect to the provisional and definitive measures. Nevertheless, taking into account the circumstances of the present case and with the aim of assisting the parties to arrive at a positive solution to the dispute, the Panel will consider the claims of the complainants.

2. Whether the competent authority acted inconsistently with obligations under the covered agreements in defining the domestic industry

(a) Main arguments of the parties

(i) Complainants

7.153 The complainants argue that the Commission defined the domestic industry in a manner inconsistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. They therefore claim that the determinations of serious injury and causality, for the purposes of the provisional and definitive measures, are inconsistent with Articles 2.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b) and 4.2(c) of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994, as well as with Article 6 of the Agreement on Safeguards with respect to the provisional measure.[231]

7.154 The complainants assert that, in defining the domestic industry, the Commission made two basic errors: (i) it failed to establish adequately and reasonably that the imported and domestic products were like or directly competitive; and (ii) it improperly excluded producers of domestic products directly competitive with the product under investigation.[232]

7.155 With respect to the first aspect of their claim, the complainants make two points. Firstly, the complainants argue that the Commission did not define the product under investigation in a manner consistent with Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.[233] More specifically, they maintain that, despite the questions and factual information put forward by various interested parties pointing to the fact that tubular fabric and polypropylene bags are separate products, the Commission persisted in treating them as a single product under investigation.[234] They assert that the only reason for making this determination was the interpretation of the customs classification based on Additional Note 2 to Chapter 63 of the Dominican Republic's Customs Tariff. They also claim that, although the Commission's interpretation would appear to be underlain by the presumption that a tubular fabric is equivalent to an incomplete or unfinished bag, that presumption is not to be found in any of the relevant reports or resolutions and neither is there any evidence from which it might be inferred. In addition, they point out that, despite the fact that the determination of the competent authorities was questioned by the Directorate-General of Customs, the authorities took advantage of the statement made by that agency (that "[Additional Note 2] being a requirement of the national legislation, the customs has to proceed accordingly, until such time as the competent courts

[231] Complainants, first written submission, paragraphs 75-76 and 193-194; second written submission, paragraphs 70 and 167-168.

[232] Complainants, first written submission, paragraph 75; second written submission, paragraph 71.

[233] Complainants, first written submission, paragraph 119.

[234] The complainants point out that the Commission stated its position without offering an explanation as to why the questions raised by various interested parties were not relevant or had no basis in fact or law and without addressing the alternative interpretation that the products were different. The complainants add that neither was there any detailed analysis of why it was considered appropriate to treat the products as the same product, despite their having different characteristics. Complainants, first written submission, paragraphs 109 and 111.

or a law dispose otherwise") to treat the products in question as the same product, without producing any additional item of evidence for determining the identity of the products.[235]

7.156 Secondly, the complainants assert that the Commission failed to establish that the imported and domestic products were directly competitive. In support of this assertion, the complainants submit five arguments. First, they affirm that the domestic product was improperly defined for the purposes of determining likeness or direct competitiveness. They point out that the description of the domestic product submitted by the applicant FERSAN was adopted and that therefore the domestic product was confined to that produced *starting from* a certain phase in the *production process*, without setting out findings or explanations regarding the suggested limitation. They add that this led to the exclusion of the domestic product manufactured *starting from* a phase distinct from the obtaining of the resin (for example, polypropylene bags manufactured from tubular fabric, domestic or imported, produced by so-called "assemblers" or "converters"). According to the complainants, the purpose of defining the domestic product is to determine likeness or direct competitiveness and that determination must be based on *products* and not on *production processes* linked with the products.[236]

7.157 Second, the complainants maintain that the Commission failed to demonstrate that the imported products and the domestic products were directly competitive. They argue that the reports and resolutions contain mere affirmations of the alleged competitive relationship between the two products (or descriptions of the relevant information available), without providing a reasoned and adequate explanation in this respect.[237]

7.158 Third, the complainants point out that there is an asymmetry in the definition of the domestic and imported products that makes the comparison of their likeness or direct competitiveness itself asymmetrical and inadequate: whereas the domestic product comprises tubular fabric and polypropylene bags produced from virgin resin, the product under investigation comprises tubular fabric and polypropylene bags regardless of whether they were produced from virgin resin or not. They conclude that, although the Agreement on Safeguards does not require the existence of symmetry in the strict sense of the word, there must at least exist a correspondence of *likeness* or *direct competitiveness* between the product under investigation and the domestic product, since otherwise the domestic industry, the injury, the increase in imports and the causal relationship could not be determined.[238]

7.159 Fourth, the complainants claim that the Commission treated tubular fabric and polypropylene bags as part of the same domestic industry without having demonstrated that the two products, as an input and as final goods, respectively, were competitive with each other. In this connection, they note

[235] Complainants, first written submission, paragraphs 94-119; second written submission, paragraphs 85, 105, 107-114; reply to Panel question No. 104; opening statement at the first meeting of the Panel, paragraph 68. The complainants assert that the Directorate-General of Customs never stated that the bags and the fabric were the same product or that they were like or directly competitive products. Complainants, first written submission, paragraph 118.

[236] Complainants, first written submission, paragraphs 129-132 and 135.

[237] See, for example, complainants, first written submission, paragraphs 136-143; second written submission, paragraphs 148-151.

[238] Complainants, first written submission, paragraphs 144-150; second written submission, paragraphs 153-157.

that the Appellate Body has found that "inputs can be included in the definition of 'domestic industry' only if they are 'like' the end-products or 'directly competitive' with them".[239]

7.160 Fifth, the complainants claim that the Commission determined the directly competitive products without following the order of analysis laid down in Article 4.1(c) of the Agreement on Safeguards, as described by the Appellate Body. In this connection, they point out that in *United States – Lamb*, the Appellate Body determined that, before the scope of a domestic industry can be established it is first necessary to identify the products which are *like* or *directly competitive* with the imported product and that only when those products have been identified is it possible then to identify their *producers*. In the present case, they assert that the Commission first defined FERSAN as the domestic industry and then defined the directly competitive product under investigation.[240]

7.161 With respect to the second aspect of their claim, the complainants argue that the Commission wrongly excluded certain producers from the definition of the domestic industry. In particular, they assert that, in considering the producers on the basis of their production process, the Commission excluded specific categories of producers out of hand, namely, *assemblers* and *converters*, which manufacture polypropylene bags from tubular fabric. They maintain that the only relevant consideration for identifying the *producers* is that the individual or enterprise should manufacture the "like or directly competitive domestic product", the *production processes* being irrelevant where the ordinary meaning of the term *producers* is concerned. They add that, even under its own interpretation of the term *producers*, the Commission wrongly excluded producers that were producing the domestic product, namely, Filamentos del Caribe (FIDECA) and Textiles TITÁN. In this connection, they point out that Article 4.1(c) of the Agreement on Safeguards and its context make it clear that domestic producers of the like or directly competitive product may not be excluded.[241]

(ii) Dominican Republic

7.162 The Dominican Republic maintains that the definition of the domestic industry adopted by the competent authority is consistent with Article 4.1(c) of the Agreement on Safeguards and that the reports and resolutions of that authority contain the determinations necessary in this respect.[242]

7.163 The Dominican Republic asserts that the complainants have not offered any legal analysis of the provisions of the Agreement on Safeguards that might prevent it from being concluded that the tubular fabric and polypropylene bags can be treated as a single product under investigation. It also points out that similar claims within the context of the Anti-Dumping Agreement have been rejected by various panels as the Agreement gives no guidance on how to determine the product under investigation and suggests that the Panel should also conclude that there are no applicable provisions within the context of safeguard investigations. In addition, it asserts that the explanations given by the Commission concerning the product under investigation are adequate and reasoned and that, in this respect, the questions of the parties with an interest in the investigation were given timely consideration. It points out that the non-adoption of the alternative interpretation proposed by various

[239] See, for example, complainants, first written submission, paragraphs 151-154 (citing Appellate Body Report, *US – Lamb*, paragraph 90).

[240] Complainants, first written submission, paragraphs 155-159; second written submission, paragraphs 85, 97-98 and 159-165 (where the Appellate Body Report in *US – Lamb*, paragraph 87, is cited).

[241] Complainants, first written submission, paragraphs 160-192; second written submission, paragraph 85.

[242] Dominican Republic, first written submission, paragraph 252.

interested parties does not affect the validity of the explanation of the determination, and that the complainants themselves have not suggested that the likeness of or competitive relationship between the products that make up the product under investigation must be demonstrated. Furthermore, it asserts that there is no basis in the rules for requiring a reasoned and adequate explanation "of the tariff classification considerations on which [to base the] decision to treat the tubular fabric and polypropylene bags as a single imported product subject to investigation" and points out that, in any case, the complainants have failed to explain how such an obligation might arise out of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[243]

7.164 Moreover, the Dominican Republic states that the like and directly competitive domestic product was defined as polypropylene bags and tubular fabric. It asserts that both the reports and the resolutions contain adequate explanations with respect to the likeness of the product under investigation and the domestic product. Without prejudice to the above, it considers it obvious that the product under investigation and the domestic product are like products which are therefore directly competitive, since the definitions of both are identical in scope. It also claims that the production process did not form part of the definition of the like domestic product: the fact that the domestic product was defined as tubular fabric and polypropylene bags manufactured from resin only indicates a physical characteristic that was also applicable to the product under investigation. In its opinion, the production process played an important role in identifying the domestic industry, as a criterion for excluding certain producers, and not for defining the like domestic product. This is supported by considerations contained in the Final Technical Report from which it may be inferred that the DEI took into account, for the purposes of determining the domestic industry, the firms which manufacture polypropylene bags from tubular fabric. It therefore asserts that, contrary to what the complainants suggest, polypropylene bags manufactured from tubular fabric were not excluded from the definition of the domestic product.[244]

7.165 At the same time, the Dominican Republic points out that the complainants have not identified the legal basis for their contention that there must be symmetry between the like or directly competitive product and the product under investigation and that none of the provisions they invoke contains this alleged obligation. Likewise, it expresses the opinion that, in *US – Lamb*, the Appellate Body did not establish that it had to be demonstrated that the products that make up the domestic industry are like to each other. Moreover, the Dominican Republic points out that, as distinct from that case, in the present case the scope of the domestic product (tubular fabric and polypropylene bags) is identical to that of the product under investigation (tubular fabric and polypropylene bags). The Dominican Republic also asserts that the Agreement on Safeguards does not require a particular order or mode of analysis in defining the directly competitive product and notes that in *US – Lamb* the Appellate Body only made clear what was the order that would be followed in that case, without stipulating any obligatory order of analysis or invalidating other possible logical orders. It asserts that in any case the Commission's analysis followed a logical order.[245]

[243] See, for example, Dominican Republic, first written submission, paragraph 145; second written submission, paragraphs 54-56; opening statement at the second meeting of the Panel, paragraphs 33-34.

[244] See, for example, Dominican Republic, second written submission, paragraphs 57-64; opening statement at the second meeting of the Panel, paragraphs 37-40.

[245] See, for example, Dominican Republic, first written submission, paragraphs 163-182, 193-198, 205-206, 209-210; second written submission, paragraph 68; opening statement at the second meeting of the Panel, paragraphs 41-42 (where the Appellate Body Report in *US – Lamb*, paragraphs 87-88, is cited).

7.166 Finally, the Dominican Republic maintains that the authorities did not exclude a priori any category of producer of the like or directly competitive product, noting that the Commission took as its starting point all the producers identified by FERSAN in its domestic producer form. With respect to the company TITÁN, the Dominican Republic states that, as its production from resin is minimal and it mainly converts imported tubular fabric, the Commission excluded it from the domestic industry under the authority of Article 26 of *Law 1-02*, which permits (although it does not require) the exclusion of producers that are importers of the product under consideration. It notes that the fact that Article 4.1(c) of the Agreement on Safeguards (as distinct from the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement) does not expressly refer to the possibility of excluding importers does not have dispositive significance. It also points out that the context of Article 4.1(c) of the Agreement on Safeguards, particularly Articles 4.2(a) and 4.2(b), supports the possibility of such an exclusion, since these provisions require an analysis of injury and causality based on reliable data not obtainable from information supplied by companies that both produce and import the product under consideration. Where the company FIDECA is concerned, the Dominican Republic points out that the Commission concluded that it did not produce the like domestic product, as it only converted imported or locally purchased tubular fabric into bags. Citing the Panel Report in *EC – Salmon (Norway)*, it maintains that the Commission was able to exclude certain companies whose level of activity was so low that they were not managing to "produce" the like product. It likewise maintains that the exclusion of FIDECA is also consistent with Article 4.1(c) of the Agreement on Safeguards.[246]

(b) Main arguments of the third parties

(i) Colombia

7.167 Colombia rejects the Dominican Republic's argument that there are no clear criteria for defining the "product under investigation". It points out that the second paragraph of the preamble to the Agreement on Safeguards states that the Agreement clarifies and reinforces Article XIX of the GATT entitled "Emergency Action *on Imports of Particular Products*"[247] and that this suggests that the product it is intended to investigate should be delimited and established using some sort of criterion. Moreover, it argues that the term *product* in the singular in Article 2.1 of the Agreement on Safeguards denotes that the scope of the product under investigation is limited. It also considers that the product under investigation could be made up of several products, provided that it can be shown that they are like or directly competitive, since otherwise it would not be possible to make this finding with respect to the domestic and imported products, as required by Article 4.1(c) of the Agreement on Safeguards.[248]

(ii) United States

7.168 The United States argues that in *US – Lamb*, the Appellate Body concluded that, while the focus of the like or directly competitive product inquiry must be on the identification of the product, the production process may also provide information on the like or directly competitive nature between products. The United States adds that where a question might arise as to whether two products are separate, it might be relevant to inquire into the production processes for those

[246] See, for example, Dominican Republic, second written submission, paragraphs 71-80; opening statement at the second meeting of the Panel, paragraphs 43-47 (where the panel reports in *US – Wheat Gluten*, paragraphs 8.54-8.56, and *EC – Salmon (Norway)*, footnote 289, paragraph 7.115, are cited).

[247] Colombia, third party written submission, paragraph 31 (emphasis added by Colombia).

[248] Colombia, third party written submission, paragraphs 25-36.

products. In its opinion, it is possible to envisage a scenario in which the production process is highly relevant to the determination of the like or directly competitive nature between products, due to the qualities that the process imparts to the product.[249]

(iii) Panama

7.169 In Panama's opinion, in defining both the input (tubular fabric) and the end-product (polypropylene bag) as a single product, the Dominican Republic failed to prove that the two products were directly competitive or like products, as established by the Appellate Body, and thus defined the domestic industry in a manner inconsistent with Articles 4.1(c) and 2.1 of the Agreement on Safeguards. It also believes that the Dominican Republic failed to consider the provisions of the Agreement on Safeguards inasmuch as it excluded from the domestic industry other producers that qualified at the same level as those assessed in the investigation and, moreover, included both the producers of the inputs and the producers of the end-product.[250]

(iv) European Union

7.170 According to the European Union, the absence of a definition of product under investigation in the Agreement on Safeguards indicates the intention of the negotiators to leave Members with wide discretion. At the same time, it considers that, insofar as the parallelism between the product under investigation and the like or directly competitive products (in each case including both inputs and the final product) is maintained, the definition of domestic industry will conform to Article 4.1(c) of the Agreement on Safeguards, without the need to establish that both inputs and the final product are like or directly competitive products. It adds that, in order to consider whether a particular company is a *producer*, the focus should lie on the essential nature of the business activities of that enterprise, such as manufacturing an article or bringing a thing into existence. Thus, if the company's main activity consists in production, the sole fact that it imports the relevant product should not lead to its being excluded from the definition of domestic industry. On the other hand, it is of the opinion that a company which is merely an importer would not qualify as a *producer* and could be excluded from the definition of domestic industry.[251]

(c) Assessment of the Panel

7.171 The claims of the complainants concerning the definition of the domestic industry, with respect to the provisional and definitive measures, comprise various related arguments and factual situations. The relevant provisions under which the complainants assert the existence of the alleged infringements are Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

7.172 In this dispute, the product under investigation was defined by the competent authority as "polypropylene bags of strip or the like and woven fabric of synthetic filament yarn, manufactured from strip or the like"; the Commission also decided that it would observe the trends in the two products in conjunction.[252] The domestic product was defined as "polypropylene bags made from

[249] United States, third party written submission, paragraphs 7-8.
[250] Panama, third party written submission, paragraphs 18-22.
[251] European Union, third party written submission, paragraphs 17-25.
[252] Initial Resolution, Exhibit CEGH-2, page 5; Initial Technical Report, Exhibit CEGH-3, pages 5-6; Preliminary Technical Report, Exhibit CEGH-7, page 8. See also, Preliminary Resolution, Exhibit CEGH-5, paragraph 11. Jumbo sacks, big bags, super sacks and containers and polyethylene bags did not form part of the definition. Preliminary Resolution, Exhibit CEGH-5, paragraphs 32 and 34; definitive Resolution, Exhibit CEGH-9, paragraphs 20-23.

tubular woven fabric manufactured starting from resin and tubular woven fabric made of synthetic filaments manufactured starting from virgin resin".[253] The Commission determined that the product under investigation and the like domestic product were directly competitive products.[254] The Commission considered that the domestic industry consisted of a single company, the applicant FERSAN.[255] The Commission did not consider the company FIDECA to be part of the domestic industry due to the fact that, in its opinion, "it does not currently produce the product under investigation but obtains the bag from imported or locally purchased tubular fabric".[256] Nor did the Commission regard the company Textiles TITÁN as part of the domestic industry, because of its imports of tubular fabric from which it manufactured a significant proportion of its output of polypropylene bags.[257]

7.173 Article 4.1(c) of the Agreement on Safeguards, which defines the domestic industry for the purposes of the Agreement, stipulates that:

> [I]n determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

7.174 Thus, the text of Article 4.1(c) of the Agreement on Safeguards establishes the elements for the definition of the domestic industry. Firstly, Article 4.1(c) stipulates that the *domestic industry* must be defined with reference to the producers of the *like or directly competitive products*, so that the key to defining the domestic industry and, ultimately, the producers of which it is composed, is the *like or directly competitive products*.[258] Secondly, Article 4.1(c) states that the domestic industry *thus defined* must consist of the producers *as a whole* of the like or directly competitive product *or*, alternatively, of those producers of *that* product whose collective output constitutes a *major proportion of the total domestic production* of the product in question.

7.175 The complainants have argued that the Commission ignored fundamental aspects of the determination of the *like or directly competitive products* and thus failed to define the domestic industry properly. In support of this claim, the complainants make two main arguments: (i) that the Commission did not properly define the product under investigation; and (ii) that the Commission did not demonstrate that the imported and domestic products were directly competitive. The Panel will examine each of these arguments in turn.

---

[253] Preliminary Resolution, Exhibit CEGH-5, paragraph 26.

[254] Initial Resolution, Exhibit CEGH-2, page 5; Preliminary Resolution, Exhibit CEGH-5, paragraph 35; definitive Resolution, Exhibit CEGH-9, paragraph 23.

[255] Initial Resolution, Exhibit CEGH-2, pages 5 and 8; Preliminary Resolution, Exhibit CEGH-5, paragraph 13; definitive Resolution, Exhibit CEGH-9, paragraph 18. See also, Initial Technical Report, Exhibit CEGH-3, pages 13-14; Preliminary Technical Report, Exhibit CEGH-7, page 58; Final Technical Report, Exhibit CEGH-10, page 46.

[256] Preliminary Technical Report, Exhibit CEGH-7, page 58; Final Technical Report, Exhibit CEGH-10, page 46. See also, Initial Technical Report, Exhibit CEGH-3, page 14.

[257] Preliminary Technical Report, Exhibit CEGH-7, pages 54-58; Final Technical Report, Exhibit CEGH-10, pages 43-47. See also, Initial Technical Report, Exhibit CEGH-3, page 14; definitive Resolution, Exhibit CEGH-9, paragraph 18.

[258] Appellate Body Report, *US – Lamb*, paragraph 84.

7.176 With respect to the first argument, the complainants state that their claim concerning the product under investigation relates to the lack of adequate and reasoned explanations in the published report and not to the determination of the product under investigation *per se*.[259]

7.177 As the complainants point out, the Agreement on Safeguards "does not contain guidelines on how to define the product under investigation".[260] This Agreement refers only in general terms to *a product* and stipulates that the safeguard measures must be applied to the "product being imported" irrespective of its source.[261] There is no provision in the Agreement on Safeguards that governs the selection, description, analysis or determination of this "product". Although, for the purpose of determining the scope of an investigation, the competent authority must define the product under investigation, the Panel does not consider that the Agreement on Safeguards requires a detailed explanation of that definition.[262]

7.178 As previously noted, the Initial Resolution defines the product under investigation as "polypropylene bags of strip or the like and woven fabric of synthetic filament yarn, manufactured from strip or the like", which enter the Dominican Republic under tariff subheadings: 6305.33.10; 6305.33.90 and 5407.20.20.[263] The same Resolution, like the Initial and Preliminary Technical Reports, indicates the reasons why it was determined that the trends in polypropylene bags and tubular fabric would be observed "in conjunction". In this respect, the Initial Technical Report points out that:

> According to FERSAN, imports of polypropylene tubular fabric are equivalent to importing polypropylene bags, because the end-product is the same and in accordance with General Interpretative Rule 2(a) it is clear that "any reference in a heading to an article includes a reference to that article incomplete or unfinished, provided that the latter has the essential character of the complete or finished article, as well as to an article treated as complete or finished by virtue of the preceding provisions when presented disassembled or unassembled". During this phase of the investigation the DEI will observe the trends in polypropylene bags and tubular fabric taken in conjunction.[264]

7.179 In the Preliminary Technical Report, the DEI adds that:

> In this connection, several consultations were held with the Directorate-General of Customs (DGA), in one of which, on 3 November 2009, the DGA made clear that "*tubular fabrics for bags obtained from polyethylene or polypropylene mesh are classified in the same subheadings as specified in the preceding paragraph, by application of Additional Note 2 to Chapter 63 of the Customs Tariff, Law No. 146-00 and its amendments, even if they are not complete bags*".

---

[259] See, for example, complainants, second written submission, paragraphs 72, 104 and 106-107.
[260] Complainants, reply to Panel question No. 104.
[261] Articles 2.1 and 2.2 of the Agreement on Safeguards.
[262] In this connection, the Panel notes that in the context of the Anti-Dumping Agreement, which like the Agreement on Safeguards does not contain any provision governing the determination of the product under consideration, several panels have expressed the opinion that although an investigating authority must make a decision as to the scope of the investigation, and give notice of the product involved, it is not required to make an elaborated determination in that regard. See Panel Reports in *EC – Salmon (Norway)*, paragraph 7.57, and *EC – Fasteners (China)*, paragraph 7.268.
[263] See paragraph 1.172 of the present Report.
[264] Initial Technical Report, Exhibit CEGH-3, pages 5-6 (footnote omitted).

> Subsequently, in a communication dated 25 November 2009, the DGA reiterated "…… *it being a requirement of the national legislation, the customs has to proceed accordingly, until such time as the competent courts or a law dispose otherwise*". In the light of all of the above, during this phase of the investigation the trends in polypropylene bags and tubular fabric will be observed in conjunction.[265]

7.180 The DEI also analysed various arguments put forward by interested parties concerning the definition of the product under investigation.[266] With respect to the arguments advanced by several parties to the effect that tubular fabric and polypropylene bags cannot be considered to be the same product due to their nature, use and end markets, the DEI referred to considerations of a customs nature on which it had based the determination to treat the products in conjunction.[267]

7.181 The complainants claim that the Commission's explanation was not adequate or reasoned. They base their assertion on the premise that the product under investigation can only include products that are "like" and point out in this respect that the facts of the investigation show that tubular fabric and polypropylene bags are not the same product.[268] Nevertheless, the complainants fail to identify the legal impediments that should have prevented the competent authorities from considering tubular fabric and polypropylene bags as part of the product under investigation and observing the trends in the two products "in conjunction". The complainants assert that "it has not been suggested that there must be a comparison of likeness or competitive relationship between the input and the end-product for the purpose of defining the imported product under investigation".[269] However, the premise on which the argument of the complainants is based is that the Commission was under the obligation to provide an explanation of why two separate products were treated as the product under investigation in the same proceeding. The Panel cannot find a basis for this premise in the text of the Agreement on Safeguards. The complainants have not identified any provision in the Agreement that restricts the inclusion of imported products within the scope of an investigation solely to those products that are *like* or *directly competitive* with each other. As already noted, the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation. In these circumstances, the Panel considers that the complainants have failed to show why the explanations of the competent authority concerning the product under investigation were not adequate and reasoned.

7.182 In conclusion, the Panel considers that the complainants have failed to show that, by including polypropylene bags and tubular fabric in the definition of the product under investigation, the Commission acted inconsistently with Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards, or that, consequently, the definition of the domestic industry was in this respect inconsistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

7.183 With respect to the second argument of the complainants, namely, that the Commission failed to show that the imported and domestic products were directly competitive, the first question to arise

---

[265] Preliminary Technical Report, Exhibit CEGH-7, page 8 (original italics; footnotes omitted). The Commission's Initial Resolution and its Preliminary Resolution also mention the consultations held by the Commission with the Directorate-General of Customs (DGA) in this respect, as well as the relevant clarifications provided by FERSAN. Initial Resolution, Exhibit CEGH-2, pages 2-5; Preliminary Resolution, Exhibit CEGH-5, pages 4-5.

[266] Final Technical Report, Exhibit CEGH-10, page 42; Preliminary Technical Report, Exhibit CEGH-7, page 31.

[267] Preliminary Technical Report, Exhibit CEGH-7, page 31.

[268] See, for example, complainants, first written submission, paragraphs 109-118.

[269] Complainants, reply to Panel question No. 94.

is whether the domestic product was inadequately defined for the purposes of determining likeness or direct competition. The complainants assert that by restricting the scope of the directly competitive domestic product to a particular phase in the *production process* the competent authorities excluded the domestic product manufactured from an input with a degree of processing different from that of resin, namely, polypropylene bags manufactured from tubular fabric.[270]

7.184 The Panel will first present its conclusions regarding the relevant facts of the determination of likeness or direct competition between the products in question. As already noted, the product under investigation was defined as "polypropylene bags of strip or the like and woven fabric of synthetic filament yarn, manufactured from strip or the like".[271] On the basis of the information supplied by the applicant FERSAN, the Commission's Preliminary Resolution refers to the like domestic product, as "polypropylene bags made from tubular woven fabric manufactured starting from resin and tubular woven fabric made of synthetic filaments manufactured starting from virgin resin".[272] The Commission considered that the product under investigation and the domestic product were "directly competitive".[273] In this connection, during the present proceeding, the Dominican Republic has pointed out that the Final Technical Report and the Definitive Resolution establish that the product under investigation and the domestic product were like and therefore directly competitive.[274]

7.185 In its Definitive Resolution, the Commission determined:

> Once the description of the product, the physical characteristics, the technical specifications and the samples provided both by FERSAN and by the importers had been analysed, the Commission was able to observe that in various cases the imported product under investigation and the like domestic product were directly competitive. In this case, big bags or containers constitute an exception to the above, as they are not manufactured by the domestic industry.[275]

7.186 In its Final Technical Report, the DEI also explained that:

> [I]n various cases the imported product under investigation and the like domestic product are directly competitive, insofar as it is intended to describe the relationship that exists between the domestic product and the imported product.[57] From the wording of the expression cited it is clear that the essence of that relationship is that

[270] Complainants, first written submission, paragraphs 129-131. Although the complainants in their claim refer in general to the exclusion of the "domestic product manufactured starting from another phase distinct from the obtaining of the resin", the analysis and the conclusions of the Panel in this respect are limited to the polypropylene bags manufactured from tubular woven fabric with respect to which the complainants made specific reference and submitted arguments. In the absence of arguments and concrete evidence, the Panel is unable to make a more general analysis with respect to "domestic products manufactured starting from another phase distinct from the obtaining of the resin".

[271] Initial Resolution, Exhibit CEGH-2, page 5.

[272] Preliminary Resolution, Exhibit CEGH-5, paragraph 26. See also, Initial Technical Report, Exhibit CEGH-3, page 10; Preliminary Technical Report, Exhibit CEGH-7, page 48; Final Technical Report, Exhibit CEGH-10, page 36.

[273] Definitive Resolution, Exhibit CEGH-9, paragraph 23.

[274] Dominican Republic, reply to question no. 99 from the Panel.

[275] Definitive Resolution, Exhibit CEGH-9, paragraph 23.

> the products are in competition and that the context of the competitive relationship is the marketplace.[276]
>
> [57] *See Korea – Alcoholic Beverages*, paragraph 114.

7.187 In the opinion of the Panel, the use of the term *like* in the passages cited does not make it possible to conclude that the competent authorities necessarily made a finding of *likeness* within the meaning of Article 4.1(c) of the Agreement on Safeguards. Accordingly, the Panel believes that, in the investigation in question, the competent authority declared that the domestic product defined and the product under investigation were *directly competitive*.[277]

7.188 The Dominican Republic also asserts that the fact that the domestic product was defined as tubular fabric and polypropylene bags *manufactured from resin* indicates only a physical characteristic shared by the domestic and imported products, so that polypropylene bags manufactured from tubular fabric were not excluded from the definition of the domestic product.[278]

7.189 The Dominican Republic suggests that, if the definition of the domestic product had not included bags manufactured by converting tubular fabric, neither the Commission nor the DEI would have taken the producers of this product (that is, Textiles TITÁN, FIDECA, Agro-arrocera S.A. and Fibras Dominicanas C. por A.) into account.[279] Nevertheless, the Final Technical Report on which the Dominican Republic bases its case[280] does not show that the definition of the directly competitive domestic product would have included polypropylene bags manufactured from tubular fabric and that, basing itself on this reason, the Commission would have considered these four companies as part of the domestic industry. All it shows is that the companies were preliminarily considered for the purpose of determining, on the basis of their respective production processes, whether they qualified as *converters* or as *producers of the directly competitive domestic product*.[281] This does not constitute evidence that the competent authorities would have considered that the directly competitive domestic product included polypropylene bags manufactured from the processing of tubular fabric. At the same time, both the resolutions of the Commission and the technical reports of the DEI confirm that the scope of the directly competitive domestic product was limited to tubular fabric and polypropylene bags manufactured starting from resin.[282] Consequently, the Panel considers that the

---

[276] Final Technical Report, Exhibit CEGH-10, page 42.

[277] This interpretation is confirmed by the fact that the passage cited by the Dominican Republic in the Final Technical Report of the DEI makes reference to paragraph 114 of the Appellate Body Report in *Korea – Alcoholic Beverages* (where the Appellate Body interpreted the term "directly competitive or substitutable"), as well the identification of the domestic product solely as "directly competitive". Both the final public notice and the preliminary public notice refer to the "*directly competitive domestic product*" (italics added). Preliminary public notice, Exhibit CEGH-8, page 2; final public notice, Exhibit CEGH-11, page 4.

[278] See, for example, Dominican Republic, reply to Panel question No. 190; opening statement at the second meeting of the Panel, paragraph 38.

[279] See, for example, Dominican Republic, opening statement at the second meeting of the Panel, paragraph 39.

[280] Final Technical Report, Exhibit CEGH-10, pages 43-46.

[281] Final Technical Report, Exhibit CEGH-10, pages 43-47. In other words, whether these companies manufactured polypropylene bags from tubular fabric or whether they carried out all the stages of the production process for the manufacture of polypropylene bags (from the production of tubular fabric from resin to the manufacture of the bags).

[282] As evidence of this, the Panel notes that the company FIDECA, which manufactures polypropylene bags starting from tubular fabric, was not considered part of the domestic industry. See below, paragraph 7.192 and following paragraphs. Moreover, the definitive Resolution of the Commission reveals that, in determining that the company FERSAN constituted the domestic industry, the Commission established that this company "is

complainants have demonstrated, as a matter of fact, that the competent authorities did not include within the scope of the definition of the domestic product polypropylene bags manufactured starting from a stage subsequent to the processing of resin.

7.190 On the other hand, the parties agree that the product under investigation on which the safeguard measures were imposed is tubular fabric and polypropylene bags in general, no matter whether these products were manufactured starting from a particular stage of production.[283] In contrast, as previously noted, the directly competitive product was restricted to the product manufactured starting from a particular stage of production, namely the processing of virgin resin, thereby excluding other possible like or directly competitive products, in particular, polypropylene bags manufactured from tubular fabric.

7.191 The text of Article 4.1(c) of the Agreement on Safeguards establishes that the domestic industry has to be defined by reference to "products" that are "like or directly competitive" with respect to the imported product. There is nothing in the text of this provision that allows the domestic industry to be defined on the basis of a limited portion of these products. If a product is like or directly competitive with respect to the imported product, that product must be considered for the purposes of defining the domestic industry. Support for this interpretation can be gained by reading Article 4.1(c) of the Agreement on Safeguards within the context of Article 4.1(a). In particular, the determination of the domestic industry in terms of a portion of the "like or directly competitive products" could fail to establish the existence of a determination of significant overall impairment of the domestic industry as required by Article 4.1(a) of the Agreement on Safeguards. In the present case, the directly competitive domestic product was defined on the basis of a *portion* of the "like or directly competitive products".

7.192 In excluding from the definition of the directly competitive domestic product other like or directly competitive products, the competent authority consequently excluded domestic producers of the like or directly competitive product. This was the case with the company FIDECA, which was excluded from the definition of the domestic industry.

7.193 The parties all agree that FIDECA was excluded from the domestic industry and that FERSAN was the only company considered to be part of the domestic industry.[284] Moreover, the data in the file show that FIDECA produces polypropylene bags by converting tubular fabric, either domestic or imported. Presumably, the reason why this company was excluded from the definition of the domestic industry is because it does not produce the directly competitive product as defined in the investigation (i.e., the product manufactured starting from a specific production stage: the processing of virgin resin). These conclusions are supported by the relevant passages in the DEI's technical reports. In particular, the Final Technical Report points out that, in determining the domestic producers, the DEI first established whether the producers examined were *converters* or *producers* of the directly competitive domestic product. With respect to the company FIDECA, the DEI reached the following conclusion:

---

the only domestic company that manufactures 100 per cent of its output of tubular fabric and polypropylene bags starting from resin". Definitive Resolution, Exhibit CEGH-9, page 4. See also, Final Technical Report, Exhibit CEGH-10, page 47.

[283] According to the Dominican Republic, the only products that were excluded from the tariff lines on which the safeguard measures were imposed were jumbo sacks, "big bags", and "super sacks or containers". Dominican Republic, reply to Panel question No. 97.

[284] See paragraph 1.172 of the present Report.

> In the case of **Filamentos del Caribe (FIDECA)** a domestic producer form was also submitted; at present, this company is not producing the product under investigation, but obtains the bag from imported or locally purchased tubular fabric[61], as certified by the Institute of Innovation in Biotechnology and Industry (IIBI) in its communication to FIDECA dated 9 January 2010.
>
> [...]
>
> By virtue of the above, during the preliminary phase of the investigation the DEI assumed that FERSAN was undoubtedly the largest producer of polypropylene bags from resin in the Dominican Republic ... In this respect … the applicant company, that is, FERSAN, will be considered as the domestic industry.[285]
>
> [61] Invoices examined during the inspection carried out at FERSAN on 17 February 2010 showed that Fideca is a customer for the tubular fabric produced by FERSAN.

7.194 The Dominican Republic claims that it is consistent with Article 4.1(c) of the Agreement on Safeguards to exclude from the domestic industry producers that do not engage in significant production operations, as would be the case with *converters* that only cut and sew the tubular fabric which they purchase.[286] In support of its position, the Dominican Republic cites the observation of the panel in *EC – Salmon (Norway)*, which reads as follows:

> There may be circumstances in which an enterprise whose product is within the scope of the like product may be found to have engaged in a level of activity so low as to justify the conclusion that it did not, in fact, "produce" the like product.[287]

7.195 The Dominican Republic also asserts that the exclusion of particular producers would not be inconsistent with Article 4.1(c) of the Agreement on Safeguards, since this provision allows producers that constitute a major proportion of domestic production to be taken into consideration.[288]

7.196 As the Appellate Body has pointed out, the term "producers" used in Article 4.1(c) of the Agreement on Safeguards can be taken to mean those who "manufacture an article", "those who bring a thing into existence".[289] In this respect, the Panel does not see any reason why, in the circumstances of the present case, a company that cuts tubular fabric and sews it[290], and consequently causes a polypropylene bag actually to exist, should not be considered to be a producer under Article 4.1(c) of the Agreement on Safeguards.

---

[285] Final Technical Report, Exhibit CEGH-10, page 46 (original emphasis and underlining). See also, Preliminary Technical Report, Exhibit CEGH-7, page 58; Final Technical Report, Exhibit RDO-10, page 52.

[286] Dominican Republic, second written submission, paragraphs 74-75; reply to question No. 195 from the Panel.

[287] Panel Report, *EC – Salmon (Norway)*, footnote 289, paragraph 7.115. See: Dominican Republic, second written submission, paragraph 74; reply to question No. 109 from the Panel.

[288] Dominican Republic, second written submission, paragraph 75. See also: *Ibid*., second written submission, paragraphs 69-71; Final Technical Report, Exhibit RDO-10, pages 49-52.

[289] Appellate Body Report, *US – Lamb*, paragraph 84. See also, Panel Report, *US – Lamb*, paragraph 7.69.

[290] The technical reports indicate that, in some cases, after cutting and sewing, the bags may undergo an additional printing process. See, for example, Final Technical Report, Exhibit CEGH-10, pages 32-35.

7.197 On the other hand, the Dominican Republic does not mention that the observation by the panel in *EC – Salmon (Norway)* did not constitute the basis of the determination in that case; in fact, that panel determined that, in accordance with Article 4.1 of the Anti-Dumping Agreement, "any enterprise that produced any form of the like product should be considered … a 'producer' of the like product, and as such, part of the domestic industry".[291] In arriving at this conclusion, the panel rejected arguments very similar to those put forward by the Dominican Republic in this dispute.[292] Moreover, what the panel said in *EC – Salmon (Norway)* was not that any "level of activity so low" could justify the exclusion of an enterprise from the scope of the term "producer", but only that level which indicated that an enterprise "do[es] not actually bring … into existence" the product in question.[293]

7.198 As already pointed out, the reason cited in the technical reports for excluding FIDECA from the definition of the domestic industry was because it did not produce the directly competitive product starting from a specific stage of production, namely the processing of resin.[294] The published report of the competent authority does not contain any explanation that would make it possible to conclude that the level of activity of FIDECA in the production of polypropylene bags was "so low" that it did not actually bring the bag into existence. Thus, the Panel considers that the statement of the Panel in *EC – Salmon (Norway)* does not support the position of the Dominican Republic.

7.199 For these reasons, the Panel considers that, in excluding from the definition of the directly competitive domestic product certain like or directly competitive products and, ultimately, producers of the like or directly competitive product, the determination of the domestic industry made by the competent authorities is inconsistent with the obligations contained in Article 4.1(c) of the Agreement on Safeguards.

7.200 Accordingly, the Panel does not consider it necessary to deal with the remaining arguments of the complainants relating to the lack of an adequate and reasoned determination with respect to the likeness or relationship of direct competition between the products in question and those relating to the exclusion of other producers from the domestic industry.

(d) Conclusion

7.201 The Panel concludes that the complainants have demonstrated that, by excluding from the definition of the directly competitive domestic product certain like or directly competitive products and, ultimately, producers of the like or directly competitive product, for the purpose of defining the domestic industry in its preliminary and definitive determinations, the Dominican Republic acted inconsistently with its obligations under Article 4.1(c) of the Agreement on Safeguards. By imposing a safeguard measure on the basis of a definition of the domestic industry that is inconsistent with Article 4.1(c) of the Agreement on Safeguards, the Dominican Republic also acted inconsistently with

[291] Panel Report, *EC – Salmon (Norway)*, paragraph 7.115.

[292] In particular, the panel in *EC – Salmon (Norway)* found that the argument of the European Communities that "enterprises engaged in filleting are not 'producers' as fillets do not result from a process of 'production', but merely transformation of one presentation to another presentation" was difficult to square with the ordinary meaning of the term "produce" ("bring a thing into existence"). Panel Report, *EC – Salmon (Norway)*, paragraph 7.114.

[293] Panel Report, *EC – Salmon (Norway)*, paragraph 7.120.

[294] Despite what the Dominican Republic says, there is no indication that FIDECA was excluded because the competent authority had decided to consider a major proportion of the domestic industry. See paragraph 1.195 of the present Report.

its obligations under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.202 In view of this finding, the Panel does not consider it necessary to rule on the additional claims of the complainants relating to Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

7.203 Nor does the Panel consider it necessary to make findings on the complainants' consequential claims relating to Articles 4.1(a), 4.2(a) and 4.2(b) of the Agreement on Safeguards, or Article 6 of the Agreement on Safeguards with respect to the provisional measure.

7.204 Having concluded that the Dominican Republic acted inconsistently with obligations under the covered agreements as regards the determination of unforeseen developments and the effect of GATT obligations and as regards the definition of the domestic industry, it would not, in principle, be necessary for the Panel to make any finding concerning the other substantive claims made by the complainants with respect to the provisional and definitive measures. Nevertheless, taking into account the circumstances of the present case and with a view to assisting the parties to arrive at a positive solution to the dispute, the Panel will consider the other claims of the complainants.

3. Whether the competent authority acted inconsistently with obligations under the covered agreements with regard to the determination of an increase in imports in absolute and relative terms

(a) Main arguments of the parties

(i) Complainants

7.205 The complainants claim that, with respect to the provisional and definitive measures, the Commission did not find an increase in imports in absolute and relative terms in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards and, moreover, with Article 6 of the Agreement on Safeguards with respect to the preliminary determination. Consequently, given the central importance of these determinations, the complainants assert that the determinations of serious injury and causality, and by implication the provisional and definitive measures, are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the Agreement on Safeguards, as well as with Article 6 of the Agreement on Safeguards with respect to the provisional measure. Moreover, with respect to the increase in imports in absolute terms, the complainants maintain that the rate of increase was not analysed, so that Article 4.2(a) of the Agreement on Safeguards was also infringed.[295]

7.206 With reference to an increase in imports in absolute terms that was "recent enough, sudden enough, sharp enough and significant enough", the complainants also claim that the Commission concluded that there had been such an increase despite having determined that there was a "marked decrease" in imports towards the end of the period and that the Commission did not provide an adequate and reasoned explanation as to why, despite this decrease, it still considered that there had been an increase in imports that was sufficiently recent, sudden, sharp and significant. The complainants assert, in particular, that the reference made by the competent authority to an overall decrease in imports during the year 2009 is insufficient and invalid, given that the investigation ought

[295] Complainants, first written submission, paragraphs 238, 249, 255, 274, 276 and 282-284; second written submission, paragraph 217.

to have explained specifically how this factor had affected imports of the relevant products. Furthermore, with respect to the information relating to the alleged increase in imports during the year 2010, the complainants claim that this is an *ex post* explanation and that the increase was brought up only with respect to the final determination and, consequently, is not relevant to the preliminary determination. At the same time, they add that as this information does not correspond to the period of investigation, it should not be taken into consideration for the purposes of the final determination and, in any case, they maintain that the information was distorted so that it could not serve as a basis for an objective analysis of the increase in imports.[296]

7.207 Likewise, the complainants claim that the authority did not make findings with respect to the "*pace*" of imports, by which they mean their *rate* of increase (or its acceleration or deceleration) and not the mere variation of amounts.[297] In particular, the complainants assert that neither the DEI nor the Commission examined the growth trend of imports, but only compared absolute levels at the beginning and end of the investigation period. According to the complainants, if the rate of the increase in imports had been considered, it would have been concluded that it was decreasing, with an initial increase and a subsequent constant, uninterrupted and drastic deceleration during the rest of the period, so that the import analysis by the DEI and the Commission cannot be taken to show that there was a recent, sharp, sudden and significant increase in imports. The complainants add that the determination by the competent authority with respect to the existence of an absolute increase in imports is inconsistent with the factual finding that imports contracted proportionately more than domestic consumption.[298]

7.208 In addition, the complainants claim that the premises on which the determination of an increase in imports was based were invalid. In this respect, they note that the treatment of tubular fabric and polypropylene bags as a single product affected the determination of the increase in imports, and that if the Panel were to find that there were no adequate and reasoned explanations in relation to the definition of the product under investigation, the determination concerning the increase in imports should also be declared invalid. The complainants also maintain that Article 2.1 of the Agreement on Safeguards establishes an identity between *a* product affected by a safeguard measure and the import analysis concerning *that product*, so that if a safeguard measure affects *two* products, the determination concerning imports would have to be based on each product in particular, since otherwise the individuality required by Article 2.1 would not be respected. In the present case, they note that the safeguard measure affected *two* products, but that the import analysis was based on a single product. Likewise, the complainants refer to the statement by the Dominican Republic that the effect of the *imports* within the context of non-attribution under Article 4.2(b) includes the effect of the domestic production of the companies Filamentos del Caribe (FIDECA) and Textiles TITÁN, and claim that from this there follows a discrepancy between the premises for the determination of the increase in imports for the purposes of Article 2.1 and for non-attribution for the purposes of Article 4.2(b) of the Agreement on Safeguards. According to the complainants, this inconsistency in the use of the term *imports* is inadmissible, and results in either the determination concerning

[296] See, complainants, first written submission, paragraphs 237, 248 and 256-264; second written submission, paragraphs 212-214; opening statement at the second meeting of the Panel, paragraph 49.

[297] The complainants claim that, otherwise, the distinction between the *amount* and the *rate* of the increase in imports in Article 4.2(a) of the Agreement on Safeguards would be meaningless. Complainants, second written submission, paragraph 216.

[298] Complainants, first written submission, paragraphs 266-269 and 273-274; opening statement at the first meeting of the Panel, paragraph 82.

increased imports being inconsistent with Article 2.1 or the determination of non-attribution being inconsistent with Article 4.2(b) of the Agreement on Safeguards.[299]

7.209 Finally, the complainants maintain that the Commission has not demonstrated an increase in imports in relative terms with respect to the domestic industry. In this connection, they assert that the Commission determined an increase in imports despite having found that the relative share of imports in relation to domestic production had fallen steadily and uninterruptedly for most of the period investigated. Likewise, they point out that the Commission did not explain the discrepancy between these findings and its final conclusion that in relation to domestic production imports had maintained "a steady and increasing trend during the investigation period" and, consequently, claim that the analysis by the competent authority does not provide a reasoned and adequate explanation of the performance of imports in relative terms.[300]

(ii) Dominican Republic

7.210 The Dominican Republic maintains that the Commission established the existence of an increase in imports in absolute terms that was recent enough, sudden enough, sharp enough and significant enough to justify the adoption of a safeguard measure, and that this increase was demonstrated by a reasoned and adequate explanation in the preliminary and final determinations.[301] It also argues that the decrease in imports during 2009 did not affect the nature of this increase, since, as the Commission's findings show, the decrease was temporary and incidental (due to the overall decrease in the Dominican Republic's imports in 2009), as well as being insignificant in the light of the major increase in imports over the whole of the period of investigation. It adds that during the final phase of the investigation, in its definitive findings, the Commission found additional support in the data for 2010, which confirmed the transitory nature of the decrease.[302]

7.211 Moreover, the Dominican Republic asserts that the Commission correctly assessed the trend in imports, by comparing the end points of the period investigated, as well as the data for each year considered individually, taking into account both the rate of increase and the amount, while also assessing the relevance of the decrease at the end of the period, as well as the data for the year 2010. At the same time, the Dominican Republic points out that the complainants have not indicated how a

[299] Complainants, second written submission, paragraphs 203-208; reply to question No. 192 from the Panel.

[300] Complainants, first written submission, paragraphs 275-282.

[301] In particular, the Dominican Republic points out that an increase in imports of more than 60 per cent in the year 2007, followed by an increase of more than 9 per cent in 2008, is an increase that is not gradual but sudden; not slow but sharp; and not insignificant but significant; and is recent, considering that the investigation was started on 15 December 2009 and ended with the completion of the Final Technical Report on 13 July 2010. Dominican Republic, first written submission, paragraph 311.

[302] Dominican Republic, first written submission, paragraphs 306, 312, and 317-320; second written submission, paragraphs 84-86. The Dominican Republic stresses that the conclusion relating to the increase in imports was reached on the basis of the period of investigation and that the data for the year 2010, although they provided additional confirmation of the finding already made in the preliminary phase, did not form the basis for the determinations of the Commission. Moreover, it maintains that the use of data not formally included in the period of investigation has been confirmed and even encouraged by previous panels and by the Appellate Body. Dominican Republic, second written submission, paragraphs 88-90; opening statement at the second meeting of the Panel, paragraph 50 (where the Panel Reports in *Argentina – Footwear (EC)*, paragraph 8.160, and *Mexico – Anti-Dumping Measures on Rice*, paragraph 7.64, and the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, paragraph 167, are cited).

contraction in imports that exceeded the contraction in apparent domestic consumption would contradict the Commission's conclusions concerning an absolute increase in imports.[303]

7.212 Nor does the Dominican Republic agree with the interpretation of the complainants concerning Article 2.1 of the Agreement on Safeguards. According to the Dominican Republic, the fact that the expression *such* product in Article 2.1 refers to *a product* subject to the safeguard measure simply indicates that the product subject to the measure must correspond to the product under investigation. In this respect, it notes that in the present case the product under investigation and the product subject to the measures are identical. It also points out that the complainants have not questioned the determination of the product under investigation *per se*, so that the determination is valid.[304]

7.213 Finally, the Dominican Republic maintains that the Commission provided a reasoned and adequate explanation of the trend in the imports in relative terms, by analysing each of the periods, and demonstrated an increase in 2007 and a decrease in 2008 and 2009, considering both the amount and the rate of the increase, without limiting itself to comparing only the end points of the period investigated. The Dominican Republic adds that, despite the fact that an increase in imports was recorded only for the year 2007, it complied with Article 2.1 of the Agreement on Safeguards, which requires an increase in absolute or relative terms.[305]

(b) Main arguments of the third parties

(i) Colombia

7.214 Colombia points out that, in accordance with previous decisions made by the Appellate Body, the determination concerning increased imports should be made on a case-by-case basis and should show that the increase is of a nature such as to cause or threaten to cause serious injury. It adds that there could be a case in which a decline in imports towards the end of the period might not be significant and from a consideration of the whole of the increase during the period of investigation it might be concluded that there had been an absolute increase in imports, despite their decreasing towards the end of the period. In the present case, Colombia considers that the conclusion reached by the Dominican Republic concerning the increase in imports and its causal link with the alleged injury is inadequate, inasmuch as the Dominican Republic restricted its assessment to the cumulative increase in imports of tubular fabric and polypropylene bags, without making it clear whether the increase related to tubular fabric or polypropylene bags.[306]

(ii) United States

7.215 The United States considers that the Agreement on Safeguards does not establish any particular methodology or analytic framework for evaluating increased imports; in particular, it notes

[303] Dominican Republic, first written submission, paragraphs 327, 334 and 336 (where the Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 129, is cited); opening statement at the second meeting of the Panel, paragraph 51. The Dominican Republic notes that a comparison between the trend in the growth of imports and the trend in the growth of apparent domestic consumption could give an indication of the increase in imports relative to domestic production, but says nothing about the absolute increase in imports. *Ibid*., paragraph 335.

[304] Dominican Republic, reply to Panel question No. 193; comments on the reply of the complainants to Panel question No. 192.

[305] Dominican Republic, first written submission, paragraphs 338-339.

[306] Colombia, third party written submission, paragraphs 55, 58 and 63.

that Articles 2.1 and 4.2 of the Agreement on Safeguards make no reference to the end of the period of investigation, nor do they indicate any special role for any particular period of time within the overall period of investigation. At the same time, the United States points out that in *US – Steel Safeguards* the Appellate Body stated that "Article 2.1 does not require that imports need to be increasing at the time of the determination" and that it did not believe "that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'".[307]

(iii) Panama

7.216 Panama considers that in the present case imports of the products in question fluctuated and there was no substantiated determination by the competent authority to show that the increase in imports was recent, sudden, sharp and significant. At the same time, it points out that a determination of increased imports requires proof that the imports increased steadily or an adequate and reasoned explanation of the reasons why, despite the increase lacking regularity, it was still considered that the imports increased recently, suddenly, sharply and significantly. In this dispute, Panama is of the opinion that the conclusions of the investigating authority do not indicate of a demonstration that the increase in imports displayed these characteristics.[308]

(c) Assessment of the Panel

7.217 This complaint raises the question of whether the determinations of the Commission concerning an increase in imports, in both absolute and relative terms, are inconsistent with Articles 2.1, 3.1, last sentence and 4.2(c) of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994, as well as with Article 4.2(a) of the Agreement on Safeguards, where the increase in imports in absolute terms is concerned.

7.218 Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 predicate the existence of an increase in imports, in absolute or in relative terms, as a prerequisite for the application of a safeguard measure.

7.219 Article 2.1 of the Agreement on Safeguards stipulates that:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury the domestic industry that produces like or directly competitive products. (Footnote omitted.)

7.220 The relevant part of Article XIX:1(a) of the GATT 1994 reads as follows:

> If … any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products … .

[307] United States, third party written submission, paragraphs 10-11 (where the Appellate Body Report in *US – Steel Safeguards*, paragraph 367, is cited).

[308] Panama, third party written submission, paragraphs 28-30.

7.221 These provisions do not make reference to any *increase* in imports. On the contrary, they state that the product must be imported into the territory of the Member concerned in *such quantities* (absolute or relative to domestic production) as to cause or threaten to cause serious injury. In other words, as the Appellate Body has pointed out, it follows from both these provisions that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.[309] This assessment must be made on a case-by-case basis.[310]

7.222 The Panel will first address the claim by the complainants concerning the increase in imports in absolute terms, including their claim relating to the rate of the increase in imports. Next, the Panel will refer to claim made by the complainants with respect to the increase in imports relative to domestic production. In this connection, it will examine whether, in its published report, the competent authority provided a reasoned and adequate explanation of the way in which the factors corroborate its determination.

(i) Absolute variation in imports

7.223 The data on absolute levels of imports on which the Commission based its determination are contained in the Preliminary and Final Technical Reports of the DEI. The relevant findings can be found in the respective Resolutions of the Commission.[311]

7.224 The Commission's Definitive Resolution reads as follows:

> 31. In its Final Technical Report the DEI notes that the relative increase in imports of polypropylene bags and tubular fabric has fluctuated; during the period 2006/2007 imports increased by 60.76 per cent, during the period 2007/2008 the increase was 9.40 per cent, while in 2009 with respect to 2008 imports fell by 14.68 per cent. Finally, over the time-frame of the investigation imports increased by 50.06 per cent.
>
> 32. Moreover, the DEI continues by noting that the analysis of the impact of the provisional safeguard measure adopted by the Commission showed that it did not have a significant impact on imports during the months of May and June 2010, due to the apparent existence of factors favouring a recovery in the imports investigated.
>
> 33. In May 2010, as compared with April 2010, imports experienced a recovery of 42 per cent, while in June of the same year imports increased substantially by 275 per cent, to almost three times the imports recorded in May.
>
> 34. Moreover, imports in June 2010 exceeded by 69 per cent the imports recorded over the same period in 2009.[312]

[309] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 131.
[310] Appellate Body Report, *US – Steel Safeguards*, paragraphs 351 and 360.
[311] The preliminary and definitive Resolutions of the Commission refer to the respective technical reports issued by the DEI, which formed an integral part of the resolutions. See paragraph 7.10 of the present Report.
[312] Definitive Resolution, Exhibit CEGH-9, paragraphs 31-34. See also, Preliminary Resolution, Exhibit CEGH-5, paragraphs 43-44.

7.225 The Preliminary Resolution also refers to the increase in the value and volume of imports. The Preliminary Resolution contains the same percentage data as the Definitive Resolution with respect to the increase in imports of polypropylene bags and tubular fabric, both for the whole of the period of investigation and year-on-year, and also notes that the increase in imports resulted in an absolute variation of 956,399.89 kg over the period of investigation.[313]

7.226 The relevant part of the Final Technical Report reads as follows[314]:

> **Volume of imports of polypropylene bags and tubular fabric**
>
> …
>
> As the following table shows, the **absolute variation** in the volume of imports of polypropylene bags in 2007 with respect to 2006 was 1,160,748.39 kg; for the period 2007/2008 the volume of imports remained relatively stable with respect to the previous year increasing by 288,747.63 kg; in 2009 relative to 2008 there was an absolute decrease of (493,096.13) kg. Finally, over the period 2006-2009, there was an absolute variation of 956,399.89 kg in the volume of imports of bags and tubular fabric.
>
> **Table 16. Absolute increase in imports of polypropylene bags and tubular fabric**
>
> **Cuadro 16. Crecimiento absoluto de las importaciones de sacos de polipropileno y tejido tubular**

Volumen (kg)				Variación Absoluta			
2006	2007	2008	2009	2007/2006	2008/2007	2009/2008	2009/2006
1,910,419.22	3,071,167.61	3,359,915.24	2,866,819.11	1,160,748.39	288,747.63	-493,096.13	956,399.89

Fuente: Elaborado por el Departamento de Investigación con informaciones de la DGA

Volume (kg) Absolute variation

Source: Compiled by the Investigation Department using Directorate-General of Customs data.

> The relative increase in imports of polypropylene bags and tubular fabric fluctuated: during the period 2006/2007 imports increased by 60.76 per cent, during the period 2007/2008 the increase in imports was 9.40 per cent, and in 2009 imports fell by 14.68 per cent relative to 2008. Finally, over the time-frame of the investigation imports increased by 50.06 per cent.

[313] Preliminary Resolution, Exhibit CEGH-5, paragraphs 42-44.

[314] Final Technical Report, Exhibit CEGH-10, pages 51-52 (original emphasis). The same findings were recorded in the Preliminary Technical Report, Exhibit CEGH-7, pages 61-62.

Table 17. Relative increase in imports of polypropylene bags and tubular fabric

Cuadro 17. Crecimiento relativo de las importaciones de sacos de polipropileno y tejido tubular

Volumen (kg)				Variación relativa			
2006	2007	2008	2009	2007/2006	2008/2007	2009/2008	2009/2006
1,910,419.22	3,071,167.61	3,359,915.24	2,866,819.11	60.76%	9.40%	-14.68%	50.06%

Fuente: Elaborado por el Departamento de Investigación con informaciones de la Dirección General de Aduanas

Volume (kg) Relative variation

Source: Compiled by the Investigation Department using Directorate-General of Customs data.

7.227 The DEI's Final Technical Report, referring to the decrease in imports in 2009, states:

> [T]his reduction can be attributed to the decrease in the Dominican Republic's overall imports in 2009. According to the report on the Preliminary Results for the Dominican Economy January-September 2009, published by the Central Bank, the slowdown in the economy was reflected in a reduction in the demand for imports, so that total imports amounted to US$8,743.0 million, equivalent to a fall of US$3,796.6 million (30.3 per cent) in the import level as compared with the corresponding period in the previous year, with a decrease of 32.3 per cent in national imports. Of these, raw materials fell by 39.4 per cent and consumption goods by 29.2 per cent with the remaining 26.3 per cent corresponding to capital goods.
>
> In addition, the DEI agrees with the ruling of the Appellate Body of the WTO, in which it makes clear that Article 2.1 of the Agreement **does not require** that imports need to be increasing at the time of the determination. The plain meaning of the phrase "is being imported in such increased quantities" suggests merely that imports must have increased, and that the relevant products continue "being imported" in (such) increased quantities. Therefore, a decrease in imports at the end of the period of investigation would not necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported "in such increased quantities".[315]

7.228 The Preliminary Technical Report contains identical findings.[316]

7.229 In the Final Technical Report, the DEI also explained:

> Furthermore, during the final phase of this investigation the DEI analysed the trend in imports (in volume and value) of the product under investigation during the period January-June 2010, as compared with the corresponding period in 2009. See under letter C of this chapter.[317]

[315] Final Technical Report, Exhibit CEGH-10, pages 61-62 (citing the Appellate Body in *US – Steel Safeguards*, paragraph 367) (original emphasis, footnotes omitted).
[316] Preliminary Technical Report, Exhibit CEGH-7, page 68.
[317] Final Technical Report, Exhibit CEGH-10, page 62 (original underlining).

7.230 For its part, letter C, as mentioned in the quotation from the Final Technical Report contained in the preceding paragraph, reads as follows:

> **C. Trends in the volume and price of imports of polypropylene bags and tubular fabric during the months of January-May 2010 as compared with the corresponding period in 2009.**
>
> On analysing the trend in imports in 2010 relative to 2009, we note that in the months of February, March and June imports for 2010 exceeded those for 2009.
>
> For the purpose of examining the impact of the provisional safeguard measure adopted by the Commission, which entered into force on 1 April 2010, we note that for that month in 2010, as compared with the previous month in the same year, imports decreased by 47 per cent and by 65 per cent when compared with April 2009.[66]
>
> However, the trend in imports in May 2010 as compared with April 2010 was characterized by a recovery of 42 per cent, and in June of the same year imports increased by a staggering 275 per cent, to almost three times the imports recorded in May. If we compare the month of June 2010 with the corresponding month in 2009, we find that imports in 2010 were 69 per cent higher than in 2009.
>
> This trend in imports in the months of May and June 2010 allows us to draw the preliminary conclusion that the provisional safeguard measure did not have a positive impact in those months, apparently due to the existence of factors favouring the recovery of the imports investigated.[318]
>
> [66] It should be noted that on the eve of the measure (months of February and March) there was a considerable increase in the volume imported, perhaps with the aim of ensuring ample stocks before the possible application of a provisional measure in the month of April.

7.231 The Panel notes that the Commission's evaluation took into account the import data corresponding to each of the years of the period of investigation, as well as the trend in imports over that period. The Commission found a global increase in imports of 956,399.89 kg (50.06 per cent) over the period investigated. An increase in imports of 1,160,748.39 kg (60.76 per cent) was observed at the beginning of the period (2006-2007) and an increase of 288,747.63 kg (9.40 per cent) during the intermediate period (2007-2008), so that imports increased continuously in two out of three annual comparisons, including a significant increase between the years 2006 and 2007. It also identified a decrease in imports of 493,096.13 kg (14.68 per cent) at the end of the period (2008-2009). In the Preliminary Technical Report it was indicated that the decrease in question could be attributed to an overall reduction in Dominican Republic imports in 2009. In the final phase of the investigation, reference was also made to the fact that in the first half of 2010, in particular in the months of February, March and June of that year, imports recovered, in some cases reaching levels higher than those recorded during 2009.[319]

---

[318] Final Technical Report, Exhibit CEGH-10, pages 55-56 (original underlining, some footnotes omitted).

[319] As in the preliminary phase, the competent authority referred to the Appellate Body Report in *US – Steel Safeguards* (where the Appellate Body stated that Article 2 of the Agreement on Safeguards "does *not* require that imports need to be increasing at the time of the determination"). Final technical report,

7.232 The complainants assert that the explanation referring to the overall fall in imports is invalid. They claim that the overall fall in imports was a macroeconomic development that affected the entire tariff universe, so that the possibility of the demand for certain imported products remaining stable cannot be ruled out. They add that it does not follow from this explanation that the decrease in imports at the end of the period was a temporary decrease or that the authority characterized it as such.[320]

7.233 The Panel does not consider the arguments of the complainants convincing. The Panel does not exclude the possibility that the demand for certain products could have remained stable and therefore unaffected by the overall fall in imports. However, the complainants have not argued or put forward any evidence from which it could be concluded that this was the case with respect to the products in question.[321] Although the DEI did not explicitly show that the decrease in imports at the end of the period was temporary, the complainants have not offered any evidence to the contrary. In particular, the complainants have not demonstrated that the decrease in imports (or the overall decrease in imports) reflected a permanent or long-term change.

7.234 The complainants also argue that the information relating to the increase in imports during 2010 does not belong to the period of investigation, so that it cannot be taken into consideration for the purposes of the definitive measure.[322] Nevertheless, the complainants have not proposed any legal basis for their position and indeed acknowledge that other previous panels have required the possibility of using information relating to a period subsequent to that investigated.[323] In any event, the data for 2010 did not constitute the competent authority's main explanation for finding an absolute increase in imports, despite the decrease identified at the end of the period. On the contrary, as pointed out in the preceding paragraphs, the competent authority referred to the data corresponding to the year 2010 *in addition* to the explanation that it had already given in the preliminary phase of its investigation, namely, that the decrease in the imports in question could be attributed to the overall decrease in Dominican imports in 2009.[324] The complainants have not demonstrated that this finding constitutes an invalid explanation.[325]

7.235 Nor does the Panel regard as valid the assertion of the complainants to the effect that the competent authority failed to examine the rate of the increase in imports. According to the complainants, the rate was decreasing sharply (from 60.76 per cent in 2007, to 9.4 per cent in 2008, and to -14.68 per cent in 2009), so that it could not be concluded that there had been a recent, sudden

---

Exhibit CEGH-10, page 62 (which cites the Appellate Body in *US – Steel Safeguards*, paragraph 367) (original Appellate Body italics and underlining). See also, Preliminary Resolution, Exhibit CEGH-5, page 6; definitive Resolution, Exhibit CEGH-9, pages 5-6.

[320] See, for example, complainants, reply to question no. 118 from the Panel; opening statement at the first meeting of the Panel, paragraphs 77-78.

[321] On the contrary, in their first written submission, the complainants assert that "[t]he explanation given by the DEI indicates that the fall in imports reflected the significant variation in the market for tubular fabric and polypropylene bags in the Dominican Republic as a result of the slowdown in its economy due to the financial crisis of 2008". Complainants, first written submission, paragraph 271.

[322] Complainants, second written submission, paragraph 213.

[323] Complainants, reply to Panel question No. 196 (which refers to the panel report in *Argentina – Footwear (EC)*).

[324] See paragraph 1.230 of the present Report.

[325] For the same reason, the Panel rejects the argument of the complainants that the preliminary determination concerning increased imports lacks a factual element explaining the irrelevance of the decrease towards the end of the period of investigation. Complainants, second written submission, paragraph 212.

and sharp increase in imports.[326] Nevertheless, as already pointed out, the competent authority analysed the data relating to imports in each of the years of the period investigated, as well as the development of the trend in imports over this period.[327] Moreover, it cannot be assumed that an increase of 9.4 per cent in the intermediate period constituted a decrease in imports, especially when this increase was calculated on the basis of an absolute volume of imports that had already increased significantly in the immediately preceding period. There is nothing in the text of Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards to indicate that the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is *rising* and *positive* only if every percentage increase is greater than the preceding increase.[328] As the Appellate Body has pointed out, the determination of whether the product "is being imported in such increased quantities" is not a "mathematical or technical" determination[329], but rather an evaluation that must be made case by case.[330] The Panel therefore considers that the complainants have not demonstrated that the competent authority did not examine the rate of the increase in imports nor that the increase in imports it found could not have been considered recent, sudden and sharp.

7.236 The complainants also maintain that Article 2.1 of the Agreement on Safeguards establishes an identity between *a* product subject to a safeguard measure and the analysis of the imports relating to *that product*, so that if a safeguard measure affects *two products*, the import determination must be made with respect to each product.[331] The Panel understands that the point raised by the complainants is that the determination of the increase in imports is invalid because there was no separate determination of the increase in imports of tubular fabric, on the one hand, and polypropylene bags, on the other. However, as the complainants have not stated an objection to the definition of the product under investigation *per se*[332], the Panel considers that the definition adopted by the competent authority is that which governs the definition of the *product under investigation*, as well as the way in which the relevant data should have been analysed in the investigation. Given the undisputed definition of tubular fabric and polypropylene bags as the product under investigation, the Panel does not regard as valid the argument of the complainants that the increase in imports should have been demonstrated separately with respect to each of these products.

7.237 In any event, the complainants have not demonstrated that Article 2.1 of the Agreement on Safeguards requires the separate consideration of imports of each product that forms part of a single *product under investigation.* Although Article 2.1 states that a safeguard measure may be applied to *a product*, imports of which have increased, this provision does not require a disaggregated analysis for all cases in which the definition of the *product under investigation* comprises more than one product. At the same time, neither have the complainants explained how, in the circumstances of the present case, the joint consideration of tubular fabric and polypropylene bags could have affected the analysis made by the Commission and resulted in an inadequate determination of the increase in

[326] See, for example, complainants, first written submission, paragraphs 265-269; opening statement at the first meeting of the Panel, paragraph 82.

[327] The competent authority determined that the increase in imports had "fluctuated". Specifically, it indicated that "the **absolute variation** in the volume of imports … in 2007 with respect to 2006 was 1,160,748.39 kg; for the period 2007/2008 the volume of imports remained relatively stable with respect to the previous year … in 2009 relative to 2008 there was an absolute decrease … . Finally, over the period 2006-2009, there was an absolute variation of 956,399.89 kg in the volume of imports of bags and tubular fabric". See, for example, Preliminary Technical Report, Exhibit CEGH-7, pages 61-62 (original emphasis).

[328] See Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 131.

[329] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 131.

[330] Appellate Body Report, *US – Lamb*, paragraphs 351 and 360.

[331] Complainants, second written submission, paragraphs 205-206; reply to Panel question No. 192.

[332] See paragraph 1.176 of the present Report.

imports during the period of investigation.[333] For these reasons, the Panel considers unfounded, in this respect, the complainants' argument that the premises on which the determination of increased imports was based are invalid.

7.238 Likewise, the Panel considers the argument concerning the alleged discrepancy between the premises for the increased imports and non-attribution determinations to be unjustified. The complainants appear to be saying that the effect of the imports within the context of the non-attribution analysis included the effect of the domestic production of the companies FIDECA and Textiles TITÁN, whereas the analysis of the increase in imports did not include any aspect of the domestic production, so that there is a discrepancy in the use of the term *imports* in the investigation.[334] However, the complainants have not demonstrated that the competent authority's non-attribution analysis included the production of the companies FIDECA and Textiles TITÁN and there is nothing in the file to suggest that this was the case.[335]

7.239 The Panel therefore considers that the complainants have failed to make the case that the published report of the competent authority does not contain a reasoned and adequate explanation of the way in which the relevant factors corroborate the determination of the existence of an absolute increase in imports of the products in question.

7.240 In conclusion, the Panel rejects the claim of the complainants that the finding of an absolute increase in imports made by the Dominican Republic was inconsistent with Article 2.1 of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994, and that the findings and explanations provided by the Dominican Republic in this respect, insofar as they relate to the preliminary and definitive determinations, were inconsistent with the provisions of Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. Likewise, the Panel rejects the claim of the complainants that the competent authority failed to analyse the rate of the increase in imports and that the Dominican Republic thereby infringed Article 4.2(a) of the Agreement on Safeguards.

7.241 In relation to the determination of the competent authority concerning increased imports, the complainants also cite Article 11.1(a) of the Agreement on Safeguards and, where the preliminary determination is concerned, Article 6 of the Agreement on Safeguards. However, with respect to this latter aspect of their claim, as well as with respect to the claims that they put forward consequentially, the complainants did not formulate any specific arguments; consequently, even assuming that all

[333] Neither does the Panel consider that the text of Article XIX:1(a) of the GATT 1994 or the fact that safeguard measures should be exceptional and extraordinary in nature supports the interpretation of the complainants. In particular, the complainants have failed to explain how the nature of the measures would support their interpretation. At the same time, the mere reference to *particular products* in the title of Article XIX:1(a) says nothing about the scope of these *particular products*.

[334] Complainants, second written submission, paragraphs 207-208.

[335] In view of its previous findings (see paragraph 7.182 of the present Report), the Panel rejects the additional argument of the complainants that "if the Panel were to find that there were no adequate and reasoned explanations regarding the definition of the imported product under investigation, the analysis of increased imports would also be invalid". Complainants, second written submission, paragraphs 203-204.

these claims were properly brought before it[336], the Panel will refrain from making findings in this respect.[337]

(ii) Relative variation in imports

7.242 The determination of an absolute or relative increase in imports that causes or threatens serious injury is sufficient to entitle a Member to adopt a safeguard measure. Consequently, given the previous finding concerning the determination of the competent authority with regard to imports in absolute terms, the Panel does not consider it necessary to make additional findings with respect to the determination of the behaviour of imports in relative terms. The possible making of additional findings with respect to increased imports could not affect the Panel's finding that the complainants have failed to show that the Dominican Republic infringed the relevant provisions of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 by not demonstrating an increase in imports within the meaning of those provisions.

4. Whether the competent authority acted inconsistently with obligations under the covered agreements with regard to the determination of serious injury to the domestic industry

(a) Main arguments of the parties

(i) Complainants

7.243 The complainants claim that, in its determination of the existence of serious injury to the domestic industry, with respect to the provisional and definitive measures, the Commission acted inconsistently with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994, as well as with Article 6 of the Agreement on Safeguards as far as the provisional measure is concerned. In support of their complaint concerning serious injury, the complainants make the following four points.

7.244 First, the complainants argue that the Commission acted inconsistently with Articles 4.1(a), 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards in not having carried out a disaggregated and complete analysis of the various segments of the domestic industry for the purpose of determining serious injury. In particular, the complainants argue that the Commission did not carry out separate analyses of the production of tubular fabric and the production of polypropylene bags and that it did not consider information relating to the commercial market for tubular fabric.[338] Likewise, in reply to the arguments put forward by the Dominican Republic in its defence, the complainants argue that the evidence provided by the Dominican Republic shows that the Commission based its analysis on information from FERSAN (Bags Division), which produces not only the like or directly

[336] The complainants' consequential claim under Article 4.1(a) of the Agreement on Safeguards was not identified in the relevant part of their requests for the establishment of a panel and therefore it is not even clear that it falls within the Panel's terms of reference. In any case, in view of the previous findings, it is not necessary for the Panel to rule in this respect.

[337] In this connection, the Panel notes that in *Chile – Price Band System*, the Appellate Body observed that a panel cannot make findings on issues that cannot be considered to have been properly brought before it because the complaining party has not clearly articulated a claim or submitted arguments. See: Appellate Body Report, *Chile – Price Band System*, paragraph 173.

[338] Complainants, first written submission, paragraphs 286 and 297-312.

competitive product but also other products such as mesh bags, cordage and ropes, and improperly included in its analysis information about FERSAN's exports.[339]

7.245 Second, the complainants argue that the Commission acted inconsistently with Articles 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards in failing to consider in the preliminary determination all the relevant factors of serious injury listed in Article 4.2(a) of the Agreement on Safeguards. In particular, the complainants argue that the Commission failed to evaluate the productivity factor and that it is not enough for the Dominican Republic to suggest that the result of this factor could be assessed by combining the production and employment indicators.[340]

7.246 Third, the complainants claim that the Commission determined the existence of serious injury in the preliminary and final resolutions, despite the fact that the indicators showed the contrary or were inadequately evaluated, acting inconsistently with Articles 4.1(a), 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. With regard to the Preliminary Resolution, they point out that the Commission: (i) after finding that production was indicating steady growth, came to the contradictory conclusion that this factor had contracted; and (ii) failed to give an adequate and reasoned explanation of why it considered that there had been an increase in inventories and financial losses. Likewise, they point out that, in the Definitive Resolution, the Commission: (i) failed to explain how it was that the performance of inventories, cash flow and the alleged contraction of production constituted an indication of the company's financial losses; and (ii) after finding that the indicators corresponding to production and the domestic product's share of domestic consumption had improved, reached the contradictory conclusion that these indicators had deteriorated.[341] Moreover, they point out that the Commission found that the performance of the domestic industry with respect to the other factors (sales, capacity utilization, productivity, employment, wages and production) was "quite favourable". In their opinion, the *overall picture* of the domestic industry indicated that it was growing and not experiencing a situation of *significant overall* impairment within the meaning of Article 4.1(a) of the Agreement on Safeguards.[342]

7.247 Fourth, the complainants assert that the application of the provisional safeguard measure was inconsistent with Articles 6, 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. In this respect, they point out that in the Preliminary Resolution the Commission failed to give a reasoned and adequate explanation of the existence of *critical circumstances* that would justify the imposition

[339] Complainants, opening statement at the first meeting of the Panel, paragraphs 86-88. Likewise, the complainants consider that there is no support for the Dominican Republic's *ex post* explanation that the production of "other products" did not exceed 15 per cent of the total output of the Bags Division. See complainants, opening statement at the second meeting of the Panel, paragraphs 52-53. Furthermore, the complainants point out that Article 3.6 of the Anti-Dumping Agreement is not applicable to safeguards. The complainants add that the explanations of the Dominican Republic concerning the company's depreciation and amortization costs are *ex post* and that the Commission did not carry out a proportional assessment of these costs in relation to the production of products different from the like or directly competitive product or the production intended for export. See, complainants, opening statement at the second meeting of the Panel, paragraphs 54-56.

[340] Complainants, first written submission, paragraphs 286 and 313-320; opening statement at the first meeting of the Panel, paragraph 95.

[341] Complainants, first written submission, paragraphs 321-323. Moreover, the complainants point out that some of the explanations provided in the present proceedings by the Dominican Republic concerning these factors are *ex post*. See complainants, opening statement at the first meeting of the Panel, paragraph 84; second written submission, paragraphs 223-225.

[342] Complainants, first written submission, paragraphs 286 and 367-368.

of a provisional measure.[343] In their opinion, there is no reason for interpreting the standard of proof of serious injury differently in a final and in a preliminary determination.[344]

(ii) Dominican Republic

7.248 The Dominican Republic rejects the claims of the complainants and replies that they are based on an erroneous interpretation of the facts and the applicable law.[345] In its opinion, the Panel should reject the claim that the preliminary and definitive determinations of serious injury are inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the Agreement on Safeguards and with Article XIX:1 of the GATT 1994.[346]

7.249 Concerning the complainants' first argument, the Dominican Republic claims that neither the Agreement on Safeguards nor the previous decisions of panels or the Appellate Body oblige the investigating authorities to undertake a separate analysis of each segment of the domestic industry for its injury determination.[347] Moreover, it points out that in its analysis it considered information on both bags and tubular fabric, having based its analysis on the financial statements of the Bags Division which produces both products. For the same reason, it asserts that it took account of sales of tubular fabric to domestic buyers.[348] Likewise, it asserts that, even though the Bags Division also produces other products which were not under investigation, the like product constituted more than 85 per cent of the Division's total output.[349] Moreover, it considers that there is no obligation to limit the analysis of injury to the production for the domestic market, to the exclusion of the part exported.[350]

7.250 With regard to the complainants' second argument, the Dominican Republic maintains that in its preliminary determination the Commission took the productivity factor into account, since it measured both the trend in the volume and value of production and the trend in the number of employees during the period of investigation and, on the basis of these data, was able to calculate the productivity for the period. In its opinion, Article 4.2(a) of the Agreement on Safeguards does not require that each of the factors relating to injury be formally set out under separate headings; it is enough to demonstrate that the competent authorities evaluated each of them. It also considers that

[343] Complainants, first written submission, paragraphs 286, 370 and 374-379.

[344] Complainants, second written submission, paragraphs 227-228; reply to Panel questions Nos. 143 and 146. Furthermore, the complainants consider that the Commission did not explain why the existence of significant financial losses had jeopardized the sustainability of the domestic industry. They also consider that neither did other indicators of serious injury in the Preliminary Technical Report (such as the performance of imports, production and stocks) demonstrate the existence of serious injury which it would be difficult to repair. See complainants, first written submission, paragraphs 374-378.

[345] Dominican Republic, first written submission, paragraphs 344-345.

[346] Dominican Republic, first written submission, paragraph 374, 407-408 and 435-436.

[347] Dominican Republic, first written submission, paragraphs 348, 351 and 361; second written submission, paragraph 96.

[348] Dominican Republic, first written submission, paragraphs 358-359.

[349] In its opinion, by the analogous application of the provisions of Article 3.6 of the Anti-Dumping Agreement, the competent authority was able to use the information corresponding to the Bags Division, which is responsible for the production of the more restricted group of products that includes the like product.

[350] Dominican Republic, second written submission, paragraphs 98-100.

Article 6 of the Agreement on Safeguards does not require the analysis of the critical circumstances indicators for a provisional measure to be as strict as in the definitive phase.[351]

7.251 In relation to the complainants' third argument, the Dominican Republic asserts that in examining the injury indicators, the competent authority assessed the *overall picture* of the domestic industry to determine whether there had been *significant overall impairment*. In its opinion, the analysis of the indicators in the Final Technical Report indicated that as from 2007 the domestic industry had suffered financial losses which had increased every year. Likewise, it asserts that the domestic industry's market share decreased up to 2008 and only in 2009 managed to exceed the share it had achieved in 2006. According to the Dominican Republic, an investigating authority does not have to examine the effect of every individual factor and is only required to explain the impact of the relevant factors on the domestic industry and whether that impact is resulting in an *overall significant impairment* of its situation.[352] In its opinion, the findings expressed in the resolutions and the technical reports constitute a reasoned and adequate explanation of its determination.[353]

7.252 With respect to the complainants' fourth argument, the Dominican Republic sees no need for the Panel to make a finding concerning the provisional measure, which was replaced by the definitive measure with retroactive effect, in order to achieve a positive solution to the dispute. Nevertheless, it asserts that the Commission correctly assessed the serious injury in the preliminary determination and adequately established that delay in adopting a provisional measure would have resulted in damage difficult to repair.[354]

(b) Main arguments of the third parties

(i) Colombia

7.253 Colombia considers that the dispute between the parties over the provisional measure affords the Panel a unique opportunity to rule on what should be understood by *critical circumstances* in Article 6 of the Agreement on Safeguards. Colombia suggests that the Panel should consider, as factors that make the damage *difficult to repair*, aspects of the economic reality of the enterprise, such as its inventories, sales, profit margins and the price of like products, which should be compared with the most recent (in the last six months) fluctuations in imports, in order to determine whether, if no provisional measure were imposed, the damage would be difficult to repair. Without taking a position on the facts of the case, Colombia invites the Panel to rule on the scope of this obligation.[355]

(ii) United States

7.254 The United States considers that the Panel should examine whether the provisional measure had expired before the consultation procedure began, since in that case the measure would fall outside its terms of reference. Assuming that the measure falls within the terms of reference, it would be

[351] Dominican Republic, first written submission, paragraphs 367-374; reply to Panel questions Nos. 145-146. The Dominican Republic affirms that Article 6 of the Agreement on Safeguards refers to "critical circumstances" in which any delay would cause damage difficult to repair.

[352] Moreover, the Dominican Republic points out that the *overall picture* of the domestic industry is revealed by the injury factor analysis in the Final Technical Report and the financial statements of the Bags Division.

[353] Dominican Republic, first written submission, paragraphs 376-385, 387, 390-396 and 407-408.

[354] Dominican Republic, first written submission, paragraphs 410, 413-415, 419-436; reply to Panel question No. 38.

[355] Colombia, third party written submission, paragraphs 66, 69 and 71.

necessary to examine whether making findings in this respect would facilitate a positive solution to the dispute. If not, this might be an appropriate situation for applying procedural economy. With regard to the standard of proof of injury for the purposes of the provisional measure, the United States asserts that, under the terms of Articles 6, 2 and 7 of the Agreement on Safeguards, a Member can impose a provisional measure only if it has determined that there is *clear evidence* that increased imports have caused or are threatening to cause serious injury and that there are "critical circumstances where delay would cause damage which it would be difficult to repair".[356]

(iii) Panama

7.255 Panama considers that the investigating authority did not carry out a detailed serious injury analysis, nor did it produce objective and positive evidence in support of its investigation or the application of the safeguard measures. It also considers that, in view of the investigating authority's failure to establish a clear and objective definition of the domestic industry and unforeseen developments resulting in serious injury through increased imports, and to demonstrate that the increase in imports was a decisive factor in the change in the market, the Dominican Republic was not in a position to conclude that these factors had been properly verified. Therefore, the Dominican Republic acted inconsistently with Articles 4.2(a) and 2.1 of the Agreement on Safeguards.[357]

(iv) European Union

7.256 The European Union observes that if the complainants wanted to challenge the provisional measure, they should have submitted their request for the establishment of a panel before the measure expired. Concerning the standard of proof of injury for the purposes of the provisional measure, it asserts that Articles 4.1(a) and 4.1(b) define *serious injury* and *threat of serious injury* for the purposes of the Agreement on Safeguards without distinguishing between the provisional and definitive measures. Likewise, neither does Article 4.2(a) distinguish between the provisional and definitive measures. Consequently, the preliminary determination under Article 6 of the Agreement on Safeguards must be based on clear evidence and a reasoned and adequate explanation of the existence of serious injury.[358]

(c) Assessment of the Panel

7.257 The Panel will examine the claim advanced by the complainants that the preliminary and definitive determinations of serious injury to the domestic industry made by the Commission are inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994.

7.258 Of the four questions raised by the complainants concerning the determination of serious injury, two deal solely with the preliminary determination (the first relates to the Commission not having examined the productivity factor in the preliminary determination of serious injury; the second to the Commission not having provided a reasoned and adequate explanation with regard to the critical circumstances). Taking into account the observations made earlier in this report[359], in this section the Panel will begin its analysis with the two remaining questions which relate to both the

[356] United States, reply to Panel questions Nos. 1 and 18.
[357] Panama, third party written submission, paragraphs 32-34.
[358] European Union, reply to questions Nos. 1 and 18 from the Panel.
[359] See paragraph 7.22 of the present Report.

preliminary and the definitive determinations: (i) whether the Commission found serious injury even though the factors indicated the contrary or being inadequately assessed, thereby acting inconsistently with Articles 4.1(a), 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards; and (ii) whether the Commission failed to carry out a disaggregated and complete analysis of the domestic industry for the purposes of the serious injury determinations, acting inconsistently with Articles 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

(i) Whether the Commission concluded that there was serious injury even though the factors indicated the contrary or were inadequately assessed

7.259 The relevant parts of Article 4 of the Agreement on Safeguards read as follows:

> *Determination of Serious Injury or Threat Thereof*
>
> 1. For the purposes of this Agreement:
>
> (a) "Serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
>
> …
>
> (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.
>
> 2(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a *domestic industry* under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and the 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, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
>
> …
>
> 2(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined.

7.260 The Appellate Body has indicated that the *objective evaluation* that must be made by a panel of a claim articulated under Article 4.2(a) of the Agreement on Safeguards consists, in principle, of two elements (one formal and the other substantive). The formal aspect involves determining whether the competent authority has evaluated *all relevant factors* contained in that provision. The substantive aspect consists in establishing whether the competent authority has given a reasoned and adequate explanation of the way in which the factors corroborate its determination.[360] The Panel has already

[360] Appellate Body Report, *US – Lamb*, paragraph 103.

indicated that it considers it appropriate to follow the standard of review laid down by the Appellate Body.[361]

7.261 In the present case, the complainants raised jointly, with respect to the provisional and definitive determinations, a question which involves the substantive aspect of the Panel's serious injury evaluation and which relates to whether the Commission provided a reasoned and adequate explanation of its determination when evaluating the factors mentioned in Article 4.2(a) of the Agreement on Safeguards.[362]

7.262 The Panel will first examine whether the findings and conclusions of the Commission, with respect to the factors to which Article 4.2(a) of the Agreement on Safeguards refers, are supported by the evidence that the Commission had before it. In particular, it will examine the situation relating to the factors in dispute: inventories, production, cash flow, share of domestic market taken by imports and financial losses. Then, following the analysis suggested by the Appellate Body in *Argentina – Footwear (EC)*, it will go on to examine whether the Commission concluded that there had been serious injury on the basis of the indicators evaluated and taking into account the *overall position* of the domestic industry.[363]

Findings of serious injury made by the Commission

7.263 In its Preliminary Resolution, the Commission established the following:

> 48. … [I]n accordance with the data cited in the Preliminary Technical Report, it can be seen that the domestic industry is in critical circumstances due to a 206 per cent reduction in its financial performance. In value terms, stocks grew by 199 per cent, while increasing by 169 per cent in volume. Likewise, the industry's level of production contracted sharply, which made it impossible to implement the company's plans for expansion.
>
> 49. For the foregoing reasons and after having evaluated the relevant factors, the Commission was able to find that the increase in imports of the product investigated has caused serious injury to the domestic industry because it suffered significant financial losses during the period investigated, jeopardizing the sustainability of this important domestic industry, so that any delay would entail damage which it would be difficult to repair.[364]

7.264 From this passage, the Panel notes that the serious injury factors on which the Commission based its *Preliminary Resolution*, apart from increased imports, were as follows: (i) inventories; (ii) production; and (iii) profits and losses. The Commission did not make reference in this Resolution to the way in which it considered other factors mentioned in Article 4.2(a) of the Agreement on Safeguards. In particular, the Preliminary Resolution is silent on the following factors: (i) the share of the domestic market taken by increased imports; (ii) changes in the level of sales; (iii) productivity; (iv) capacity utilization; and (v) employment.

---

[361] See paragraphs 7.4 to 7.10 of the present Report.

[362] As previously pointed out, the complainants also put forward an argument that would involve a formal analysis of the serious injury factors mentioned in Article 4.2(a) of the Agreement on Safeguards (relating to whether the Commission evaluated the productivity factor). This argument was deployed only with respect to the provisional determination.

[363] Appellate Body Report, *Argentina – Footwear (EC)*, paragraphs 138-139.

[364] Preliminary Resolution, Exhibit CEGH-5, paragraphs 48-49.

7.265 The *Preliminary Technical Report*, which served as a basis for the findings of the Commission, indicates that the DEI examined the following indicators: (i) production; (ii) installed capacity; (iii) utilized capacity; (iv) sales; (v) employment; (vi) wages; (vii) level of exports; (viii) cash flow; (ix) investment; (x) product prices; (xi) costs; (xii) profits or losses; (xiii) inventories; (xiv) domestic market share taken by imports; and (xv) apparent consumption.[365]

7.266 Among the factors listed, in its Preliminary Technical Report, the DEI recorded a positive performance by the domestic industry during the period of investigation in: (i) sales; (ii) installed and utilized capacity; (iii) employment and wages; (iv) export value; (v) prices of the like domestic product; and (vi) investment. Moreover, according to the Preliminary Technical Report, the Commission lacked information relating to the cash flow factor and did not examine the productivity factor. Finally, the factors that the Commission found to have followed an adverse trend and on which it based its determination of injury, apart from increased imports, are as follows: (i) costs; (ii) profits and losses; (iii) inventories; and (iv) production.[366]

7.267 At the same time, in the Definitive Resolution the Commission concluded that:

> 37. The performance of imports in relation to domestic production continued to show an upward and sustained trend during the period investigated. It is therefore obvious that the increase in imports has caused injury to the domestic industry inasmuch as it was verified that the increase in the value and volume of the imports was the cause of a significant drop in the domestic industry's share of apparent domestic consumption.
>
> 38. Moreover, as a result of the increase in imports of the product under investigation, the firm suffered significant financial losses during the period investigated, which can be seen from the increase in stocks, the reduced cash flow, and the sharp contraction in its level of production.
>
> …
>
> 41. When it visited FERSAN, the Commission was able to confirm that the company had purchased new machinery as part of its adjustment plan, which was helping to increase the installed capacity for manufacturing square-bottom and valve bags, with a production capacity of twice the domestic demand. Moreover, FERSAN had added a third work shift.[367]

7.268 From the this passage, the Panel concludes that the serious injury factors on which the Commission based its *Definitive Resolution*, apart from increased imports, were as follows: (i) the share of the domestic market taken by imports; (ii) profits and losses; (iii) inventories; (iv) cash flow; and (v) production. In its Definitive Resolution the Commission gave no indication of how it treated other factors mentioned in Article 4.2(a) of the Agreement on Safeguards. In particular, the Definitive Resolution is silent on the following factors: (i) changes in the level of sales; (ii) productivity; and (iii) employment.

[365] See Preliminary Technical Report, Exhibit CEGH-7, pages 77-84.
[366] *Ibid*.
[367] Definitive Resolution, Exhibit CEGH-9, paragraphs 37-38 and 41.

7.269 In its *Final Technical Report*, the DEI examined the following indicators: (i) production; (ii) installed capacity; (iii) utilized capacity; (iv) productivity; (v) sales; (vi) employment; (vii) wages; (viii) level of exports; (ix) cash flow; (x) investment; (xi) product prices; (xii) costs; (xiii) profits and losses; (xiv) inventories; (xv) domestic market share taken by imports; and (xvi) apparent consumption.[368]

7.270 Out of the factors mentioned, in its Final Technical Report the DEI noted a positive trend during the period of investigation in: (i) installed and utilized capacity; (ii) productivity; (iii) sales; (iv) employment and wages; (v) exports; (vi) investment; and (vii) prices of the like domestic product. Finally, the factors that the Commission found to have followed an adverse trend and on which it based its determination of injury, apart from increased imports, were as follows: (i) production; (ii) cash flow; (iii) costs; (iv) profits and losses; (v) inventories; and (vi) domestic market share taken by imports.[369]

7.271 The complainants claim that, in the preliminary and definitive Resolutions, the Commission concluded that there had been serious injury, despite the fact that the indicators examined (production, cash flow, costs, profits and losses, inventories, and share of apparent domestic consumption) indicated the opposite or were inadequately evaluated. The Dominican Republic disagrees and asserts that, in examining the injury indicators, in both the preliminary and the definitive Resolutions, the competent authority made an evaluation of the *overall picture* of the domestic industry.

7.272 Below, the Panel will examine the Commission's evaluation of the factors in dispute. It will then examine the Commission's assessment of the *overall position* of the domestic industry.

Analysis of serious injury factors under Article 4.2(a) of the Agreement on Safeguards

Production

7.273 The complainants point out that, in the Preliminary and Final Technical Reports, the DEI established that production had increased steadily and uninterruptedly[370] and that, nevertheless, in contradiction of this, in its preliminary and definitive Resolutions the Commission concluded that production had contracted.[371] For its part, the Dominican Republic admits that in absolute terms production increased (both in volume and in value); however, it points out that the value decreased when compared with the volume.[372]

7.274 As already mentioned, in the preliminary and definitive Resolutions the Commission concluded that the industry's level of production had suffered sharp contractions, which had made it impossible for FERSAN to implement its plans for expansion.[373]

7.275 However, with respect to this factor, the DEI indicated, in its preliminary as well as in its Final Technical Report, that the volume of production had increased by 25 per cent between 2006 and 2007, by 31 per cent between 2007 and 2008, and by 17 per cent between 2008 and 2009. The total

[368] See Final Technical Report, Exhibit CEGH-10, pages 72-85.
[369] *Ibid*.
[370] The complainants mention that this finding concerning the trend in production is reflected in Table 20 of the Preliminary Technical Report (p. 78). Complainants, first written submission, paragraph 334.
[371] Complainants, first written submission, paragraph 337.
[372] Dominican Republic, first written submission, paragraphs 392-393.
[373] Preliminary Resolution, Exhibit CEGH-5, paragraph 48; Definitive Resolution, Exhibit CEGH-9, paragraph 38. See paragraphs 7.263 and 7.267 of the present Report.

increase in production by volume over the period 2006 to 2009 was 91 per cent. With respect to the value of production, the DEI indicated that it had increased by 4 per cent between 2006 and 2007, by 41 per cent between 2007 and 2008, and by 11 per cent between 2008 and 2009. The total increase in production by value over the period 2006 to 2009 was 63 per cent.[374] The DEI reflected this in the following table:

Table 20. Volume and value of the production of the domestic manufacturer of polypropylene bags and tubular fabric[375]

No.	Indicator	Rate of increase, %			Cumulative increase
		2007/ 2006	2008/ 2007	2009/ 2008	2009/ 2006
1	Production by volume (kg)	25%	31%	17%	91%
2	Production by value (DR$)	4%	41%	11%	63%
3	Installed capacity	58%	0%	0%	58%

7.276 On the basis of the information that can be extracted from the Preliminary and Final Technical Reports, and as distinct from what is reflected in the conclusions of the Commission, domestic production of the directly competitive product increased steadily in percentage terms, both in value and in volume. From the table itself in the Final Technical Report, it follows that, in volume, domestic production recorded a cumulative increase of 91 per cent while, in terms of value, it increased by 63 per cent, over the period of investigation.

7.277 At the same time, the explanation that the Dominican Republic provided in the proceedings before the Panel, namely, that production increased more in terms of volume than of value, is not to be found either in the resolutions of the Commission or in the technical reports of the DEI and, in any event, does not alter the fact that the domestic industry performed well during the period of investigation.

7.278 Therefore, the Panel finds that, with respect to the production factor, the complainants have demonstrated that the Commission did not provide, either in its preliminary or in its definitive determination, a reasoned and adequate explanation of the performance of that factor during the period of investigation and its relationship with the finding on serious injury.

Inventories

7.279 The complainants claim that in the Preliminary and Final Technical Reports the Commission confined itself to establishing inventory levels at the beginning and end of the period of investigation, but failed to explain the nature of the trend over the course of the period. In addition, they question how inventories could have increased when production and sales were increasing and suggest that the explanation of the increase could be that the inventories included other products that did not form part of the investigation.[376] For its part, the Dominican Republic asserts that the total level of inventories increased during the period of investigation because, although sales increased more rapidly than production in percentage terms, they grew less in absolute terms as they began from a lower base and

[374] Preliminary Technical Report, Exhibit CEGH-7, p.77; Final Technical Report, Exhibit CEGH-10, page 73.

[375] Preliminary Technical Report, Exhibit CEGH-7, page 78; Final Technical Report, Exhibit CEGH-10, page 74.

[376] Complainants, first written submission, paragraphs 340-342; reply to questions Nos. 139-140 from the Panel.

therefore inventories continued to increase. Likewise, it points out that although the DEI did not provide figures for inventories year by year, these figures are contained in the financial statements of the Bags Division, which formed the basis for the Commission's determinations.[377]

7.280 With respect to this factor, the Commission noted in the Preliminary Resolution that, during the period of investigation, inventories increased by 169 per cent in volume and 199 per cent in value.[378] In the Definitive Resolution it was mentioned only that inventories had increased.[379] In the Preliminary and Final Technical Reports, the DEI said exactly the same as the Commission in the Preliminary Resolution.[380] Neither the Commission nor the DEI provided any additional explanation concerning the evaluation of this factor.

7.281 Article 4.2(a) of the Agreement on Safeguards does not require any particular method to be followed for examining each factor. For its part, Article 4.2(c) requires the competent authorities to publish a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. Furthermore, Article 3.1, last sentence, of the Agreement on Safeguards stipulates that the report published by the authorities must set forth their findings and reasoned conclusions on all pertinent issues of fact and law. What these provisions require is that the competent authorities evaluate all relevant factors of an objective and quantifiable nature and set forth findings and reasoned conclusions.

7.282 In the present case, as the complainants point out, the Commission only provided information on the trend in inventories with respect to the end points of the period of investigation (that is, the beginning and end), without offering any reasoned additional explanation of how this information tied in with its conclusion. From the information provided by the Commission there is no way of telling how this factor behaved during the period of investigation. The Panel therefore considers that the explanation provided by the Commission concerning the performance of inventories is neither adequate nor reasoned.

7.283 Moreover, with regard to the Dominican Republic's assertion that the information corresponding to this factor can be derived from the financial statements of the Bags Division, the Panel considers that it is not enough to cite the evidence that the competent authority had at its disposal in order adequately to explain this trend, since it is not the task of the Panel to carry out a *de novo* examination based on evidence provided by the parties in the internal procedure.

7.284 Therefore, the Panel finds that, with respect to the inventories factor, the complainants have demonstrated that the Commission did not provide, either in its preliminary or in its definitive determination, a reasoned and adequate explanation of the performance of this factor during the period of investigation and its relationship with the finding on serious injury.

Financial losses

7.285 According to the complainants, the technical reports indicate that the competent authorities evaluated profits and losses as they related to the company FERSAN. In view of the fact that

[377] Dominican Republic, first written submission, paragraphs 394 and 396; reply to question No. 141 from the Panel.

[378] Preliminary Resolution, Exhibit CEGH-5, page 48.

[379] Definitive Resolution, Exhibit CEGH-9, page 38.

[380] Preliminary Technical Report, Exhibit CEGH-7, page 82; Final Technical Report, Exhibit CEGH-10, page 82.

FERSAN also makes other products and engages in export activities, the complainants consider that the financial losses at company level do not automatically explain the losses of the domestic industry as defined by the Commission. Moreover, they consider that the Commission also failed to explain whether or not the pre-tax profit and loss calculation included depreciation costs, as well as indirect costs.[381] For its part, the Dominican Republic points out that the information on financial losses could not be ascribed to other products or activities carried out by other divisions of the FERSAN company, since the analysis was conducted on the basis of financial information for the Bags Division. Moreover, the Dominican Republic considers that the complainants, in suggesting that the depreciation costs and indirect costs should not have been included in the cost of production, seek to ignore the basic principles of accountancy applicable to the calculation of pre-tax profits and losses in corporate financial statements.[382]

7.286 With respect to the profit and loss factor, the Commission noted, in both its preliminary and definitive Resolutions, that the domestic industry's financial result had declined by 206 per cent and that serious injury had been caused to the industry, since it had suffered significant financial losses during the period of investigation.[383] In the Definitive Resolution, the Commission added that "the company had significant financial losses during the period investigated, as evidenced by the increase in inventories, the decrease in cash flow, and the sharp contractions in its level of production".[384]

7.287 For its part, in its technical reports, the DEI indicated that from 2006 to 2007 the company recorded a decrease in the pre-tax result for the period of 116 per cent. For the period from 2007 to 2008, pre-tax losses increased by 296 per cent, and in the period from 2008 to 2009 pre-tax losses increased by 27 per cent. The DEI suggests that this situation appears to have been influenced by a significant increase in sales costs. Moreover, during the period of investigation the company increased the amount of its medium and long-term debt by 825 per cent, for the purpose of buying more modern machinery and improving its productive efficiency. Therefore, overall, during the period examined pre-tax profits fell by 206 per cent.[385]

7.288 With respect to the evaluation of this factor, the Panel considers that, inasmuch as the Commission provided the Bag Division's percentage increases in pre-tax losses and debts for each year of the period of investigation, as well as over the complete period of investigation, the complainants have failed to make the case that it did not give a reasoned and adequate explanation of the performance of the factor in question.

7.289 With regard to the complainants' argument concerning the inclusion of other products that did not form part of the investigation in the analysis of injury, the Panel notes that the Commission conducted its analysis of injury by considering the Bags Division, the specific division used by FERSAN to manufacture the directly competitive products. The Bags Division produces other products, in addition to polypropylene bags. The Dominican Republic has stated that the directly competitive product accounts for more than 85 per cent of the Bags Division's total output. The complainants have not submitted any evidence capable of invalidating this assertion, as a matter of fact. Therefore, the Panel considers that the complainants have failed to show that in this respect the

[381] Complainants, first written submission, paragraphs 348-349 and 351-352.
[382] Dominican Republic, first written submission, paragraphs 400-401; second written submission, paragraph 103.
[383] Preliminary Resolution, Exhibit CEGH-5, paragraphs 48-49.
[384] Definitive Resolution, Exhibit CEGH-9, paragraph 38.
[385] Preliminary Technical Report, Exhibit CEGH-7, pages 81-82; Final Technical Report, Exhibit CEGH-10, page 81.

analysis of injury conducted by the Commission was not based on information that made it possible to present a reliable and representative overview of the domestic industry. This argument will be examined in more detail later in this section.[386]

7.290 Moreover, with regard to the consideration of indirect costs and depreciation in the evaluation of the production costs, the Panel considers that the complainants have failed to show that the Commission acted in a manner contrary to its obligations under Article 4.2(a) of the Agreement on Safeguards, since these factors also have a bearing on the situation of the domestic industry. As observed by the panel in *United States – Line Pipe*, in a finding that was not appealed:

> If a competent authority were only to take into account costs incurred specifically in respect of the product under investigation, it would not comply with the Article 4.2(a) [of the Agreement on Safeguards] requirement to evaluate all relevant factors "having a bearing on the situation of" the relevant domestic industry.[387]

7.291 Therefore, the Panel finds that, with respect to the profit and loss factor, the complainants have not made the case that the Commission failed to provide, in its preliminary and definitive determinations, a reasoned and adequate explanation of the performance of this factor in relation to the finding on serious injury.

Share of imports and production in apparent domestic consumption

7.292 With respect to this factor, the complainants argue that the Commission's conclusion, namely, that imports took an increasing share of apparent domestic consumption (ADC) during the period of investigation while the domestic industry's share decreased, contradicts the DEI's own findings in the Final Technical Report[388], since as Table 21 "Apparent Consumption" itself shows, whereas from 2007 the domestic product tended steadily and uninterruptedly to increase its share of the market, imports displayed the opposite trend.[389] For its part, the Dominican Republic denies this and says that this indicator should be analysed within its context, namely, that of a sector which made significant investments between 2006 and 2009 and which, although it managed to double its sales and production volumes, did so at the cost of sacrificing income from sales. Moreover, it took the domestic industry until 2009 to win back a share of the market greater than that which it had achieved in 2006.[390]

7.293 With respect to this factor, in the Definitive Resolution the Commission concluded that relative to domestic production imports had maintained a steadily increasing trend within the period of investigation. It also indicated that the increase in imports had caused injury to the domestic industry, insofar as it had been found that the increase in the value and volume of imports had caused the industry to lose a significant proportion of its share of ADC.[391]

7.294 For its part, in its Preliminary and Final Technical Reports, the DEI noted that ADC was 3,145,919 kg of the relevant product in 2006, 4,614,240 kg in 2007, 5,283,539 kg in 2008, and 5,071,361 kg in 2009. On the basis of this information, the DEI estimated rates of increase of 47 per

[386] See paragraph 7.325 of the present Report.
[387] Panel Report, *US – Line Pipe*, paragraph 7.227.
[388] Complainants, first written submission, paragraph 366.
[389] Complainants, first written submission, paragraphs 362-364.
[390] Dominican Republic, first written submission, paragraph 405.
[391] Definitive Resolution, Exhibit CEGH-9, paragraph 37.

cent for the period from 2006 to 2007, 15 per cent for the period from 2007 to 2008 and -4 per cent for the period from 2008 to 2009.[392] Furthermore, it calculated that the domestic production intended for the home market represented 39 per cent of ADC in 2006, 33 per cent in 2007, 36 per cent in 2008 and 43 per cent in 2009. At the same time, the DEI estimated that imports, as a percentage of ADC, had a 61 per cent share in 2006, a 67 per cent share in 2007, a 64 per cent share in 2008, and a 57 per cent share in 2009.[393]

7.295 The DEI presented the information on this indicator in Table 21 "Apparent consumption" of its Preliminary and Final Technical Reports[394], the relevant data from which are reproduced below:

Variables	**Share, % (volume)**			
	2006	**2007**	**2008**	**2009**
Production for the home market/ADC	39%	33%	36%	43%
Imports investigated/ADC	61%	67%	64%	57%

7.296 On the basis of this information, the DEI concluded that the domestic production of polypropylene bags and tubular fabric as a percentage of ADC had constantly decreased, falling from 39 per cent in 2006 to 36 per cent in 2008, while the share of imports as a percentage of ADC had increased. Concerning the 2009 increase in the domestic industry's share and the decrease in that of imports, the DEI suggested that this phenomenon was a question of a cause-and-effect relationship basically due to the general trend in total imports into the Dominican Republic.[395]

7.297 After analysing the information provided by the DEI, the Panel notes that the domestic industry's share of ADC fell only in 2007 (relative to 2006), while from that year onwards it increased steadily, even exceeding in 2009 the level it had reached in 2006. Correspondingly, the share of ADC taken by imports increased only in 2007 with respect to the level reached in 2006. From 2007 onwards, however, the share of ADC taken by imports fell steadily and in 2009 reached a level lower than its initial level in 2006.

7.298 Thus, the Panel observes that there is no support for the conclusion reached by the Commission with respect to this indicator in the Definitive Resolution if the period of investigation is considered and that the information provided in the DEI's Final Technical Report indicates that the trend in this indicator was favourable for the domestic industry. Domestic production's market share improved during the period of investigation, while that of imports declined.

7.299 The Panel therefore finds that, with respect to the share of ADC taken by imports and production, respectively, the complainants have made the case that in its final determination the Commission failed to provide a reasoned and adequate explanation of the performance of this factor during the period of investigation and of its relationship with the finding on serious injury.

[392] The Preliminary Technical Report refers to a growth rate of ADC of 41 per cent for the period 2008/2009, a figure that is corrected in the Final Technical Report. Preliminary Technical Report, Exhibit CEGH-7, page 82; Final Technical Report, Exhibit CEGH_10, page 82.

[393] Preliminary Technical Report, Exhibit CEGH-7, pages 82-83; Final Technical Report, Exhibit CEGH-10, pages 82-83.

[394] Preliminary Technical Report, Exhibit CEGH-7, page 83; Final Technical Report, Exhibit CEGH-10, page 83.

[395] See Final Technical Report, Exhibit CEGH-10, page 85.

Cash flow

7.300 With respect to cash flow, the complainants assert that in the Final Technical Report the Commission noted that there had been a cumulative reduction in this factor during the period of investigation, but failed to show its trend or development during that period. Moreover, they point out that the Commission selectively considered specific intervals of time that did not coincide with the period of investigation[396] to demonstrate that there had been significant falls, thereby precluding a complete and reliable assessment of the factor in question. In addition, they argue that the cash flow was evaluated at company level, without separating out the information corresponding to other products that did not form part of the investigation.[397] For its part, the Dominican Republic notes that an analysis was carried out both for separate 12-month periods and for the whole of the period from 2006 to 2009 and for this reason considers that the trends during the period were analysed. It also notes that the cash flow analysis was carried out on the basis of the financial statements for the Bags Division and not for the entire company, as claimed by the complainants.[398]

7.301 In its Definitive Resolution, the Commission concluded that, "as a consequence of the imports of the product under investigation, the company [FERSAN] suffered significant financial losses during the period investigated, as evidenced by the increase in inventories and *decrease in cash flow*, as well as by sharp contractions in its level of production".[399]

7.302 Furthermore, from the Preliminary Technical Report it appears that the DEI was not able to analyse this indicator until the final stage of the investigation, when FERSAN supplied the cash flow statements for the period from 2006 to 2009. At the same time, from the Final Technical Report it appears that the information that FERSAN submitted embraced the period between July 2006 and June 2009. On the basis of this information, the DEI reported the data by annual periods that covered July to June of each year. According to the DEI, the net cash available or used for operating activities showed a cumulative reduction for the period of 578 per cent.[400] In addition, the DEI pointed out that, for the period from July 2007 to June 2008, as compared with the period from July 2008 to June 2009, the net cash for the company's operating activities decreased by 121 per cent, continuing the negative trend for the period from July 2006 to June 2007, as compared with the period from July 2007 to June 2008, when the net cash for the company's operating activities decreased by 457 per cent.[401]

7.303 The most appropriate procedure would have been for the Commission to have carried out its cash flow analysis by taking into account periods of time that coincided precisely with the annual intervals of the period of investigation. However, the Panel recognizes that in some circumstances it can be difficult for national authorities to obtain information from the interested parties in a form that coincides with this time-frame. Although it was not ideal for the information on cash flow to have left out the periods from January to June 2006 and from July to December 2009, this of itself does not mean that the Commission's evaluation was inadequate, since the Commission at least had before it

[396] According to the complainants, the intervals that the Commission considered were: (i) June 2006 to July 2007; (ii) July 2007 to June 2008; and (iii) July 2008 to June 2009. As the period of investigation ran from January 2006 to December 2009, the periods that were not considered in the analysis of this factor were: (i) January to May 2006; and (ii) July to December 2009.

[397] Complainants, first written submission, paragraphs 355-358.

[398] Dominican Republic, first written submission, paragraphs 403-404. The Dominican Republic asserts that this follows clearly from Section 8.B of the Final Technical Report, entitled "Analysis of the relevant domestic industry economic and financial indicators".

[399] Definitive Resolution, Exhibit CEGH-9, paragraph 38 (italics added).

[400] Final Technical Report, Exhibit CEGH-10, page 76.

[401] Final Technical Report, Exhibit CEGH-10, pages 76-77.

information on the trend in this factor corresponding to annual periods and explained how the factor had evolved over the time periods with respect to which it did have information. The complainants have not explained how this aspect would have resulted in an inadequate determination of the behaviour of cash flow during the period of investigation. Therefore, the Panel concludes that the complainants have not succeeded in demonstrating that the Commission failed to provide, in its definitive determination, a reasoned and adequate explanation of the performance of cash flow in relation to the finding on serious injury.[402]

Overall position of the domestic industry in the preliminary and final determinations

7.304 According to Article 4.1(a) of the Agreement on Safeguards, serious injury is to be taken to mean a *significant overall impairment* in the position of a domestic industry. The Appellate Body has stated that it is "only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry".[403]

7.305 To evaluate the *overall position* of the domestic industry, the Panel considers it necessary to analyse the findings of the Commission on all the relevant factors (including the factors in dispute and the other factors analysed), as well as the findings and conclusions contained in the technical reports of the DEI on which the resolutions are based. On the basis of this information, it will be able to examine whether the competent authority gave a reasoned and adequate explanation of the existence of significant overall impairment of the position of the domestic industry, sufficient to demonstrate the existence of serious injury.

7.306 As previously mentioned, in the Preliminary Resolution the Commission analysed four injury factors[404] and in the Definitive Resolution six injury factors[405], without referring in either of these resolutions to other factors mentioned in Article 4.2(a) of the Agreement on Safeguards. In the Preliminary Resolution, the Commission made no reference to the performance of the following factors: (i) share of the domestic market taken by increased imports; (ii) changes in the level of sales; (iii) productivity; (iv) capacity utilization; and (v) employment. Likewise, in the Definitive Resolution, the Commission said nothing about the performance of the following factors: (i) changes in the level of sales; (ii) productivity; (iii) capacity utilization; and (iv) employment.

7.307 At the same time, the Preliminary Resolution, on the basis of the factors to which the Commission did make reference, found that the domestic industry was in critical circumstances and, after the relevant factors had been evaluated, it was determined that the increase in imports of the product under investigation had caused serious injury to the domestic industry (inasmuch as during the period of investigation it had suffered significant losses that had jeopardized its sustainability), so

[402] In paragraph 38 of the Definitive Resolution, the Commission noted that the decrease in cash flow was part of the evidence for a causal link between the increase in imports and FERSAN's financial losses. The Panel wishes to point out that its finding with respect to the cash flow determination in this section only involves the relationship between this factor and the serious injury determination and does not extend to the alleged causality mentioned by the Commission. The causal link is analysed later in this report. See section VII.D.5 of the present Report.

[403] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 139 (original italics).

[404] The factors which the Commission expressly considered in the Preliminary Resolution are: (i) increase in imports; (ii) stocks; (iii) production; and (iv) profits and losses.

[405] The factors that the Commission expressly considered in the Definitive Resolution are: (i) increase in imports; (ii) stocks; (iii) production; (iv) profits and losses; (v) domestic industry's share of domestic apparent consumption; and (vi) cash flow.

that any delay would involve damage which it would be difficult to repair.[406] In the case of the Definitive Resolution, on the basis of the six factors considered, the Commission found that the increase in imports had caused the domestic industry to lose a significant proportion of its share of ADC, thereby doing it serious injury. Moreover, it indicated that, as a consequence of the increase in imports of the product under investigation, the company had suffered significant financial losses during the period of investigation, as evidenced by an increase in inventories, a decrease in cash flow and sharp contractions in its level of production.[407]

7.308 In addition, in the Definitive Resolution, the Commission noted that FERSAN had purchased new machinery as part of its adjustment plan, which had helped to increase the installed capacity for manufacturing square-bottom and valve bags, with a production capacity equal to twice the domestic demand, and that the company had added a third work shift.[408]

7.309 On the other hand, the Panel found that, in both the preliminary and the final phase of the investigation, the DEI recorded that the following factors had performed favourably during the period of investigation: (i) sales; (ii) installed capacity and capacity utilization; (iii) employment and wages; (iv) value of exports; (v) prices of the like domestic product; and (vi) investment.[409] In addition, in the Final Technical Report, the DEI noted that the productivity factor had also performed favourably.[410] It should be pointed out that in the preliminary and definitive Resolutions the Commission did not provide any explanation of the consideration that it gave to these factors in its serious injury determination.

7.310 Furthermore, among the factors found by the Commission to have performed negatively during the period of investigation (production, cash flow, costs, profits and losses, inventories and production's share of apparent domestic consumption), the Panel has already found that the Commission's determinations relating to production, and share of imports and production in apparent inventories domestic consumption are not based on a reasoned and adequate explanation.[411]

7.311 When the above is taken into account, the Commission's considerations in the preliminary and final determinations do not appear to be duly supported by the facts nor by an adequate evaluation of the relevant factors. Firstly, the level of domestic production and its share of apparent domestic consumption performed favourably within the period of investigation. Secondly, the Commission's inventory evaluation is inadequate for the reasons already given. Thirdly, according to the information provided by the DEI, the performance of the factors corresponding to sales, installed capacity and capacity utilization, productivity, employment and wages, value of exports, prices of the like domestic product and investment was positive. Fourthly, the Commission also found that FERSAN had purchased new machinery for manufacturing bags with different characteristics, with a capacity equal to twice the domestic demand, and had added a third work shift within the company, which represented a favourable aspect for the domestic industry. Fifthly, the only factors actually

[406] Preliminary Resolution, Exhibit CEGH-5, paragraphs 48-49.
[407] Definitive Resolution, Exhibit CEGH-9, paragraphs 37-38
[408] Definitive Resolution, Exhibit CEGH-9, paragraph 41.
[409] See Preliminary Technical Report, Exhibit CEGH-7, pages 77-81; Final Technical Report, Exhibit CEGH-10, pages 73-85.
[410] See Final Technical Report, Exhibit CEGH-10, p.74.
[411] See paragraphs 7.278, 7.284 and 7.299 of the present Report.

shown to have performed unfavourably during the period of investigation are: (i) cash flow; (ii) costs; (iii) profits and losses; and (iv) inventories.[412]

7.312 The Panel recalls that, as pointed out by the Appellate Body, the standard for the existence of *serious injury* under the definition contained in Article 4.1(a) of the Agreement on Safeguards is very strict and rigorous: "the word 'injury' is qualified by the adjective 'serious', which … underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met".[413]

7.313 Considering that the injury evaluated within the context of the Agreement on Safeguards is *serious injury*, the Panel does not believe that the fact that four factors evaluated displayed a negative trend, as compared with the evidence that seven factors (including important elements indicative of the position of the domestic industry, such as production, sales, installed capacity and capacity utilization, and production's share of domestic consumption) performed positively, without the competent authority having provided a sufficient explanation, can result in an adequate and reasoned conclusion with respect to the existence of serious injury.

Conclusions

7.314 For the reasons set out above, the Panel finds that the complainants have made the case that the indicators of serious injury mentioned in Article 4.2(a) of the Agreement on Safeguards were inadequately evaluated and that the explanations provided by the competent authority in the preliminary and final determinations do not support the conclusion that the overall position of the domestic industry indicated *significant overall impairment*. Consequently, the complainants have made the case that in its preliminary and final determinations the Commission failed to provide a reasoned and adequate explanation of the determination of the existence of serious injury.

7.315 The Panel therefore concludes that the complainants have made the case that, in its findings in the preliminary and final determinations on the existence of serious injury, the Dominican Republic acted inconsistently with its obligations under Articles 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards. In imposing a safeguard measure on the basis of a determination of the existence of serious injury that is inconsistent with Article 4.1(a) of the Agreement on Safeguards, the Dominican Republic also acted inconsistently with its obligations under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(ii) Whether the Commission failed to carry out a disaggregated and complete analysis of the domestic industry

7.316 Having concluded in the previous section that in its preliminary and final determinations the Commission failed to provide a reasoned and adequate explanation of the preliminary and final determinations of serious injury, there should, in principle, be no need to examine whether the

[412] The Panel notes that the Commission found an increase in imports of the product under investigation in absolute and relative terms. In the corresponding section of the present Report, the Panel found that the complainants had failed to demonstrate that the determination concerning increased imports was inconsistent with obligations under the covered agreements. In any case, the Commission did not make a separate analysis of this factor in its preliminary and final determinations of the existence of serious injury.

[413] Likewise, the Appellate Body has indicated that the standard of *serious injury* in the Agreement on Safeguards is a very high one when contrasted with the standard of *material injury* envisaged under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the GATT 1994. See Appellate Body, *US – Lamb*, paragraph 124.

Commission failed to carry out a disaggregated and complete analysis of the domestic industry for the purposes of the injury analysis and whether that failure resulted in the Commission acting inconsistently with Articles 4.1(a), 4.2(a), 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

7.317 However, with a view to placing on record a factual analysis of the question raised by the complainants, the Panel will analyse whether, as a matter of fact: (i) the Commission failed to consider the production of tubular fabric for the commercial market and therefore carried out an incomplete analysis of the domestic industry; and (ii) the Commission failed to make an adequate analysis of the domestic industry by considering in its analysis products different from the like or directly competitive product, as well as exports of the product in question.

Whether the Commission made an incomplete analysis of the domestic industry

7.318 The complainants point out that, in the determinations made by the competent authority, "there was no indication of disaggregated information being available for the segment producing tubular fabric and the segment producing polypropylene bags, 'assumed to be a single product'". Moreover, "neither was there any indication of the availability of information concerning the production of tubular fabric not 'assumed' to be included in finished bag production. That is … concerning the production of tubular fabric intended for the commercial market". Therefore, the complainants consider that in basing itself on the aggregated information of the Bags Division, the Commission failed to consider the information relating to the commercial market for tubular fabric.[414]

7.319 The Panel notes that in its preliminary and definitive Resolutions the Commission concluded that there had been serious injury to the domestic industry, meaning the company FERSAN, in its capacity of producer of tubular fabric and polypropylene bags. In the Initial Technical Report, the DEI stated: "It should be pointed out that in submitting information relating to the production volumes of the product under investigation the applicant company assumed it to be a single product, that is, the finished bag".[415] Moreover, in its Initial Resolution the Commission indicated that the trends in polypropylene bags and tubular fabric would be examined in conjunction.[416]

7.320 At the same time, the Initial, Preliminary and Final Technical Reports indicate that, for the purposes of analysis of the serious injury factors, the DEI took into account the financial statements of the company FERSAN relating specifically to the Bags Division, the division which produces the two relevant products, for the years 2006-2009.[417] From the analysis of the financial statements submitted by the Dominican Republic[418] the Panel notes that the Bags Division "has as its main objective the production and sale of polypropylene fabric bags, mesh bags, cordage and ropes, intended for both the local market and the international market".[419]

7.321 With regard to these financial statements, the Dominican Republic explained before the Panel that the Bags Division produces both tubular fabric and polypropylene bags and that the financial

[414] According to the complainants, it is a fact that the company FERSAN reserves part of its output for the commercial market given that the DEI found that FERSAN sells part of the tubular fabric on the commercial market, for example, to the company FIDECA. Complainants, first written submission, paragraphs 301-302.

[415] Initial Technical Report, Exhibit CEGH- 3, page 14.

[416] Initial Resolution, Exhibit CEGH-2, page 5.

[417] Initial Technical Report, Exhibit CEGH-3, page 22; Preliminary Technical Report, Exhibit CEGH-7, page 77; Final Technical Report, Exhibit CEGH-10, pages 72-73.

[418] Exhibits RDO-13, RDO-14 and RDO-15.

[419] Exhibits RDO-13, page 000165; RDO-14, page 000128; and RDO-15, page 000178.

statements it submitted contain information about both products, including financial information corresponding to the portion of tubular fabric destined for the commercial market. Moreover, it argued that "[t]o the extent that the bags and the tubular fabric are produced by the same division, all the data on production, inventories and sales prepared for this division necessarily include the production, sales and inventories relating to both products".[420]

7.322 On the basis of the above information, the Panel notes that, in actual fact, the Commission did not provide in its published report separate information on tubular fabric, on the one hand, and polypropylene bags, on the other. On the other hand, the complainants have failed to demonstrate, as a matter of fact, that the financial statements corresponding to the Bags Division, which produces both tubular fabric and polypropylene bags, did not include information on tubular fabric intended for the commercial market.

Whether the Commission included in its analysis products different from the like or directly competitive product and exports

7.323 In relation to the above, the complainants point out, in reply to the arguments put forward by the Dominican Republic in its own defence, that the Bags Division's information also includes the manufacture of products which are not the like or directly competitive product and, moreover, that this information includes sales for the international market of the like or directly competitive product (that is, exports).[421]

7.324 It is not disputed that, in addition to polypropylene bags, the Bags Division produces other products that did not form part of the investigation and that information corresponding to these products was considered in the serious injury analysis, since this information was not excluded from the financial information that formed the basis of the competent authority's serious injury determination. The Dominican Republic, however, points out that these other products constitute only a minor part of the Bags Division's total output, since the directly competitive product's share of the division's total output amounted to more than 85 per cent during the period.[422]

7.325 As already indicated, the Commission conducted its injury analysis by considering the specific division of the company that produces the directly competitive products. In addition, the Panel notes that, according to the Dominican Republic, the directly competitive product's share of the Bags Division's total output amounts to more than 85 per cent. The complainants have not produced any evidence capable of invalidating this assertion, as a matter of fact.[423]

7.326 The complainants have argued that the Commission based itself on data that embraced more products than the directly competitive product, as well as on information that included exports of that product, and that the arguments of the Dominican Republic constitute *ex post* explanations.[424] Irrespective of whether, in the present case, the competent authority may have based its determination

[420] Dominican Republic, first written submission, paragraph 359.
[421] Complainants, opening statement at the first meeting of the Panel, paragraphs 86-88.
[422] Moreover, the Dominican Republic affirms that, by virtue of Article 4.2(a) of the Agreement on Safeguards and Article 3.6 of the Anti-Dumping Agreement, it was possible to use the information supplied by the Bags Division, which is responsible for the production of the more restricted group of products that includes the like product. At the same time, the Dominican Republic points out that there is no obligation to limit the analysis solely to the production intended for the domestic market, by excluding the fraction of the like product that was exported. Dominican Republic, second written submission, paragraphs 98-100.
[423] See paragraph 7.289 of the present Report.
[424] Complainants, opening statement at the second meeting of the Panel, paragraphs 52-53.

on information concerning a group of products broader than the directly competitive product itself, the complainants have not explained how the method followed by the Commission and, in particular, the group of products that the Commission considered for the purposes of its analysis could have resulted in an inadequate explanation of the trend in the domestic industry indicators during the period of investigation. Nor have the complainants explained how the fact that the Commission may have included in its analysis information relating to exports of the like or directly competitive product could have affected the outcome of the analysis carried out by the Commission and resulted in an inadequate explanation of the trend in the domestic industry indicators during the period of investigation.

5. Whether the competent authority acted inconsistently with obligations under the covered agreements as regards the determination of a causal link between the increase in imports and the serious injury

7.327 In the previous section of this Report, the Panel concluded that, in its finding of serious injury in both the preliminary and the final determinations, the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.328 Having reached these conclusions with regard to the Dominican Republic's assessment relating to the determinations of serious injury, it would not be possible for the Panel to find that the competent authority had demonstrated the existence of a causal link between the increase in imports and serious injury whose existence had not been proved.[425] It is not necessary, therefore, for the Panel to issue any finding on whether the Dominican Republic proved that the increase in imports *caused* serious injury to the domestic industry.[426]

7.329 Nevertheless, without going any further, the Panel is able issue a factual finding on the assessment of the causal link by the Dominican Republic's competent authority, which is consonant with its responsibility to assess the facts in this DSU proceeding.[427]

(a) Main arguments of the parties

(i) Complainants

7.330 The complainants argue that the Commission incorrectly determined the existence of a causal link between the increase in imports and the serious injury in the preliminary and final determinations, inasmuch as it failed to demonstrate: (i) the link between the alleged increase in imports and the serious injury to the domestic industry, using a relevant analytical method; and (ii) that the harmful effects caused by factors other than imports were not attributed to the imports under investigation. Consequently, the preliminary and final determinations regarding the causal link were inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a) and 4.2 of the Agreement on Safeguards, as well as with

[425] This statement finds support in the Appellate Body Report *Argentina – Footwear (EC)*, paragraph 145; and in the Panel Reports in *Korea – Dairy*, paragraph 7.87; *Argentina – Preserved Peaches*, paragraph 7.135; and *Chile – Price Band System*, paragraph 7.176.

[426] Nor is it necessary for the Panel to rule on the preliminary issue raised by the Dominican Republic with regard to this claim. See paragraphs 7.98-7.111 of the present Report.

[427] This approach has been followed by panels in previous cases when it was determined that the complainant had not succeeded in proving one or more of the elements on which the causal link was assessed in the terms of Article 4.2(b) of the Agreement on Safeguards. See also the Panel reports, *Argentina – Preserved Peaches*, paragraphs 7.135-7.139; and *Chile – Price Band System*, paragraphs 7.175-7.180.

Article 6 of the Agreement on Safeguards with regard to the provisional measure, and with Article XIX:1(a) of the GATT 1994.[428] Moreover, they indicate that, because the Dominican Republic failed to comply with Article 4.2(b), second sentence, of the Agreement on Safeguards, the provisional and final measures are also inconsistent with Article 5.1 of the Agreement on Safeguards.[429]

7.331 As regards their first argument, the complainants state that the Commission did not examine the alleged causation by means of a relevant analytical method. According to the complainants, the Commission's causation analysis was limited to: (i) two paragraphs in the Definitive Resolution (paragraphs 37 and 38); and (ii) the serious injury analyses contained in the Preliminary and Final Technical Reports.[430] In their opinion, the Commission found that there was a causal link on the basis of mere assertions in the reports and resolutions that the increase in imports had caused serious injury to the domestic industry[431]; these assertions do not meet the requirements prescribed in Article 4.2(b) of the Agreement on Safeguards. The complainants also indicate that the Definitive Resolution contains a confused finding regarding causation.[432]

7.332 Concerning their second argument, the complainants assert that neither the reports by the DEI nor the resolutions of the Commission contain a non-attribution analysis of the harmful effects caused by factors other than the imports investigated and that such an omission is inconsistent with Articles 4.2(b), second sentence, 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. Specifically, according to the complainants, the Dominican Republic did not conduct a non-attribution analysis of the financial losses, the increase in stocks and the reduced cash flow. Moreover, they state that during the Panel proceedings the Dominican Republic put forward *ex post* explanations of the non-attribution of injury to factors other than the imports, which do not contain references to the competent authority's reports or resolutions.[433]

7.333 In the complainants' view, the finding of the existence of financial losses when the domestic industry's revenue had shown a large increase suggests that these losses were caused by factors other than the imports (for example, production costs, operating costs and financial costs).[434]

---

[428] Complainants, first written submission, paragraphs 380-381, 404 and 434; opening statement at the first meeting of the Panel, paragraph 97; second written submission, paragraphs 231-232.

[429] Complainants, second written submission, paragraph 235; replies to Panel questions Nos. 39, 82, 85 and 86.

[430] Complainants, first written submission, paragraphs 383 and 397; opening statement at the first meeting of the Panel, paragraph 98.

[431] Complainants, first written submission, paragraphs 389-393; opening statement at the first meeting of the Panel, paragraph 99. According to the complainants, these assertions consist of the following: (i) it was ascertained that the increased imports had caused a significant decline in the domestic industry's share of apparent domestic consumption; and (ii) as a result of the increased imports, the firm suffered large financial losses during the period investigated, as could be seen from the increased inventories, reduced cash flow and sharp contraction in production levels. Complainants, first written submission, paragraph 394.

[432] Complainants, first written submission, paragraphs 395 and 396. According to the complainants, the confusion consists of referring to the increased inventories, reduced cash flow and contraction in production as evidence of financial losses. Apparently, these effects were not caused by the imports. Nevertheless, the complainants assert that there was no adequate non-attribution analysis.

[433] Complainants, first written submission, paragraphs 405-407, 410-411, 416-418, 423-425 and 428; opening statement at the first meeting of the Panel, paragraphs 102-104; second written submission, paragraph 232; reply to Panel question No.149.

[434] Complainants, first written submission, paragraphs 412-416.

7.334 As to the increase in inventories (even when sales had risen to a level that exceeded output), the complainants consider that this could have been caused by factors other than imports and that the explanations given by the Dominican Republic in this regard cannot be found in either the reports or the resolutions. They also consider that the information on inventories refers to the Bags Division as a whole, which produces other goods in addition to the like or directly competitive product (in particular ropes, cordage and mesh bags) but that the Dominican Republic did not conduct a non-attribution analysis in respect of the other factors.[435]

7.335 Regarding the cash flow, the complainants point out that this factor too was assessed for the Bags Division and that the Commission did not distinguish between the effects attributable to the production of goods or to activities other than domestic sales (for example, exports) by this Division.[436] Furthermore, in their view, the effects of factors other than imports that had an effect on cash flow were likewise not considered separately.[437]

7.336 The complainants also state that the Commission did not analyse the possible impact on FERSAN's operations caused by competition from other domestic producers that had been excluded from the consideration of the domestic industry, in order to distinguish this impact from that of competition from imports.[438]

(ii) Dominican Republic

7.337 The Dominican Republic contends that, contrary to what is alleged by the complainants, the Commission issued findings and reasoned conclusions on the existence of a causal link in the terms of Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.[439] In its view, the evidence of the existence of a causal link is not limited to the section on causation in the DEI's Preliminary and Final Technical Reports cited by the complainants, but also includes the DEI's analysis of the indicators of injury in addition to the paragraphs in the Definitive Resolution cited by the complainants. As stated, the competent authorities' conclusions show a direct link between the increase in imports and the serious injury and, accordingly, are not based on "mere assertions".[440]

7.338 In addition, the Dominican Republic states that the complainants' assertions regarding the shares of the domestic industry and of imports in apparent domestic consumption are mistaken[441] and that the Commission provided an adequate and reasoned explanation of the causation.[442]

---

[435] Complainants, first written submission, paragraphs 418-423; opening statement at the first meeting of the Panel, paragraph 107.

[436] Complainants, first written submission, paragraph 426; opening statement at the first meeting of the Panel, paragraphs 108-109.

[437] For example, the increase in costs owing to higher fuel and energy prices, the increase in costs owing to the larger number of employees and a higher wage bill and to the payment of interest and commissions on loans. Complainants, first written submission, paragraph 427.

[438] Complainants, first written submission, paragraphs 429-433; opening statement at the first meeting of the Panel, paragraphs 110-111.

[439] Dominican Republic, first written submission, paragraphs 437-440.

[440] Dominican Republic, first written submission, paragraphs 437-440, 442.

[441] According to the Dominican Republic, because of the large influx of cheap imports, the "timid recovery" in the domestic industry's share was only achieved by selling "at a loss"; this was the cause of the financial losses suffered by the domestic industry. As to imports, it indicates that the "slight decrease up to the end of the period", of an "incidental and temporary nature" did not manage to reverse the significantly upward

7.339 The Dominican Republic also contends that in the technical reports the Commission provided a reasoned and adequate explanation of how the financial losses were attributable to the increase in imports, so that it cannot be maintained that a non-attribution analysis should have been conducted in this regard. Concerning the increase in inventories, the Dominican Republic states that this can be explained by two factors that emerge from the DEI's technical reports: (i) the increase in FERSAN's output; and (ii) the impossibility of increasing market share despite prices artificially kept low. By displacing sales of the domestic product, imports were one of the reasons for the increase in inventories, both in terms of value and volume. The Commission's explanations regarding attribution of the increase in inventories to the increase in imports were thus reasoned and adequate.[443]

7.340 With regard to the reduced cash flow, the Dominican Republic affirms that the financial statements used to assess serious injury were based on the FERSAN division that only produces bags and tubular fabric, so that it could not be claimed that factors other than imports were not distinguished, for example, increased production costs, operating costs and higher financial costs. The Dominican Republic adds that the increase in these costs is related to FERSAN's increased output and expansion plan, and that the trend in these factors reflected the firm's decision to keep prices low and output high, taken in the light of the increase in imports.[444]

7.341 With regard to the exclusion of certain domestic producers, the Dominican Republic states that this was done in conformity with its domestic legislation and that both the legislation and the exclusion of the producers were consistent with the WTO Agreements. The Dominican Republic adds that the two domestic producers identified by the complainants (FIDECA and Textiles TITÁN) are assembly firms that add minimum value to the tubular fabric they make into bags. Consequently, any injury suffered by FERSAN as a result of competition from these firms would be directly attributable to the imports of tubular fabric, which is the product investigated in these proceedings.[445]

(b) Main arguments of the third parties

(i) United States

7.342 The United States affirms that there is no basis for the complainants' claim that Article 2.1 of the Agreement on Safeguards requires the competent authority to conduct a separate analysis of the volume of imports in order to determine whether it was "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry before continuing with the rest of the analysis. In its view, it suffices to find that imports have increased, and then, in the remainder of the analysis, to address the question of whether those increased imports have caused serious injury or threat of serious injury.[446]

(ii) Panama

7.343 Panama states that the Dominican Republic's investigating authority did not substantiate the determination of serious injury and causation for an industry that enjoys a favourable situation, and also failed not only to prove that it is currently being affected by the alleged increase in imports but

---

trend established by the previous increases in 2007 and 2008. Dominican Republic, first written submission, paragraphs 443-445.

[442] Dominican Republic, first written submission, paragraph 446.

[443] Dominican Republic, first written submission, paragraphs 405, 406, 447-452, 454, 456 and 457.

[444] Dominican Republic, first written submission, paragraphs 459-461.

[445] Dominican Republic, first written submission, paragraphs 464-466.

[446] United States, third party written submission, paragraph 4.

also to identify other factors not directly related to the imports that might have affected the domestic industry. In light of the foregoing, Panama considers that the investigation by the investigating authority in order to determine the causal link was flawed.[447]

(c) Assessment of the facts

7.344 Pursuant to Articles 2.1 and 4.2(b) of the Agreement on Safeguards, it must be demonstrated that there is a causal link between increased imports of the product concerned and the serious injury. When factors other than increased imports are causing injury to the domestic industry, such injury shall not be attributed to increased imports.

7.345 In *US – Wheat Gluten*, the Appellate Body stated that:

> "Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*."[448]

7.346 Furthermore, the Panel in *Argentina – Footwear (EC)*, in a finding upheld by the Appellate Body, stated that a proper approach that could be adopted by a Panel in order to evaluate whether a Member has complied with the provisions of Article 4.2(a) and 4.2(b) of the Agreement on Safeguards with regard to a causal link would consist of examining the following points: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why, nevertheless, the data show causation; (ii) whether the analysis of the conditions of competition between the domestic and the imported product demonstrate a causal link between the imports and the injury; and (iii) whether other relevant factors have been analysed and whether it has been established that injury caused by factors other than imports has not been attributed to the imports.[449]

7.347 The Panel notes that the Commission's causation analysis can be found in paragraphs 37 and 38 of the Definitive Resolution and paragraph 49 of the Preliminary Resolution, as well as in the analyses of serious injury in the Preliminary and Final Technical Reports, and in the section on causation in both technical reports.

---

[447] Panama, third party written submission, paragraphs 36 and 38.

[448] Appellate Body Report, *US – Wheat Gluten*, paragraph 69 (italics in the original). See also the Appellate Body Report, *US – Lamb*, paragraphs 167-168.

[449] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.229; Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 145. See also the Panel Report, *US – Wheat Gluten*, paragraph 8.91.

7.348 The Commission concluded the following in its Preliminary Resolution:

> "49. For the foregoing reasons and after having evaluated the relevant factors, the Commission was able to find that the increase in imports of the product investigated has caused serious injury to the domestic industry because it suffered significant financial losses during the period investigated, jeopardizing the sustainability of this important domestic industry, so that any delay would entail damage which it would be difficult to repair."[450]

7.349 Moreover, in its Definitive Resolution, the Commission concluded:

> "37. That the performance of imports in relation to domestic production continued to show an upward and sustained trend during the period investigated. It is therefore obvious that the increase in imports has caused injury to the domestic industry inasmuch as it was verified that the increase in the value and volume of the imports was the cause of a significant drop in the domestic industry's share of apparent domestic consumption.
>
> 38. That, moreover, as a result of the increase in imports of the product subject to investigation, the firm suffered significant financial losses during the period investigated, which can be seen from the increase in inventories, the reduced cash flow, and the sharp contraction in its level of production."[451]

7.350 The Panel also notes that in the section entitled *Causation* in its Final Technical Report, after having referred to the legal grounds applicable to the issue and repeating the arguments of the applicant enterprise, the importing and exporting firms and the countries taking part in the national investigation, the DEI stated that:

> "In order to determine a possible causal link and to substantiate the existence of any "logical connection" between the increase in imports and the injury to the domestic industry, in the previous point … the DEI analysed the elements of injury that could determine the existence of a direct link between the increase in imports of polypropylene bags and tubular fabric and the commercial situation faced by FERSAN, so that the plenary meeting of the Commission may decide whether or not a definitive safeguard measure needs to be imposed."[452]

7.351 The DEI's Preliminary Technical Report contains almost identical wording with reference to the provisional safeguard measure.[453]

7.352 In other words, the DEI's Preliminary and Final Technical Reports confine themselves to citing relevant legal provisions, repeating the arguments of the interested parties during the national investigation procedure, and suggesting that there are elements of injury that "*could* determine the existence" of a "direct link" between the increased imports of polypropylene bags and tubular fabric and the commercial situation facing the domestic industry. The DEI's reports do not therefore contain any finding, but put the decision on whether or not to impose a provisional or definitive safeguard

[450] Preliminary Resolution, Exhibit CEGH-5, paragraph 49.
[451] Definitive Resolution, Exhibit CEGH-9, paragraphs 37-38.
[452] Final Technical Report, Exhibit CEGH-10, page 91.
[453] Preliminary Technical Report, Exhibit CEGH-7, page 88.

measure before the *plenary meeting of the Commission*. Neither does the injury section in the technical reports provide any explanation concerning the causation itself.

7.353 None of the parties brought to the Panel's attention the existence of other parts of the report published by the competent authority that could provide evidence of additional considerations in the examination of the existence of a causal link.

7.354 On the basis of the competent authority's findings in the preliminary and definitive Resolutions and in the Preliminary and Final Technical Reports, the Panel notes that the Commission concluded that there was a causal link between the increased imports and the serious injury without having analysed the elements to be taken into account in order to reach such a determination. In particular, the Commission concluded that the company FERSAN suffered significant financial losses during the period investigated, which in its view was demonstrated by the increase in stocks, the reduction in cash flow, and the sharp contraction in its level of production. Nevertheless, in its preliminary and definitive Resolutions the Commission does not provide any explanation of how this conclusion would justify the determination of the existence of a causal link between the increased imports and the injury. Neither does the Commission provide any analysis how it was ensured that the effects of the injury to the domestic industry caused by other factors were not attributed to the increased imports.

E. WHETHER THE DOMINICAN REPUBLIC ACTED INCONSISTENTLY WITH OBLIGATIONS UNDER THE COVERED AGREEMENTS AS REGARDS THE APPLICATION OF THE IMPUGNED MEASURES AND BY FAILING TO COMPLY WITH CERTAIN PROCEDURAL OBLIGATIONS

7.355 The Panel will address below the claims made by the complainants regarding: (i) the application of the provisional and definitive measures as regards the principle of *parallelism* and Article 9.1 of the Agreement on Safeguards; and (ii) compliance with certain procedural obligations.

1. Whether the competent authority acted inconsistently with obligations under the covered agreements by failing to comply with the principle of *parallelism* and Article 9.1 of the Agreement on Safeguards

(a) Main arguments of the parties

(i) Complainants

7.356 The complainants ask the Panel to find that the Dominican Republic acted inconsistently with Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Agreement on Safeguards by failing to respect the principle of parallelism between the scope of the provisional and definitive measures and the basis for the determinations.[454] The complainants assert that the Dominican Republic did not comply with this principle because: (i) in its analysis of the increase in imports, serious injury and causation, the Commission considered all imports that entered the Dominican Republic between 2006 and 2009, including those from Colombia, Indonesia, Mexico and Panama; (ii) based on Article 9.1 of the Agreement on Safeguards, the Commission excluded imports from Colombia, Indonesia, Mexico and Panama from the application of the provisional and definitive measures; and (iii) the Commission did

[454] Complainants, first written submission, paragraphs 436-438.

not, however, undertake a new analysis of the increase in imports, serious injury and causation excluding imports from Colombia, Indonesia, Mexico and Panama.[455]

7.357 The complainants contend that the exclusion of certain Members from the scope of the measure, based on Article 9.1 of the Agreement on Safeguards, does not exempt the Dominican Republic from complying with the *parallelism* requirement, as in their interpretation Article 9.1 provides an exception both to Article 2.1 and Article 2.2 of the said Agreement. Likewise, the exclusion of certain origins pursuant to Article 9.1 of this Agreement does not exempt the Dominican Republic from conducting a new investigation excluding imports from the origins left outside the scope of the measure. The complainants consider that, inasmuch as the Appellate Body has established that the principle of parallelism is a general formula without exceptions, it applies irrespective of the reasons for which a Member has decided to exclude certain imports from the application of the measure.[456]

7.358 The complainants also state that, pursuant to Article 9.1 of the Agreement on Safeguards, the Dominican Republic should have excluded imports from Thailand from the scope of the measures as these accounted for 0.32 per cent of total imports during the period investigated and, by not doing so, the Dominican Republic failed to comply with this provision.[457]

(ii) Dominican Republic

7.359 The Dominican Republic considers that the theory of parallelism, as established in WTO case law, does not apply to imports excluded from the application of a measure pursuant to Article 9.1 of the Agreement on Safeguards.[458] It considers that, in the present case, the fact that the Agreement on Safeguards itself provides, and indeed requires, the exclusion of certain Members pursuant to Article 9.1 is highly relevant and provides support for the view that the principle of parallelism is not applicable. Accordingly, in its view, Article 9.1 allowed it to exclude imports from Colombia, Indonesia, Mexico and Panama from the application of the measures because imports from each of these countries did not exceed 3 per cent and as a whole did not exceed 9 per cent.[459]

7.360 In addition, the Dominican Republic points out that, based on the findings of the Panels in *Argentina – Footwear (EC)* and *US – Wheat Gluten* and also of the Appellate Body in the latter case, Article 9.1 of the Agreement on Safeguards acts as an exception to Article 2.2 but not to Article 2.1 of the said Agreement.[460] This would imply that this provision also acts as an exception to the principle of parallelism. In its view, the absence of the parallelism requirement when excluding imports under Article 9.1 of the Agreement on Safeguards does not lead to disproportionate results, as the exception to Article 9.1 is subject to conditions and imposes *de minimis* thresholds. Consequently, in this

[455] Complainants, first written submission, paragraphs 446-449.

[456] Complainants, second written submission, paragraphs 239 and 241; oral statement at the first meeting of the Panel, paragraph 116; reply to Panel question No. 156.

[457] Complainants, first written submission, footnote 387 to paragraph 450; reply to Panel question No. 156.

[458] Dominican Republic, second written submission, paragraphs 107 and 110.

[459] The DEI determined that imports from Colombia represented some 0.01 per cent; those from Indonesia 0.75 per cent; those from Mexico 0.08 per cent; and those from Panama 0.37 per cent; and that together they accounted for 1.21 per cent of the Dominican Republic's total imports. Dominican Republic, first written submission, paragraphs 472-474.

[460] Dominican Republic, second written submission, paragraphs 113-116 (where there is a reference to the Panel Report, *US – Wheat Gluten*, footnote 164 to paragraph 8.171); reply to Panel question No. 155.

context it is likewise unnecessary to conduct a new analysis that would exclude imports from Colombia, Indonesia, Mexico and Panama.[461]

7.361 Lastly, regarding imports from Thailand, it argues that according to the Appellate Body's opinion in *US – Line Pipe*, there is no requirement to indicate a list of countries covered by or excluded from the application of the measure; it suffices simply to show that the Members in question are in fact excluded from the application of the measure. Moreover, it indicates that, given that there were no imports from Thailand in 2009, it did not consider it necessary expressly to exclude Thailand from the application of the measure.[462]

(b) Main arguments of the third parties

(i) United States

7.362 The United States points out that Article 9.1 of the Agreement on Safeguards only acts as an exception to the application of safeguard measures under Article 2.2 and not Article 2.1. It also considers that, because Article 9.1 of the Agreement on Safeguards uses the word *shall* in the English text, it is a mandatory provision. Consequently, if a Member seeks to justify a measure as a safeguard, this Member must prove that it has complied with the requirements of this provision.[463]

(ii) Nicaragua

7.363 Nicaragua observes that the Dominican Republic failed to comply with the principle of parallelism and that the Commission did not explain the reasons for which it considered that this principle did not have to be respected.[464]

(iii) Turkey

7.364 Turkey states that the principle of parallelism established by the Appellate Body in *Argentina – Footwear (EC)* does not apply in the present case because certain countries were excluded from the application of the measure on the basis of Article 9.1 of the Agreement on Safeguards. According to Turkey, the word *shall* in Article 9.1 lays an obligation on Members to give "*special and differential treatment*". It is Turkey's view that, as a developing country, it should be excluded from application of the measure. It also points out that Articles 9.1 and 2.2 of the Agreement in question are provisions on the *application* of measures and that Article 3.1 contains the rules applicable to the investigation, but does not include any reference to Article 9.1. Accordingly, in its view, there are no grounds for excluding developing countries that meet the requirements in Article 9.1 from the safeguards investigation.[465]

(iv) European Union

7.365 The European Union considers that there is no rule/exception relationship between Articles 2.2 and 9.1 of the Agreement on Safeguards as the two provisions contain separate and

[461] Dominican Republic, second written submission, paragraphs 107 and 121; reply to Panel question No. 158.

[462] Dominican Republic, replies to Panel questions Nos. 157 and 198.

[463] United States, third party written submission, paragraph 16; reply to Panel question No. 19.

[464] Nicaragua, third party written submission, paragraph 10.

[465] Turkey, third party written submission, paragraph 8; third party statement, paragraphs 6 and 7; reply to question No.19 from the Panel.

distinct obligations. It is also its view that the reference to Article 9.1 of the Agreement as the reason for excluding certain imports from the measure's scope may constitute the *reasoned and adequate explanation* as to why imports from developing countries do not have to be excluded from the scope of the investigation.[466]

(c) Assessment of the Panel

7.366 The complainants put forward the following two claims jointly in section VI.F of their first written submission: (i) that the Dominican Republic failed to comply with the principle of *parallelism* under Articles 2.1, 2.2, 3.1, 4.2 and 6 of the Agreement on Safeguards; and (ii) that the Dominican Republic failed to comply with Article 9.1 of the Agreement on Safeguards by not having excluded imports from Thailand from the application of the measures.[467] The Panel will analyse each of these claims separately.

(i) Compliance with the principle of parallelism between the coverage of the measures and the basis for the determinations

The principle of parallelism in the Agreement on Safeguards

7.367 As pointed out by the Appellate Body in *US – Steel Safeguards*, the principle of *parallelism* emerges from the *parallel* language used in Article 2.1 and 2.2 of the Agreement on Safeguards.[468] This principle also covers the symmetry that must exist between Articles 2.1 and 4.2 of the Agreement.[469] It implies that the imports considered for the purposes of the safeguards investigation (in the terms of Articles 2.1 and 4.2 of the Agreement on Safeguards) and the products to which the measure is applied (in the terms of Article 2.2 of the said Agreement) must be the same. Notwithstanding the foregoing, in certain circumstance a *difference* in the *parallel* requirements in Article 2.1 and 2.2 of the Agreement on Safeguards may be justified if the Member imposing the measure establishes *explicitly* that the imports satisfy the conditions for the application of the safeguard measure according to Articles 2.1 and 4.2 of the Agreement.[470]

7.368 The Spanish text of Article 2.1 of the Agreement on Safeguards uses the term "*importaciones del producto*" and Article 2.2 refers to the "*producto importado*". The French version uses the words "*produit importé*" and the English version the expression "product being imported" in both provisions. Furthermore, the Spanish text of subparagraphs (a) and (b) of Article 4.2 of the Agreement on Safeguards uses the words "*del producto de que se trate*". The English text reads "of the product concerned" and the French text "*du produit considéré*".

[466] European Union, replies to Panel questions Nos. 19 and 20.

[467] When making their claim regarding parallelism, the complainants identified Article 9.1 of the Agreement on Safeguards, but did not explain why the Dominican Republic had acted inconsistently with its obligations under this provision. The only argument put forward by the complainants in support of the claim that the Dominican Republic violated Article 9.1 is that imports from Thailand were not excluded from application of the measures.

[468] Appellate Body Report, *US – Steel Safeguards*, paragraph 439.

[469] Panel Report, *US – Wheat Gluten*, paragraph 8.168 (finding upheld by the Appellate Body in its Report on the same case, paragraph 96).

[470] Appellate Body Reports, *US – Wheat Gluten*, paragraph 98; *US – Line Pipe*, paragraph 181; *US – Steel Safeguards*, paragraph 441.

7.369 The Appellate Body has established that when a Member seeks to exclude certain origins from the application of a measure, that Member must conduct a new analysis that takes into account only the impact of the origins actually covered by the measure.[471]

7.370 The four cases in which the principle of parallelism has been examined so far in the WTO dispute settlement mechanism (*Argentina – Footwear (EC)*[472], *US – Wheat Gluten*[473], *US – Line Pipe*[474], and *US – Steel Safeguards*[475]) referred to the exclusion of trading partners under FTAs or members of customs unions from the application of the safeguard measure. The situation is different in the present case because the exclusion of certain imports from developing countries from the measure's coverage was based on Article 9.1 of the Agreement on Safeguards. In the light of the discussion between the parties, the Panel considers it necessary to address, as a prior issue, whether the principle of parallelism as developed in the case law until now applies to the exclusion of certain Members on the basis of Article 9.1 of the Agreement on Safeguards.

The principle of parallelism in connection with the exclusion of certain Members pursuant to Article 9.1 of the Agreement on Safeguards

7.371 In order to determine the scope of Article 9.1 of the Agreement on Safeguards in relation to the principle of parallelism, the Panel will examine the relationship among the various relevant provisions.

7.372 Article 9.1 of the Agreement on Safeguards provides the following:

"*Developing Country Members*

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[2]
>
> [2] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards."

7.373 Article 9.1 of the Agreement on Safeguards lays down two requirements in order to be able to exclude products originating from certain developing country Members from the coverage of a safeguard measure, namely: (i) the individual share of the developing country Member which it is sought to exclude from the application of the measure shall not exceed 3 per cent of the imports of the Member applying the measure; and (ii) the collective share of the developing countries that meet the first requirement shall not exceed 9 per cent of total imports of the product concerned.

---

[471] Appellate Body Report, *US – Steel Safeguards*, paragraph 441.

[472] In *Argentina – Footwear (EC)*, the Argentine authorities excluded imports from the Common Market of the South (MERCOSUR) from application of the measures.

[473] In *US – Wheat Gluten*, the United States excluded imports from Canada, a partner in the North American Free Trade Agreement (NAFTA), from the scope of application of the measure.

[474] In *US – Line Pipe*, the United States excluded imports from Canada and Mexico (NAFTA partners) from the scope of application of the measure.

[475] In *US – Steel Safeguards*, the United States excluded imports from Canada and Mexico, as well as those from Israel and Jordan (all members of free trade agreements with the United States) from the scope of application of the measures.

7.374 The Panel considers it appropriate to examine the wording of Articles 2.1, 2.2, 3.1, 4.2 and 9.1 of the Agreement on Safeguards in order to consider the relationship between the principle of parallelism and Article 9.1 of the Agreement on Safeguards. The above provisions were cited by the complainants as the basis for their complaint.

7.375 The Panel shares the view expressed by Turkey as a third party that Articles 9.1 and 2.2 of the Agreement on Safeguards are provisions on the *application of measures.* Article 2.2 of the Agreement on Safeguards lays down as a general principle that "Safeguard measures shall be applied to a product being imported irrespective of its source." Article 9.1, on the other hand, provides that "Safeguard measures shall not be applied against a product originating in a developing country Member as long as ..." certain conditions set out in the Article are met. The Panel therefore considers that Articles 9.1 and 2.2 of the Agreement on Safeguards, read together, impose an obligation to apply the measures to products of any origin, except those origins that meet the requirements set out in Article 9.1.

7.376 In addition, Article 3.1 of the Agreement on Safeguards imposes the obligation to conduct an investigation before applying a measure. Articles 2.1 and 4.2 of the Agreement also provide that a Member may only apply a safeguard measure after having found that increased imports have caused or are threatening to cause serious injury to the domestic industry. The Panel also agrees with Turkey that Articles 3.1, 2.1 and 4.2 are rules relating to the investigation and analysis which the competent authority must undertake. None of these three provisions specifically refers to Article 9.1 of the Agreement and neither does Article 9.1 contain any indication enabling it to be concluded that these provisions have to be read together.

7.377 In the case before us, Article 9.1 of the Agreement on Safeguards involves explicit departure from the obligation in Article 2.2 on the application of safeguard measures; this provision does not apply to or affect other provisions such as Articles 2.1, 3.1 or 4.2 of the Agreement concerning the analysis and the investigation to be conducted by the competent authorities.

7.378 Regarding the relationship between Article 9.1 of the Agreement on Safeguards and the principle of parallelism, two criteria are relevant. Firstly, the Panel in *Argentina – Footwear (EC)* stated the following:

> "… Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from *the imposition* of safeguard measures where the injury and causation fully reflect the effects of those imports from developing countries."[476]

7.379 Secondly, in *US – Wheat Gluten* the Panel determined that:

> "… there is a requirement of symmetry under Articles 2.1 and 4.2 SA between the scope of the imports subject to a safeguards investigation and the scope of the imports subject to the application of the measure.[164, 477]
>
> [164] The only explicit departure from this principle in the Agreement on Safeguards is in Article 9.1 …"

[476] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.85 (italics added). See also United States, third party written submission, paragraph 17.

[477] Panel Report, *US – Wheat Gluten*, paragraph 8.171.

7.380 It should be noted that, when examining the latter case and after having indicated that Article 9.1 of the Agreement on Safeguards is an exception to the general rules set out in the Agreement and applies only to developing countries, the Appellate Body indicated that it did not consider it of relevance to the appeal.[478]

7.381 Taking into account the foregoing points of view and the analysis of the legal provisions cited above, the Panel considers that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard measure a share of the imports (corresponding to those from developing country Members that meet the requirements laid down in the provision) even when these have been taken into account in the substantive analysis during the investigation.

7.382 In the present case, both the complainants and the Dominican Republic agree that Article 9.1 of the Agreement on Safeguards is an exception.

7.383 In the Panel's view, when Article 9.1 of the Agreement on Safeguards is applicable, this affects the scope of the obligation contained in Article 2.2. Because of the way in which Article 9.1 of the Agreement on Safeguards is worded[479], it contains an obligation to exclude developing country Members that satisfy the requirements in the provision and is not a discretionary faculty given to a Member imposing a measure which it may decide to employ or not. In other words, when a Member conducting a safeguards investigation finds, as a result of its examination, that products from certain origins are covered by the provisions in Article 9.1 of the Agreement on Safeguards, it is obliged to grant special and differential treatment to the developing countries concerned when imposing the measure by excluding them from its application. In such cases, in their report the competent authorities must provide an explanation of the way in which the foregoing was determined.

7.384 The findings of the Panel in *US – Wheat Gluten* suggest that the principle of parallelism (as developed until now) seeks to ensure that origins which collectively make a significant contribution to the injury caused to the domestic industry are not excluded from the application of the measure.[480] Nevertheless, in the present case the exclusion was based on Article 9.1 of the Agreement on Safeguards, which provides that the imports excluded must not exceed 9 per cent of the total imports of the Member imposing the measure, so that the exclusion of developing country Members does not run the risk of generating the disproportionate effects indicated.

---

[478] Appellate Body Report, *US – Wheat Gluten*, footnote 96 to paragraph 96.

[479] The Spanish text of Article 9.1 of the Agreement on Safeguards starts with the words "*No se aplicarán medidas de salvaguardias* …". The English text commences "Safeguard measures shall not be applied …". The French text provides "*Des mesures de sauvegarde ne seront pas appliquées* …".

[480] The Panel which heard the *US – Wheat Gluten* case explained this in the following terms:

"An approach that excludes from the application of the measure imports of certain countries if they do not account for a 'substantial share' of total imports and do not 'contribute importantly' to the serious injury caused by imports might also result in a situation where, after multiple minor quantities of imports are excluded from the application of the measure, which *collectively* accounted for a major proportion of imports, it would no longer be clear that any injury remaining that was due to the remaining imports would still achieve the threshold of 'serious' as that term is defined in Article 4.1(a) of the Agreement on Safeguards. For example, assume that the imports of five countries, each accounting for approximately 10 per cent of total imports, were all deemed individually not to account for a 'substantial share' of total imports' and not to 'contribute importantly' to serious injury and on this basis were thus excluded. Collectively, such imports account for 50 per cent of total imports. There is no demonstration that any injury caused by imports remaining after the exclusion of 50 per cent of total imports would still reach the threshold of '*serious* injury'."

Panel Report, *US – Wheat Gluten*, paragraph 8.176 (italics in the original).

7.385 Accordingly, in cases in which the exclusion is based on Article 9.1 of the Agreement, the Panel does not consider it necessary to undertake a new analysis of the increase in imports, the injury and causation. In this case, it would be enough for the competent authorities to show in their report that the excluded Members actually satisfied the requirements laid down in Article 9.1 itself of the Agreement on Safeguards. Moreover, the Panel agrees with the Dominican Republic that the fact that the Agreement on Safeguards itself, in Article 9.1, imposes the obligation to exclude products from specific origins from the application of the safeguard measure results in a departure from the usual application of the principle of parallelism with regard to such imports.

7.386 As to imports from Members that do not meet the requirements laid down in Article 9.1 of the Agreement on Safeguards, the safeguard measures have to be applied irrespective of the source of the imports, in conformity with Article 2.2 of the Agreement.

Analysis in the present case

7.387 In its Preliminary Resolution, the Commission decided "not to apply provisional safeguard measures to imports from Mexico, Panama, Colombia and Indonesia as they are developing countries which collectively account for 1.21 per cent of the imports investigated, in conformity with Article 9.1 of the WTO Agreement on Safeguards".[481] In its Definitive Resolution, for the same reasons, the Commission decided not to apply the definitive safeguard measure to imports from these origins.[482]

7.388 The Commission based the above findings on the Preliminary and Final Technical Reports. In these technical reports, the DEI indicated that it had analysed all the transactions separately. Based on this, the DEI found that 14 countries had exported the product investigated to the Dominican Republic during the investigation period.[483] Later, the DEI found that imports from Colombia, Indonesia, Mexico and Panama each accounted for less than 3 per cent of the Dominican Republic's total imports of the product investigated during the period 2006-2009 and that these Members qualified as developing countries, taking into account their trade policy reviews at the WTO. It was therefore suggested that these imports should be excluded from the application of the provisional and definitive measures as they collectively accounted for 1.21 per cent of the imports investigated.[484]

7.389 The Panel notes that imports from Colombia, Indonesia, Mexico and Panama did not individually exceed 3 per cent of the Dominican Republic's total imports during the period investigated. These imports therefore meet the first threshold laid down in Article 9.1 of the Agreement on Safeguards. Furthermore, the total share of the individual imports of

[481] Preliminary Resolution, Exhibit-5, page 9. On 30 March 2010, the Commission approved an Addendum to the Preliminary Resolution, Exhibit-6, in which it is specified that the provisional measure would not apply to goods (*originating*) (the Preliminary Resolution uses the words *coming from*) in Mexico, Panama, Colombia and Indonesia.

[482] Definitive Resolution, Exhibit-9, page 10.

[483] Preliminary Technical Report Exhibit-7, page 60; Final Technical Report, Exhibit CEGH-10, pages 49-50.

[484] Preliminary technical report, Exhibit CEGH-7, pages 60, 61 and 95; Final Technical Report, Exhibit CEGH-10, pages 49 and 50, 100 and 101; in addition to the foregoing, in both Reports the DEI included a table entitled "Exclusion of developing countries". This table shows the total volume and total share for each of the 14 Members exporting the product investigated during the investigation period. It also shows the information corresponding to imports from the four Members excluded: Colombia, Indonesia, Mexico and Panama. Preliminary Technical Report, Exhibit CEGH-7, page 96; Final Technical Report, Exhibit CEGH-10, page 102.

Colombia (0.01 per cent), Indonesia (0.75 per cent), Mexico (0.08 per cent) and Panama (0.37 per cent) amounted to 1.21 per cent of the Dominican Republic's total imports over the period investigated and so remained below 9 per cent of the Dominican Republic's total imports of the product concerned. Accordingly, the collective share of the excluded Members, also remained below the second threshold prescribed in Article 9.1 of the Agreement.

7.390 The Panel considers that the Commission, after having found that the product investigated was being imported from developing country Members which met the thresholds determined in Article 9.1 of the Agreement on Safeguards, provided a satisfactory explanation in the preliminary and definitive Resolutions of the reason why Colombia, Indonesia, Mexico and Panama were excluded from the application of the measure.

7.391 The Panel therefore considers that the complainants have not demonstrated that the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Agreement on Safeguards as regards compliance with the principle of parallelism by failing to conduct a new analysis in order to determine the increase in imports, injury and causal link, excluding imports from Colombia, Indonesia, Mexico and Panama.

7.392 Nonetheless, the fact that the Dominican Republic did not violate the principle of parallelism in the case of Colombia, Indonesia, Mexico and Panama by excluding these countries from application of the measure based on Article 9.1 of the Agreement on Safeguards does not necessarily imply that the Dominican Republic complied fully with the obligation in this provision to exclude imports from all relevant origins from application of the measure. This question will be examined below.

(ii) Compliance with Article 9.1 of the Agreement on Safeguards

The obligation in Article 9.1 of the Agreement on Safeguards

7.393 Until now, only one dispute at the WTO (*US – Line Pipe)* has examined Article 9.1 of the Agreement on Safeguards. In that case, Korea claimed that the United States had violated Article 9.1 because it had not determined which developing countries would be exempt from application of the measure and treated all developing countries in the same way as other suppliers.[485] The Appellate Body found that the available documents revealed no effort by the United States to make certain that *de minimis* imports from developing countries were excluded from the application of the measure.[486] On the basis of this approach, the Panel considers that Members which apply safeguard measures are obliged to adopt *all reasonable measures* available to them to exclude all developing countries that meet the requirements in Article 9.1 of the Agreement on Safeguards.

7.394 The complainants argue that the Dominican Republic failed to comply with Article 9.1 of the Agreement on Safeguards by not excluding imports from Thailand from application of the measure, which accounted for 0.32 per cent of the Dominican Republic's total imports during the period investigated. The Dominican Republic responds that it was not obliged to include Thailand, or any other developing country, in a list of Members excluded or included, but that it sufficed to show that this country was in fact excluded from application of the measure.

[485] Appellate Body Report, *US – Line Pipe*, paragraph 121.
[486] Appellate Body Report, *US – Line Pipe*, paragraph 132.

7.395 In *US – Line Pipe*, the Appellate Body determined the following:

> "We agree with the United States that Article 9.1 does not indicate how a Member must comply with this obligation. There is nothing, for example, in the text of Article 9.1 to the effect that countries to which the measure will not apply must be expressly excluded from the measure. Although the Panel may have a point in saying that it is 'reasonable to expect' an express exclusion, we see nothing in Article 9.1 that requires one."[487]

7.396 Taking into account the foregoing, although there is no express obligation in Article 9.1 of the Agreement on Safeguards requiring that a list of Members included in or excluded from coverage of a measure be drawn up, the Member imposing a safeguard measure must ensure that products from origins that fall within the provision in Article 9.1 are excluded. There is a degree of flexibility regarding the way in which each Member may comply with Article 9.1. Irrespective of the way in which each Member complies with this provision, however, the Member concerned must show that it has made the efforts it can to exclude all those Members covered by the provision in Article 9.1 of the Agreement on Safeguards.

7.397 There follows an analysis of whether the Dominican Republic complied with its obligation under Article 9.1 of the Agreement on Safeguards.

Whether the Dominican Republic complied with the obligation in Article 9.1 of the Agreement on Safeguards

7.398 Neither the preliminary nor the definitive Resolution analyse the situation of Thailand. Nevertheless, the information furnished by the DEI, particularly the table entitled "Exclusion of developing countries" in the Preliminary and Final Technical Reports[488], shows that imports of the product concerned from Thailand amounted to 0.32 per cent of the Dominican Republic's total imports over the period investigated. If the imports from Thailand are added to those from the four Members excluded, imports of the product concerned during the investigation period would not collectively have exceeded 9 per cent as in total they represented 1.53 per cent of the imports investigated. Thailand was not, however, specifically excluded from the measure's coverage, even though it is a developing country Member that satisfies the requirement in Article 9.1 of the Agreement on Safeguards.

7.399 In response to a question from the Panel, the Dominican Republic indicated that it sufficed to show that in fact imports from Thailand had been excluded from application of the measure without there being any obligation to exclude them explicitly and that, as there had been no imports from this origin in 2009, it did not find it necessary expressly to exclude Thailand. Lastly, it stated that if Thailand started to export to the Dominican Republic and requested exemption from the measure, the Dominican Republic would be prepared to grant it.[489]

7.400 As already mentioned, there is a certain flexibility in the manner of complying with the obligations under Article 9.1 of the Agreement on Safeguards. In the present case, the Dominican Republic explicitly excluded imports from four origins, some of them in a similar position

[487] *Ibid.*, paragraph 127.
[488] Preliminary Technical Report, Exhibit CEGH-7, page 96; Final Technical Report, Exhibit CEGH-10, page 102.
[489] Dominican Republic, replies to Panel questions Nos. 158 and 199.

to Thailand (as regards imports during the period investigated). Unlike these countries, however, Thailand was not specifically mentioned in the list of countries excluded. It should also be noted that Colombia, Indonesia and Panama did not export to the Dominican Republic either in 2009 and yet these three Members were included by the competent authority in the list of countries excluded.

7.401 Bearing this in mind, the Panel does not consider that the Dominican Republic has provided a convincing explanation of the reason why Thailand was treated differently and was not included specifically in the list of countries excluded from the measure's coverage. It is not enough for the Dominican Republic to state without any further substantiation that imports from Thailand were de facto excluded from the measure's application because there are no grounds for the different treatment given to imports from Thailand and no proof that if Thailand had decided to export the product investigated to the Dominican Republic, it would have been exempt from application of the measures.

7.402 The Panel therefore concludes that the complainants have made the case that the Dominican Republic did not take all *reasonable measures* available to it to exclude from application of the measures contested all developing countries which export less than the *de minimis* levels indicated in Article 9.1 of the Agreement on Safeguards and, in this particular instance, Thailand. Consequently, as far as the provisional and definitive measures are concerned, the Dominican Republic acted inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards.

2. Whether the Dominican Republic acted inconsistently with obligations under the covered agreements by failing to comply with certain procedural obligations

7.403 The complainants put forward jointly the following three claims regarding procedural obligations: (i) the Dominican Republic imposed the definitive measure without timely notification in the terms of Article XIX:2 of the GATT 1994; (ii) the Dominican Republic did not afford Members having a substantial interest in the products under investigation an opportunity for consultations in the terms provided in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards; and (iii) the Dominican Republic did not give the complainants the opportunity to obtain an adequate means of trade compensation in accordance with Article 8.1 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.[490]

(a) Main arguments of the parties

(i) Complainants

7.404 First of all, the complainants contend that the Dominican Republic did not notify the safeguard measure prior to its *adoption*, thereby acting inconsistently with Article XIX:2 of the GATT 1994. In their view, the Dominican Republic's interpretation that Article XIX:2 of the GATT 1994 only requires that the notification should be made prior to *application* of the measure, on the basis of the English and French versions of this text, is incorrect. The complainants state that the text of the GATT is equally authentic in the three languages. They also consider that the language in the last part of the first sentence of Article XIX:2 of the GATT 1994 ("the proposed action") confirms that, pursuant to this provision, a Member imposing a safeguard measure must first notify the proposed measure (before it is adopted) and then hold consultations with Members having a

[490] Complainants, first written submission, paragraph 451.

substantial interest. The complainants also indicate that Article 12.1 of the Agreement on Safeguards is irrelevant for the purposes of their complaint.[491]

7.405 Secondly, the complainants argue that, by failing to notify the safeguard measure prior to its adoption, the Dominican Republic did not give exporting Members affected the opportunity to hold the consultations provided in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards and, therefore, also failed to maintain a level of concessions and other obligations substantially equivalent to the level it was obliged to maintain with other exporting Members affected by the safeguard measure, thereby acting inconsistently with Article 8.1 of the Agreement on Safeguards.[492] The complainants also point out that the various acts by which the Dominican Republic seeks to prove that it held consultations with interested Members were acts carried out during the national safeguards investigation and are not related to the consultations referred to in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards.[493]

(ii) Dominican Republic

7.406 Regarding the claim concerning the alleged lack of notification, the Dominican Republic points out that the English and French texts of Article XIX:2 of the GATT 1994 require that notification has to be made before application of the measure and that Article XIX:2 of the GATT has to be interpreted in the light of the wording of these versions. In its view, Article 12.1 of the Agreement on Safeguards and the interpretation of this provision by the Panel and the Appellate Body in *US – Wheat Gluten* are relevant when interpreting Article XIX:2 of the GATT 1994 and support its interpretation that the notification required by this provision must be made after adoption and not before.[494]

7.407 As to the claim concerning the obligation under Article 12.3 of the Agreement on Safeguards, the Dominican Republic states that the complainants had opportunities to examine the measure's probable effects before it came into force and that consultations were held with the complainants on 12 May 2010 at the time of the public hearing in the national investigation.[495]

7.408 With regard to the claim concerning the alleged failure to comply with Article 8.1 of the Agreement on Safeguards, the Dominican Republic recalls that it lodged a preliminary objection asserting that this did not form part of the Panel's terms of reference. Nevertheless, even if the Panel considers that this claim is covered by its terms of reference, the Dominican Republic is of the view that it did not act inconsistently with its obligations under this provision because it did not suspend

[491] Complainants, first written submission, paragraphs 458 and 460; second written submission, paragraph 244; opening oral statement at the first meeting of the Panel, paragraph 122; replies to Panel questions Nos. 161-163.

[492] Complainants, first written submission, paragraphs 458-459; second written submission, paragraph 245.

[493] Complainants, opening statement at the first meeting of the Panel, paragraph 124; second written submission, paragraphs 248-250.

[494] Dominican Republic, first written submission, paragraphs 486, 487 and 490-495; replies to Panel questions Nos. 163 and 165.

[495] Dominican Republic, first written submission, paragraphs 500-501; replies to Panel questions Nos. 166 and 167.

any concession (as the provisional and definitive measures did not exceed the bound tariff of 40 per cent *ad valorem*) and so was not in the situation covered by Article 8.1.[496]

(b) Main arguments of third parties

(i) Colombia

7.409 Colombia points out that Article XIX:2 of the GATT 1994 determines that the notification must be made before a party adopts measures under Article XIX:1 of the GATT. Regarding the opportunity to hold consultations, Colombia considers that the Panel will have to determine whether the Dominican Republic gave the complainants an adequate opportunity for these in advance and with a view to reaching an agreement on a means of trade compensation, in the terms of Articles 12.3 and 8.1 of the Agreement on Safeguards.[497]

(ii) United States

7.410 With regard to the claim concerning notification, the United States considers that the last part of the first sentence of Article XIX:2 of the GATT 1994[498] has to be addressed within the context of the first part of this sentence. Furthermore, it indicates that there has to be compliance with the requirement to hold consultations, as provided in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards, before application of the safeguard measure.[499]

(iii) Panama

7.411 Panama considers that the Dominican Republic failed to comply with the obligation to give notice sufficiently in advance because it did not provide Members having a substantial interest with an opportunity to hold prior consultations, in the terms of Article 12.3 of the Agreement on Safeguards. In its view, the Panel should rule that the Dominican Republic did not give the Members concerned the possibility of obtaining adequate trade compensation.[500]

(iv) European Union

7.412 The European Union states that the first sentence of Article XIX:2 of the GATT 1994 contains two separate but related obligations. The first part of this Article lays down the obligation to give notice in writing; the second the obligation to give exporting Members having an interest the opportunity to hold consultations with the Member wishing to apply the measure. Both obligations relate to an action that has not been taken. The European Union also considers that, in the event of

[496] Dominican Republic, first written submission, paragraphs 550-552. See also preliminary Section 4.1 of the submission.

[497] Colombia, third party written submission, paragraphs 79-80.

[498] In the English text, the first sentence of Article XIX:2 of the GATT contains the text corresponding to the first two sentences in the Spanish and French texts; as a result, when the United States refers to the last part of the first sentence of Article XIX:2 of the GATT it has to be understood that it is referring to the last part of the second sentence in the Spanish and French texts.

[499] United States, replies to Panel questions Nos. 21 and 22.

[500] Panama, third party written submission, paragraphs 13, 14 and 17; third party statement, paragraph 5.

any conflict between Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, the latter provision should prevail.[501]

(c) Assessment of the Panel

7.413 The Panel takes note of the following facts, which both parties accept: (i) on 5 October 2010, the Commission adopted the definitive safeguard measure; (ii) on 8 October (three days later), the Dominican Republic notified WTO Members of the measure; (iii) on 18 October, the notification was circulated to Members of the WTO; and (iv) on the same day, 18 October, the measure came into force.

7.414 The Panel is called upon to examine the following questions: (i) whether the Dominican Republic complied with its notification obligation under the applicable provisions (Articles XIX:2 of the GATT 1994 and 12 of the Agreement on Safeguards); (ii) whether the Dominican Republic afforded Members having a substantial interest in the products investigated the opportunity to hold consultations in the terms of Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards; and (iii) whether the Dominican Republic gave the complainants the opportunity to obtain adequate means of trade compensation in the terms of Articles 8.1 of the Agreement on Safeguards and XIX:2 of the GATT 1994.

(i) Notification of the definitive measure under Article XIX:2 of the GATT 1994

Introductory remarks

7.415 With regard to the first question, concerning the notification obligation in Article XIX:2 of the GATT 1994, the complainants have stated that Article 12.1 of the Agreement on Safeguards does not apply for the purposes of their claim. Accordingly, the complainants contend that the Dominican Republic did not notify the safeguard measure before its adoption, in the terms of Article XIX:2 of the GATT 1994. The Dominican Republic, for its part, states that both provisions are relevant when examining this complaint and that there are differences in the text of Article XIX:2 of the GATT 1994 in the three official languages, the implication being that the notice must be given before the measure is applied (and not before it is adopted). It also points out that Article 12.1(c) of the Agreement on Safeguards, as well as previous decisions by Panels and the Appellate Body that have examined this provision, apply to the analysis of the obligation under Article XIX:2 of the GATT 1994.

7.416 Until now, the obligation to notify a safeguard measure under Article XIX:2 of the GATT 1994 has not been interpreted by WTO Panels or by the Appellate Body. This Panel is called upon to interpret the scope of this provision in the light of the three official versions of the text.

7.417 As a preliminary remark, the Panel observes that the obligation on Members to notify their safeguard measures is based both on Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards. A proper assessment of these obligations, when addressing the present claim, should therefore take into account both provisions.

[501] European Union, replies to Panel questions Nos. 21 and 22.

Principle of a *single whole*

7.418 We have already noted above that Article XIX of the GATT 1994 and the Agreement on Safeguards constitute an inseparable set of rights and disciplines that have to be addressed simultaneously.[502]

7.419 In view of the foregoing, the Panel will have to interpret the notification obligation under Article XIX:2 of the GATT 1994 in such a way that it gives meaning to all the terms, not only those in the GATT but also those in the Agreement on Safeguards. The Panel therefore notes that the Agreement on Safeguards contains a special provision (Article 12, entitled "Notification and Consultation") which includes several notification obligations. This provision in the Agreement on Safeguards is linked to the obligations to notify and give Members the opportunity to hold consultations provided by Article XIX of the GATT 1994.

7.420 Accordingly, the question before the Panel is to determine whether the Dominican Republic complied with the notification requirement under Article XIX:2 of the GATT 1994, examined in conjunction with Article 12 of the Agreement on Safeguards.

7.421 Article 3.2 of the DSU requires panels to clarify the prevailing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". These rules include the principles set out in Articles 31, 32 and 33 of the Vienna Convention.[503] According to Article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[504]

7.422 When examining the different official versions of the text of Article XIX:2 of the GATT 1994, the parties have a different interpretation of the moment at which the notification obligation in this provision becomes effective. According to the customary rules of interpretation of treaties in Article 33 of the Vienna Convention, in case of discrepancy between various official texts it is necessary to seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language.[505] The WTO's legal texts are equally authentic in English, French and Spanish.[506]

---

[502] See paragraph 7.66 of the present Report.

[503] Appellate Body Reports, *US – Gasoline*, pages 16-18; *India – Patents (US)*, paragraph 45; *US – Shrimp*, paragraph 114; *Chile – Price Band System*, paragraph 271. See also the Panel Report, *China – Raw Materials*, paragraph 7.246.

[504] Appellate Body Report, *US – Gasoline*, p. 17.

[505] See also Appellate Body Reports, *Chile – Price Band System*, paragraph 271; *EC – Bed Linen* (paragraph 5 of Article 21 – India), footnote 153 to paragraph 123; *US – Softwood Lumber IV*, footnote 50 to paragraph 59; *EC – Tariff Preferences*, paragraph 147; and *US – Upland Cotton*, footnote 510 to paragraph 424. For the theory, see also B. Condon, *El Derecho de la Organización Mundial de Comercio: Tratados, Jurisprudencia y Práctica* (Spanish only) (Cameron May, 2007), p. 53.

[506] Article XVI of the Marrakesh Agreement Establishing the WTO and Explanatory Note of paragraph 2(c)(i) of the GATT 1994.

Articles XIX:2 of the GATT 1994 and 12 of the Agreement on Safeguards

7.423 The Spanish text of Article XIX:2 of the GATT 1994 provides the following:

"*Medidas de urgencia sobre la importación de productos determinados*

2. Antes de que una parte contratante adopte medidas de conformidad con las disposiciones del párrafo 1 de este artículo, lo notificará por escrito a las PARTES CONTRATANTES con la mayor anticipación posible. Les facilitará además, así como a las partes contratantes que tengan un interés substancial como exportadoras del producto de que se trate, la oportunidad de examinar con ella las medidas que se proponga adopter …" (italics added).

7.424 The English text of Article XIX:2 of the GATT 1994 reads as follows:

"*Emergency Action on Imports of Particular Products*

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action …" (italics added).

7.425 The French text of Article XIX:2 of the GATT 1994 reads as follows:

"*Mesures d'urgence concernant l'importation de produits particuliers*

2. *Avant qu'une partie contractante ne prenne des mesures en conformité des dispositions du paragraphe premier du présent article, elle en avisera les PARTIES CONTRACTANTES par écrit et le plus longtemps possible à l'avance*. Elle fournira à celles-ci, ainsi qu'aux parties contractantes ayant un intérêt substantiel en tant qu'exportatrices du produit en question, l'occasion d'examiner avec elle les mesures qu'elle se propose de prendre …" (italics added).

7.426 The first sentence of Article XIX:2 of the GATT 1994 determines an obligation to notify before a situation arises. This situation is described in the Spanish text of the General Agreement by the words "*adopte medidas*"*;* in the English by the words "take action"; and in the French text by the words "*prenne des mesures*". The words "*adopte medidas"* in Spanish[507] suggest that the moment at which the obligation arises is the adoption of a measure. The words "*prenne des mesures*" in French and "take action" in English, however, are not clear regarding the moment at which the obligation to

[507] The word "*adoptar*" in Spanish means "*tomar resoluciones o acuerdos con previo examen o deliberación*" (take decisions or make agreements after prior consideration or deliberation). *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), page 33. The word "*medida*" in Spanish means "*disposición, prevención*" (provision, arrangement, precaution). *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), page 1001; R. Villa-Real Molina and M. Á. del Arco Torres, *Diccionario de Términos Jurídicos* (Editorial Comares, 1999), page 311.

notify is triggered. The words "take action"[508] translate into Spanish in one of its meanings as "*emprender acciones judiciales, actuar*" (take legal action, act)[509], whereas the words "*prenne des mesures*" could be translated as "*tomar una medida o decisión judicial*" (take a measure or legal decision).[510] From neither the French text nor the English text, however, can it be clearly determined whether the moment at which the obligation is triggered is the moment of the *adoption* or the *application* of the measure.

7.427 Article 12 of the Agreement on Safeguards, for its part, determines the following:

"*Notification and Consultation*

1. A Member shall immediately notify the Committee on Safeguards upon:

(a) Initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

…

[508] In English the word "take" means "seize, grasp, catch". *Shorter Oxford English Dictionary*, 6th Ed. (Oxford University Press, 2007), vol. 2, page 3166. "Take" translates into Spanish as "*tomar… coger*", *Collins Spanish-English English-Spanish Dictionary*, 14th Ed. (1985), page 514, or "*tomar, llevar*", E. Alcaraz Varó and B. Hughes, *Diccionario de Términos Jurídicos* (Editorial Ariel, 2002), page 15). In Spanish the word "action" means "*actuación; trámites (jurídicos), medidas (judiciales), resolución, diligencias*", E. Alcaraz Varó and B. Hughes, *Diccionario de Términos Jurídicos* (Editorial Ariel, 2002), page 15.

[509] Alcaraz Varó, Enrique and Brian Hughes, *Diccionario de Términos Jurídicos*, Ed. Ariel, 2002, page 15.

[510] In French the word "*prendre*" means "*mettre avec soi ou faire sien*" (take to one's self or make one's own), *Le Nouveau Petit Robert* (Dictionnaires Le Robert, 2000), page 1978. The word "*prendre*" translates into Spanish as "*tomar, coger*", whereas the words "*Prendre des mesures*" can be translated as "*tomar medidas*", *Larousse Grand Dictionnaire, Français Espagnol*, 2nd Ed. (Larousse, 1998), pages 430 and 537-538. The word "*mesure*" in French means "*décision (judiciaire ou administrative)*" (legal or administrative decision), *Vocabulaire Juridique Association Henri Capitant* 8th Ed. (Presses Universitaires de France, 2000), page 550.

> 4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken ...".

7.428 Article 12.1 of the Agreement on Safeguards indicates three moments at which Members must notify, each of which corresponds to the moment when one of the events specified in each of its paragraphs occurs. The Article's chapeau provides that notifications must be made "*immediately* upon" the occurrence of one of the triggering events (italics added).[511] Article 12.4 of the Agreement imposes a fourth obligation to notify, which has to be observed before a provisional safeguard measure is adopted. The Panel is of the view that Article 12 of the Agreement on Safeguards identifies four obligations to notify the Committee on Safeguards.[512] Article XIX:2 of the GATT 1994, on the other hand, only determines one obligation to notify. Despite this, the Panel has already indicated that Articles XIX:2 of the GATT 1994 and 12 of the Agreement on Safeguards have to be interpreted together and giving meaning to the terms in both provisions.

7.429 In order to define the scope of the notification obligation in Article XIX:2 of the GATT 1994 it is appropriate to begin by considering whether such an obligation corresponds to any of the four notification obligations mentioned in Article 12 of the Agreement on Safeguards. The Panel will commence by analysing the relevance of interpreting Article XIX:2 of the GATT in the light of Article 12.1(c) of the Agreement on Safeguards, as suggested by the Dominican Republic.

7.430 Both Article XIX:2 of the GATT 1994 and Article 12.1(c) of the Agreement on Safeguards determine obligations to notify safeguard measures.[513] As already indicated, Article XIX:2 of the GATT 1994 provides that "Before any contracting party *shall take action*[514] pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable" (italics added). The Spanish text of Article 12.1(c) of the Agreement on Safeguards, on the other hand, provides that "Todo Miembro hará inmediatamente una notificación … *cuando adopte la decisión de aplicar* … una medida de salvaguardia." (italics added) . The English text reads "A Member shall immediately notify the Committee on Safeguards upon … *taking a decision to apply or extend a safeguard measure*." (italics added) and the French provides that "Un Membre notifiera immédiatement au Comité des sauvegardes *la decision d'appliquer ou de proroger une mesure de sauvegarde*." (italics added).

7.431 Both provisions (Article XIX:2 of the GATT 1994 and Article 12.1(c) of the Agreement on Safeguards) refer to the obligation to notify a definitive measure. The words "shall take action" in

---

[511] See Appellate Body Report, *US – Wheat Gluten*, paragraph 102.

[512] These obligations, in chronological order, are triggered at the following moments: (i) when initiating an investigation; (ii) when adopting a provisional safeguard measure under Article 6 of the Agreement on Safeguards; (iii) when finding that there is serious injury or threat of serious injury caused by the increase in imports; and (iv) when taking the decision to apply or extend a safeguard measure.

[513] Article XIX:2 of the GATT refers to the obligation to notify the CONTRACTING PARTIES. According to paragraph 2(b) of the GATT 1994, the functions assigned to the CONTRACTING PARTIES in various provisions of the GATT (including Article XIX), will be assigned to the Ministerial Conference. The WTO General Council, in the document entitled "Avoidance of procedural and institutional duplication", adopted on 31 January 1995 (WT/L/29), indicated that "If a measure is subject to a notification obligation both under the WTO Agreement and under the GATT 1947 …, the notification of such a measure to a WTO body shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947." Article 12.1 of the Agreement on Safeguards determines the obligation to notify the Committee on Safeguards.

[514] Bearing in mind the differences in this term in the various official language versions of the text.

Article XIX:2 of the GATT are attenuated by the words "*de conformidad con las disposiciones del párrafo 1 de este artículo*" in the Spanish text (in English "pursuant to the provisions of paragraph 1 of this Article"; in French "*en conformité des dispositions du paragraphe premier du présent article*"). Consequently, the measure referred to in Article XIX:2 of the GATT 1994 is the measure regulated by Article XIX:1. Reading Article XIX:1 of the GATT 1994 suggests that the measure referred to is the *definitive measure*. In the case of Article 12.1(c) of the Agreement on Safeguards, the measure to be notified is also the definitive measure as the obligation is triggered once the decision to apply or extend *the measure* has been taken.[515]

7.432 Furthermore, as the notification under Article XIX:2 of the GATT 1994 concerns the definitive measure, this obligation could not correspond to any of the other notification obligations mentioned in Article 12 of the Agreement on Safeguards.[516] Only the notifications referred to in Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards concern a definitive measure.

7.433 Accordingly, as the complainants indicate, Article 12.1(c) of the Agreement on Safeguards determines that the obligation is triggered upon taking a decision *to apply* the measure (in Spanish the word is *aplicar* and in French *d'appliquer*). The words *to apply* are similar in the three official language versions of this provision. Nevertheless, as mentioned, Article XIX:2 of the GATT 1994, read simultaneously in the three official language versions, does not clearly determine at which moment the obligation to notify is triggered. Consequently, the Panel considers that the clarity of the text of Article 12.1(c) of the Agreement on Safeguards in the three official language versions provides guidance and throws light on the time at which the obligation in GATT Article XIX:2 has to be observed. Article XIX:2 of the GATT 1994, therefore, read in conjunction with Article 12.1(c) of the Agreement on Safeguards, determines the obligation to notify a definitive measure before it is applied but not necessarily before it is adopted.

7.434 The Panel will now go on to examine whether the complainants succeeded in making the case that the Dominican Republic acted inconsistently with the notification obligation under Articles XIX:2 of the GATT 1994 and 12 of the Agreement on Safeguards by notifying the definitive measure on 8 October 2010.

Analysis in the present case

7.435 As already mentioned, the definitive safeguard measure was adopted on 5 October 2010 and was notified on 8 October[517], three days after the measure had been adopted. The definitive safeguard measure came into effect on 18 October 2010[518], ten days after the Committee on Safeguards had received the notification from the Dominican Republic.

[515] Appellate Body Report, *US – Wheat Gluten*, paragraph 120.

[516] Article 12.1(a) of the Agreement on Safeguards determines the obligation to notify the initiation of an investigation and Article 12.4 determines the obligation to notify before adopting a provisional measure. Article 12.1(b), on the other hand, determines the obligation to notify a finding of the existence of serious injury or threat of serious injury. Depending on the mechanism used by each Member for the imposition of safeguard measures, the time of the event referred to in this last notification (finding of the existence of serious injury or threat of serious injury) may or may not coincide with the moment at which the definitive measure is adopted.

[517] Notification, document G/SG/N/7/DOM/1/Suppl.1 and G/SG/N/8/DOM/1/Suppl.1 (13 October 2010), Exhibit CEGH-19. This document was replaced by document G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1 and G/SG/N/11/DOM/1/Suppl.1 (18 October 2010), Exhibit CEGH-21.

[518] Definitive Resolution, Exhibit CEGH-9.

7.436 The notification of 8 October 2010 is based on Article 12.1(b) and 12.1(c) of the Agreement on Safeguards. In this notification, the Dominican Republic provided information on its findings concerning serious injury and an increase in imports, the product concerned, the measure envisaged, the measure's planned date of introduction and duration, the timetable for its liberalization and the main exporters of the product in question to the Dominican Republic.[519]

7.437 In *US – Wheat Gluten*, in relation to notifications under Article 12.1 of the Agreement on Safeguards, the Appellate Body indicated that the degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. Nevertheless, the amount of time taken to prepare the notification must be kept to a minimum, as the underlying obligation is to notify *immediately*.[520] In this particular case, the Appellate Body concluded that notification within five days (following adoption of the measure) was consistent with the requirement of immediacy contained in Article 12.1(c) of the Agreement on Safeguards.[521]

7.438 Taking into account the foregoing, the Panel considers that, as it has been shown that the Dominican Republic notified the definitive measure to the WTO Committee on Safeguards on 8 October 2010, three days after its adoption (5 October 2010), the complainants have not made the case that the Dominican Republic acted inconsistently with its obligations under Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards.

(ii) Requirement to hold consultations and provide a means of trade compensation before imposing a definitive measure

7.439 The complainants put forward two other claims regarding the requirement to hold consultations and to provide a means of trade compensation before imposing a definitive measure, pursuant to Articles XIX:2 of the GATT 1994 and 12.3 and 8.1 of the Agreement on Safeguards, as consequential claims.[522] The way in which the complainants put forward these claims means that they are linked to the Panel's findings on the claim concerning notification pursuant to Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards.

7.440 Accordingly, having determined that the complainants have not made the case that the Dominican Republic failed to comply with the notification obligation pursuant to Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards, the Panel rejects the complainants' claim that the Dominican Republic did not give them an opportunity to hold consultations in the terms provided in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards.

7.441 Moreover, taking into account the finding concerning the obligation prescribed in Article 12.3 of the Agreement on Safeguards and in the light of the explicit link between the obligations in Articles 12.3 and 8.1 of the Agreement on Safeguards[523], the Panel considers inappropriate the complainants' claim (on the assumption that this claim was duly brought before it for consideration[524])

[519] Exhibits CEGH-19 and CEGH-21.
[520] Appellate Body Report, *US – Wheat Gluten*, paragraphs 105-106.
[521] Appellate Body Report, *US – Wheat Gluten*, paragraph 129 (italics added).
[522] Complainants, first written submission, paragraphs 456-458; opening oral statement at the first meeting of the Panel, paragraph 126; opening oral statement at the second meeting of the Panel, paragraph 74.
[523] See the Appellate Body Reports, *US – Wheat Gluten*, paragraph 146; and *US – Line Pipe*, paragraph 119.
[524] See paragraphs 7.98-7.110 of the present Report.

that the Dominican Republic did not give the complainants an opportunity to obtain an adequate means of trade compensation in the terms of Articles 8.1 of the Agreement on Safeguards and XIX:2 of the GATT 1994.

F. SPECIAL AND DIFFERENTIAL TREATMENT

7.442 According to Article 12.11 of the DSU:

> "Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

7.443 Article 12.10 of the DSU also provides the following:

> "… in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation".

7.444 In the present proceedings, and except for the claim concerning Article 9.1 of the Agreement on Safeguards on which the Panel has already ruled, none of the parties, neither the complainants nor the defendant, has referred to any provision in the WTO Agreements on special and differential treatment for developing countries. In any event, the Panel has taken into account the status of the parties as developing country Members, particularly when preparing the timetable for the proceedings after having heard their respective views. There are no other provisions on differential and more favourable treatment for developing country Members that should be the subject of special consideration by the Panel.

7.445 The Panel also points out that the Dominican Republic has stated that this dispute could affect the "inherent and essential flexibility of the WTO's tariff concessions mechanism", according to which Members are free to raise tariffs up to a level that does not exceed the bound rate.[525] In this connection the Panel has noted that the findings in this Report do not affect the flexibility given to WTO Members under the provisions in the GATT 1994 freely to modify their tariffs by adopting new ordinary customs duties that remain within the level bound in the schedule of concessions. Neither do they affect the right of WTO Members to impose emergency measures on imports of specific products and, as a result, to suspend, in whole or in part, obligations under the GATT 1994 with respect to those products, including the possibility of withdrawing or modifying concessions in a manner consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set out above, the Panel concludes the following:

(a) The Panel rejects the request of the Dominican Republic that it find that the impugned measures are not covered by Article XIX of the GATT 1994 or the Agreement on Safeguards and that, therefore, the dispute brought by the complainants, at least as far as these rules are concerned, is devoid of purpose and, on

[525] Dominican Republic, closing statement at the second meeting of the Panel, paragraphs 5-7.

the contrary, concludes that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination of the claims put forward in this dispute;

(b) the Panel does not consider it necessary to rule on the request of the Dominican Republic that the Panel decline jurisdiction in the present dispute on the grounds that the complainants are contesting the Dominican Republic's application of a tariff higher that the preferential tariff provided for in regional free trade agreements, in view of the subsequent statements by the parties;

(c) the Dominican Republic acted inconsistently with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the Agreement on Safeguards with regard to the findings, in the preliminary and final determinations, on the unforeseen developments and the effect of the GATT obligations that were claimed to be the cause of the alleged increase in imports that caused serious injury;

(d) the Dominican Republic acted inconsistently with its obligations under Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to the findings, in the preliminary and final determinations, on the definition of the domestic industry;

(e) the complainants have not made the case that the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 3.1, last sentence, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to the findings, in the preliminary and final determinations, on the increase in imports;

(f) the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to the findings, in the preliminary and final determinations, on the existence of serious injury;

(g) the complainants have not made the case that the Dominican Republic acted inconsistently with its obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Agreement on Safeguards by failing to conduct a new analysis in order to determine the increase in imports, injury and the causal link when excluding imports from Colombia, Indonesia, Mexico and Panama;

(h) the Dominican Republic acted inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards by failing to take all reasonable measures available to it to exclude Thailand from the application of the provisional and definitive safeguards measures; and

(i) the complainants have not made the case that the Dominican Republic acted inconsistently with its obligations under Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards when notifying the definitive measure, or that the Dominican Republic failed to give them an opportunity for consultations in the terms provided in Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards, or that the Dominican Republic failed to give them an opportunity to

obtain an adequate means of trade compensation in the terms of Articles 8.1 of the Agreement on Safeguards and XIX:2 of the GATT 1994.

8.2 Pursuant to Article 3.8 of the DSU, in cases of failure to comply with obligations assumed under a covered agreement the measure is considered prima facie to constitute a case of nullification or impairment of the benefits accruing from that agreement. Consequently, we find that, to the extent that it acted inconsistently with certain provisions of the GATT 1994 and the Agreement on Safeguards, the Dominican Republic nullified or impaired benefits accruing to the complainants under those Agreements.

8.3 In accordance with Article 19.1 of the DSU and having found that the Dominican Republic acted inconsistently with certain provisions of the GATT 1994 and the Agreement on Safeguards, as described above, we recommend that the Dominican Republic bring its measures into conformity with its obligations under those Agreements.

WORLD TRADE ORGANIZATION

WT/DS415/R/Add.1
WT/DS416/R/Add.1
WT/DS417/R/Add.1
WT/DS418/R/Add.1
31 January 2012
(12-0543)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Final Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS415/R-WT/DS416/R-WT/DS417/R-WT/DS418/R.

LIST OF ANNEXES

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT THE SPECIAL SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX H

COMMUNICATION FROM THE PANEL

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. This dispute relates to the provisional safeguard measure ("provisional measure") and the definitive safeguard measure ("definitive measure") imposed by the Dominican Republic on imports of polypropylene bags and tubular fabrics. Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") consider that these measures are inconsistent with the Agreement on Safeguards ("AS") and with the General Agreement on Tariffs and Trade 1994 ("GATT").

2. These measures give rise to serious concerns about the conduct of trade policy in the region of Central America and the Caribbean. They are being used by the Dominican Republic as an instrument to circumvent its regional commitments under the Free Trade Agreement between Central America and the Dominican Republic ("Central America-DR Agreement") and under the agreement between the Dominican Republic, Central America and the United States ("DR-CAFTA"). For that purpose, the Dominican Republic carried out an investigation in accordance with its domestic legislation on safeguard measures, the AS and the GATT. The resulting safeguard measures were notified to the WTO.

3. In carrying out the investigation and adopting the safeguard measure, the Dominican Republic acted in a manner inconsistent with various provisions of WTO law, including: (a) the determination of the domestic industry entails arbitrary definitions of the products under investigation, the failure to consider relevant evidence and the unjustified exclusion of certain domestic producers; (b) there is no determination as to unforeseen developments and the effect of the obligations incurred under the GATT that are alleged to have resulted in increased imports causing serious injury to the domestic industry; (c) the increase in imports is not of the nature or magnitude required by the AS for the application of safeguard measures; (d) the determination of serious injury and causal link relate to a domestic industry of the Dominican Republic which is in a favourable position and suffers no damage on account of imports, but rather, if anything, on account of other factors relating to the domestic industry's own performance or economic conditions in the Dominican Republic; (e) the measures have not been applied on a most-favoured-nation basis, as required by Article 2.2 of the AS (which calls for safeguard measures to be applied to all imports under investigation, irrespective of their source), for which reason an argument was made for the exclusion of specific imports pursuant to Article 9.2 of the AS, without observing the requirement of parallelism.

II. FACTUAL BACKGROUND

4. Tubular fabric is described as a woven fabric of synthetic polypropylene yarn, which is produced from: (i) polypropylene resin; (ii) calcium carbonate; (iii) colouring agent; (iv) flexographic inks; and (v) solvents.[1] The yarn is wound on to bobbins and fed to circular looms in order to give the fabric a tubular form. The tubular fabric constitutes the raw material or main input for the manufacture of polypropylene bags.

[1] Initial technical report of the DEI, page 10.

5. Polypropylene bags are described as bags or sacks for packaging. They are produced from bobbins or rolls of tubular fabric, which in turn are produced from resin and other minor components.[2] Polypropylene bags are used for the packaging of food, agro-industrial and industrial products.[3]

III. THE MEASURES AT ISSUE

6. The provisional measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It was applied from l April 2010 until 17 October 2010 (a period of 200 days). The provisional measure was not applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, nor irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from and/or originating in Mexico, Panama, Colombia and Indonesia.[4] The provisional measure is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 26 March 2010.[5]

7. The definitive measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It came into effect on 1 April 2010, for a period of 18 months until 21 April 2012.[6] The definitive measure is not being applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, or irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from/or originating in Mexico, Panama, Colombia and Indonesia.[7] The definitive measure is applied as an alternative duty to the MFN tariff and is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 8 October 2011.[8]

IV. THE FRAMEWORK FOR THE PANEL'S REVIEW

8. The objective assessment by a panel must have certain characteristics. It must be a ***critical and in-depth examination*** of the explanations provided by the investigating authorities[9], in which it determines whether those explanations are ***reasoned and adequate***, as well as ***explicit***.[10] This assessment may not consist of finding "support for [the] conclusions [of the investigating authorities] by cobbling together disjointed references scattered throughout a competent authority's report".[11]

---

[2] *Ibid.*

[3] Public notice of provisional measure; public notice of definitive measure.

[4] Addendum to Resolution CDC-RD-SG-061-2010, dated 16 March 2010, deciding on the application of provisional measures, Exhibit CEGH-6, second article.

[5] G/SG/N/7/DOM/1, G/SG/N/8/DOM/1, G/SG/N/11/DOM/1, Exhibit CEGH-18.

[6] Public notice of definitive measure.

[7] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 (final resolution), fourth article. Exhibit CEGH-9.

[8] (G/SG/N/7/DOM/1/Suppl.1, G/SG/N/8/DOM/1/Suppl.1 (Exhibit CEGH-19); G/SG/N/7/DOM/1/Suppl.1/Corr.1, G/SG/N/8/DOM/1/Suppl.1/Corr.1 (Exhibit CEGH-20); G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (Exhibit CEGH-21).

[9] Appellate Body Report, *US – Lamb*, paragraph 106.

[10] *Ibid.*; see also Appellate Body Report, *US – Steel*, paragraphs 287 and 297.

[11] Appellate Body Report, *US – Steel*, paragraph 326.

9. The basis for the assessment by a panel must be the findings, conclusions and analysis contained in the public reports of the authority.[12] This assessment cannot be based on *ex post facto* explanations.

V. LEGAL CLAIMS

A. THE DEFINITION OF THE DOMESTIC INDUSTRY IS INCONSISTENT WITH ARTICLES 3.1, 4.1(c), 4.2(c) OF THE AS

1. The Commission failed to establish adequately and reasonably that the imported products were like or directly competitive products

10. The Regulatory Commission on Unfair Trade Practices and Safeguard Measures (the "Commission") held that the imported product under investigation was a single product jointly comprising tubular fabric and polypropylene bags. However, the Commission and its Investigations Department (DEI) made a number of basic errors in arriving at this definition:

- Despite the fact that the interested parties put forward a variety of questions and factual information concerning the definition of the imported product, neither the Commission nor the DEI gave an adequate and reasoned explanation in response to those objections. The questions concerned pointed to the fact that tubular fabric and polypropylene bags are distinct products and cannot be considered to be the same product.

- The only reason for considering tubular fabric and polypropylene bags as the same product was the classification based on Note 2 in Chapter 63 of the Dominican Republic's Customs Tariff.[13] What would appear to underlie the interpretation given to Note 2 by FERSAN, the DEI and the Commission (to the effect that heading 6305 covers tubular fabric) is the presumption that a tubular fabric is equivalent to an incomplete or unfinished bag. However, that presumption is not explained in any of the relevant reports or resolutions. Moreover, according to the Directorate of Customs of the Dominican Republic, this Note is inconsistent with the Harmonized System Convention.[14]

11. In the absence of reasoned findings and conclusions on the definition of the product under investigation, the Commission defined the product investigated inconsistently with Articles 3.1, last sentence, and 4.2(c) of the AS and, in consequence, defined the domestic industry inconsistently with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

12. In addition, the Commission failed to make a valid determination that the domestic products were directly competitive with the imported products under investigation. The Commission considered the production of tubular fabric and polypropylene bags as the same domestic industry, without having demonstrated that both products, as an input and as final goods, respectively, are

[12] *Ibid*., paragraph 299.

[13] According to Note 2, as described by the Commission in its preliminary resolution, "heading 6305 (corresponding to bags and sacks for packaging) also covers tubular fabric for bags, in accordance with interpretative rule 2(a), (preliminary resolution, paragraph 31).

[14] Communication from the Directorate-General of Customs (DGA) dated 25 November 2009, folio 000089 in the file, Exhibit CEGH-13.

directly competitive with each other. Further, the Commission failed to make a determination with regard to the directly competitive domestic product having the same scope as the imported product, since the Commission considered tubular fabric and polypropylene bags manufactured from resin (excluding bags manufactured from tubular fabric) as the domestic product and, at the same time, considered tubular fabric and polypropylene bags in general (regardless of whether the latter were produced from resin) as the imported product. Finally, the Commission determined the directly competitive products without following the order of analysis established by the Appellate Body for that purpose[15], inasmuch as the Commission first defined the status of FERSAN as that of the domestic industry, and subsequently defined the directly competitive products.[16]

13. The Commission could not have validly identified the domestic producers constituting the domestic industry, and this therefore entails a violation of Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

2. The Commission improperly excluded producers of directly competitive domestic products

14. The Commission considered that the domestic industry is the industry producing tubular fabric and polypropylene bags made from resin[17] and that that status fell to the applicant, FERSAN.[18] However, the Commission reached that conclusion despite making two fundamental errors:

- It excluded out of hand specific categories of producers of the directly competitive domestic product on the basis of an erroneous interpretation of the term "producers" in Article 4.1(c) of the AS. The requirement of being a "producer" of tubular fabric and polypropylene bags *made from resin* makes the status of producer conditional on a specific production process. The Commission's interpretation is contrary to the interpretation given to the term "producers" in the context of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.[19]

- Even under their own interpretation of the term "producers" based on production from resin, the DEI and the Commission excluded domestic producers producing the domestic product from resin, such as the companies FIDECA and TITAN.

15. For these reasons, the Commission failed to define the domestic industry in a manner consistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

[15] Appellate Body Report, *US – Lamb* paragraph 87.

[16] Initial resolution, page 4: preliminary resolution, paragraphs 13 and 14 and 26-36; definitive resolution, paragraphs 18-23.

[17] Preliminary resolution, paragraph 13; preliminary report, pages 55-58; final resolution, paragraph 18; final report, pages 43-46.

[18] *Ibid.*

[19] Panel Report, *US – Lamb*, paragraph 7.69. See also, with regard to countervailing measures, the Panel Report in *Mexico – Olive Oil*, paragraph 7.192; and with regard to anti-dumping measures, the Panel Report in *EU – Salmon*, paragraph 7.114.

B. THE ABSENCE OF DETERMINATIONS ON UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT IS INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 3.1, 4.2(c) AND 11.1(a) OF THE AS

1. The Commission failed to demonstrate that there were unforeseen developments

16. The Commission produced no reasoned finding or conclusion to demonstrate the existence of unforeseen developments, as well as the logical connection between those developments and the increased imports alleged to have caused serious injury to the domestic industry.

17. In the initial report, the DEI transcribed the arguments of FERSAN to the effect that there had been unforeseen developments caused by the obligations assumed in the DR-Central America Agreement for which the total reduction period was ascertained from 2004.[20]

18. In the preliminary report, the DEI stated that FERSAN added to its claim further unforeseen developments such as: (i) the international economic crisis of 2008 and its repercussions on the regional economy, and (ii) the introduction of goods produced under regimes allegedly incompatible with the DR-Central America Agreement, for which reason a bilateral violation of that agreement would qualify as unforeseen developments.[21] The DEI also mentioned FERSAN's argument that, with regard to the economic/financial crisis of 2008, the DEI simply confined itself to affirming that this "had a significant impact on the economy of the region which has not spared the Dominican industry". Moreover, the DEI itself disregarded the relevance of the alleged violation of the 1998 bilateral agreement as an event brought about by unforeseen developments.

19. Lastly, in the final report, the DEI added a new aspect relating to China's accession to the WTO.[22] Moreover, no opinion was given as to whether that fact was not foreseen by the Dominican Republic in its capacity as a WTO Member, at the time of entering into its obligations under the GATT (of 1994).

20. The descriptive and scattered references to unforeseen developments in the initial, preliminary and final determinations fail to satisfy the standard of factual demonstration required by Article XIX:1(a) of the GATT in relation to Articles 3.1, last sentence, and 4.2(c) of the AS. Consequently, the DEI and the Commission acted inconsistently with those provisions.

2. The Commission failed to explain how the GATT obligations caused the increased imports of tubular fabric and polypropylene bags

21. The DEI and the Commission recognized the obligation under Article XIX:1(a) of the GATT to demonstrate the unforeseen developments and the effect of the obligations incurred under the GATT which resulted in increased imports.[23] The Appellate Body has confirmed that, in order to demonstrate the *effect* of obligations assumed under the GATT, it is necessary to demonstrate that specific obligations have been assumed.[24]

[20] Initial report, page 15.
[21] Preliminary report, pages 70-71.
[22] Final report, page 66. We take it that the reference to "China's incursion into the multilateral trading system" refers to China's accession to the WTO.
[23] Preliminary report, page 69; final resolution, paragraph 27; final report, pages 63-65.
[24] Appellate Body Report, *Argentina – Footwear*, paragraph 91; Appellate Body Report, *Korea – Dairy*, paragraph 84.

22. There is no finding in the reports or resolutions that identifies the GATT obligations alleged to have caused the increased imports, or that indicates how those obligations would have resulted in an increase in the imports concerned. This is inconsistent with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

C. THE DETERMINATIONS REGARDING INCREASED IMPORTS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1 AND 4.2(c) AND 6 OF THE AS

1. The Commission failed to demonstrate an increase in imports in absolute terms that was "recent enough, sudden enough, sharp enough, and significant enough"

23. The Commission reached the conclusion that the imports increased in absolute terms, causing serious injury to the domestic industry[25], despite having found that there was a "marked decrease"[26] in imports in absolute terms towards the end of the period. Nor did the Commission provide an adequate and reasoned explanation as to why, despite the absolute decrease towards the end of the period, it still considered that there had been an increase in imports. It was not demonstrated, therefore, that there had been an increase in imports that was sufficiently sudden, recent, sharp and significant to support the contention of an absolute increase in imports, in line with the interpretation given by the Appellate Body in *Argentina – Footwear*.[27]

24. Likewise, neither the DEI nor the Commission complied with the obligation to examine the upward trend of imports during the period investigated, since they only referred to a comparison of the absolute levels at the beginning and end of the period of investigation.[28]

25. Consequently, the DEI and the Commission failed to establish a reasoned conclusion regarding the increased imports in a manner consistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

2. The Commission failed to demonstrate an increase in imports relative to domestic production

26. The Commission reached the conclusion that imports increased in relative terms, causing serious injury to the domestic industry.[29] However, the Commission reached this conclusion despite having found that the relative share of imports in relation to domestic production fell steadily and uninterruptedly for most of the period of investigation.

27. The Commission's final conclusion is not explained in the light of the factual findings of the DEI. From 2007, imports clearly showed a steady and uninterrupted downward trend in relation to domestic production.

28. Consequently, the Commission's determination that there had been an increase in imports in absolute terms was inconsistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last

[25] Preliminary resolution, first article; final resolution, paragraph 31 and first article.
[26] Preliminary report, page 68; final report, page 61.
[27] Appellate Body Report, *Argentina – Footwear*, paragraph 131.
[28] Appellate Body Report, *US – Steel*, paragraph 354.
[29] Preliminary resolution, first article; final resolution, paragraph 31 and first article.

sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

D. THE DETERMINATIONS REGARDING SERIOUS INJURY, AND THE DEMONSTRATION OF CRITICAL CIRCUMSTANCES (WITH REGARD TO THE PROVISIONAL MEASURE) ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, 4.1(a), 4.2(a), 4.2(c) AND 6 OF THE AS

29. In both the preliminary and the final determination, the Commission concluded that there was serious injury despite having committed numerous errors:

- It failed to carry out a disaggregated and complete analysis regarding the many segments of the domestic industry, as required by the Appellate Body.[30] Therefore, no separate analysis was provided regarding the production of tubular fabric and regarding the production of polypropylene bags.

- In the preliminary determination, the Commission failed to evaluate all relevant factors listed in Article 4.2(a) of the AS, since it omitted from its analysis the factor relating to the productivity of the domestic industry.

- In the preliminary and final determinations, the Commission concluded that there was serious injury despite the fact that the relevant indicators showed the contrary or were inadequately evaluated.

- Neither the DEI nor the Commission provided an adequate and reasoned explanation of the "critical" nature of the circumstances that allegedly justified the provisional measure in accordance with Article 6 of the AS.

30. The Commission's determination of serious injury to the domestic industry was therefore inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 5 of the AS, as well as with Article XIX:1(a) of the GATT.

E. THE CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, LAST SENTENCE, 4.2(a), 4.2(c) AND 6 OF THE AS

31. The Commission imposed the provisional and definitive measures on the basis of its conclusion that imports had increased, "causing" serious injury to the domestic industry of fabrics and bags.[31] In reaching this conclusion, the Commission was guilty of two serious omissions:

- It failed to demonstrate by means of a relevant analytical method the causal relationship between the alleged increase in imports and the alleged serious injury to the domestic industry. The Commission confined itself to making assertions with

[30] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 195, 213, 214; Appellate Body Report, *Mexico – Rice*, paragraphs 180-187.

[31] Preliminary resolution, first article; final resolution, first article.

regard to causation[32], but it failed to provide an adequate and reasoned explanation in this respect.

- It failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS. In violating this obligation, the Commission failed to show that the harmful effects caused by factors other than imports would not be attributed to the imports under investigation.

32. As a result, the Commission determined the causal link between the imports and the serious injury to the domestic industry inconsistently with Articles 2.1, 3.1, last sentence, 4.1(a), and 4.2 of the AS and Article XIX:1(a) of the GATT, as well as with Article 6 of the AS, with regard to the provisional measure.

F. THE MEASURES AT ISSUE VIOLATED THE REQUIREMENT OF PARALLELISM AND ARE INCONSISTENT WITH ARTICLES 2.1, 2.2, 3.1, 4.2, 6 AND 9.1 OF THE AS

33. In accordance with the requirement of parallelism, if a Member decides to exclude certain imports from the scope of a measure, the investigating authorities must satisfy themselves that those imports are also excluded from the evaluations relating to substantive aspects in which they were the subject of analysis.[33]

34. In the analysis of imports, the Commission considered all imports that entered the Dominican Republic between 2006 and 2009.[34] Thus, in the preliminary and final resolutions, the Commission decided to apply the provisional and final measures, respectively, to *all* imports of tubular fabric and polypropylene bags under headings 5407.20.20 and 6305.33.90 of the Dominican Republic's Customs Tariff.[35] Nevertheless, in the same resolutions, the Commission decided to exclude imports from Mexico, Panama, Colombia and Indonesia from the scope of both measures, on the ground that they collectively accounted for 1.21 per cent of the imports investigated.[36]

35. As a result, the Commission decided to apply the provisional and definitive measures inconsistently with Articles 2.1, 2.2, 3.1, last sentence, 4.2(a), 4.2(b), 4.2(c), 6 and 9.1[37] of the AS (the latter provision in relation to the provisional measure).

[32] Preliminary resolution, paragraph 47; preliminary report, page 88; final resolution, paragraphs 37 and 38.

[33] Appellate Body Report, *US – Steel*, paragraph 441. Appellate Body Report, *US – Tubular Goods*, paragraph 181, with citation from *US – Lamb*, paragraph 103.

[34] Preliminary report, Annexes I and II: final report, Annexes I and II.

[35] Preliminary resolution, second article, as amended by the amending preliminary resolution: final resolution, second article.

[36] Preliminary resolution, fourth article, as amended by the amending preliminary resolution; final resolution, fourth article.

[37] According to the statistics on imports, imports from Thailand amounted to 0.32 per cent of total imports during the period under investigation, and thus constituted less than 3 per cent of imports. It was therefore necessary to exclude imports from Thailand from the scope of the measures at issue, in accordance with Article 9.1 of the AS. However, the resolutions do not exclude Thailand from the scope of the measures at issue.

G. THE DOMINICAN REPUBLIC ACTED INCONSISTENTLY WITH ARTICLE XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

36. The Commission imposed the definitive measure without timely notification and without affording Members with a substantial interest in the products under investigation an opportunity for consultations as provided in Article 12.3 of the AS and Article XIX:2 of the GATT. Nor did the Commission provide an opportunity to obtain an adequate means of trade compensation in accordance with Article 8.1 of the AS and Article XIX:2 of the GATT.

VI. REASONS FOR REQUESTING SUGGESTIONS CONCERNING IMPLEMENTATION OF POSSIBLE RULINGS AND RECOMMENDATIONS BY THE PANEL

37. The complainants request the Panel, on the basis of Article XIX:1 of the DSU, to suggest that the Dominican Republic immediately put an end to the definitive measure. This request is also based on the previous practice followed by other panels.[38]

38. The magnitude and number of the errors committed by the DEI and the Commission in carrying out their investigation lead to a situation analogous to that obtained in the above-mentioned cases, so that the only way in which the Dominican Republic could properly apply the possible rulings and recommendations of the Panel would be through the immediate revocation of the definitive safeguard measure.

VII. REQUEST FOR RULINGS AND RECOMMENDATIONS

39. On the basis of the foregoing, the complainants request the Panel to issue the following findings and rulings: (i) the provisional measure and the definitive measure are inconsistent with Article XIX:I(a) of the GATT and Articles 2.1, 2.2, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the AS; and (ii) the Dominican Republic acted inconsistently with Article XIX:2 of the GATT and Articles 8.1 and 12.3 of the AS.

40. Pursuant to the provisions of the second sentence of Article 19.1 of the DSU, the complainants request the Panel to make suggestions for the application of its rulings and recommendations with regard to the definitive measure.

[38] Panel Report, *Argentina – Poultry*, paragraph 8.7; Panel Report, *Guatemala – Cement II*, paragraph 9.6; Panel Report, *Mexico – Steel Pipes and Tubes*, paragraph 8.12.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. This dispute concerns the Dominican Republic's imposition of a 38 per cent tariff on imports of polypropylene bags and tubular fabric by means of a provisional measure and, subsequently, a definitive measure. These measures are contested by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") in the light of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and various provisions in the Agreement on Safeguards ("AS").

2. As the course of action followed by the Dominican Republic did not, however, result in suspension of the obligations undertaken with respect to these products, or withdrawal or modification of concessions, neither Article XIX nor the AS are applicable to the measures contested by the complainants. Consequently, there are no grounds for this dispute and the present procedure before the Panel cannot continue.

3. If the Panel does decide that Article XIX of the GATT and the AS do apply to the measures contested, the Dominican Republic affirms, as a preliminary, that several claims are adequately identified in terms of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and are not covered by the Panel's terms of reference, or that the complainants have not been able to make a prima facie case for any violation. This is the case for the complaint based on the alleged omission of determinations of unforeseen developments and the effect of GATT obligations, an omission which, in the view of the complainants, resulted in inconsistency in the determinations of the increase in imports, serious injury and the causal link.

4. Likewise, the Panel's terms of reference do not include Article 4.1(a) of the AS as the legal basis for the complaint concerning the causal link, which was not included in the request for consultations. For the same reason, the complaint concerning the obligation to reach agreement on a means of trade compensation, based on Article 8.1 of the AS, does not fall within the Panel's terms of reference. Lastly, the complainants failed to elaborate on some complaints in their first written submission, and it is therefore the Dominican Republic's understanding that they have been withdrawn. This is the case for the complaints in points (h), (i), (l) and (m) of the request for the establishment of a panel submitted by the complainants.[1] The last three complaints (points (i), (l) and (m)) are not included in the Panel's terms of reference either.

5. If the Panel should decide to consider the measures at issue in the light of the GATT and the AS, the Dominican Republic affirms that, contrary to what is asserted by the complainants, the measures at issue fully comply with the GATT and the AS, particularly as regards the following:

- The definition of the domestic industry;
- determinations of the existence of unforeseen developments and the effect of the obligations incurred under the GATT;
- determinations of the increase in imports, the serious injury, the critical circumstances and the causal link;

[1] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.

- the parallelism requirement; and
- notice of the measure and the holding of consultations.

6. Contrary to the contention by the complainants, the definition of the domestic industry is based on valid determinations of the imported product under investigation and the directly competitive domestic product. As to the **imported product under investigatio**n, the complainants question the treatment of tubular fabric and polypropylene bags as a single product to be investigated. The previous reports on which the complainants base their case, however, provide little, if any, guidance. The paragraphs mentioned in the Appellate Body Report on *US – Lamb* refer to the inclusion of certain actors in the domestic industry, without dealing with determination of the imported product under investigation or the likeness of the lamb meat produced in the United States and that imported. The facts and the products under consideration are, moreover, very unlike each other.

7. The other Appellate Body Report mentioned, *Chile – Price Band System*, only mentions in this connection *US – Lamb* and, what is more, relates to a situation in which the Chilean authorities had only made an implicit affirmation of likeness or direct competition, simply providing an *ex post facto* explanation. This is in direct contrast to the present case, where there are many and detailed findings about the product under consideration and the directly competitive product in the initial report and resolution, the public notice of initiation, the preliminary report and resolution, as well as the final report and resolution of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic ("the Commission"). It is difficult to claim, therefore, that the considerations of the Appellate Body in that case are relevant to the present case. The reports and resolutions cited also show that, contrary to what is asserted by the complainants, the Commission and the Investigation Department (DEI) took into account comments by certain importers, exporters, and government authorities, even when they did not respond to them.

8. The complainants' analysis provides no conclusive legal grounds based on Article XIX of the GATT or on the AS to indicate that treating tubular fabric and polypropylene bags as a single product for the purposes of the investigation is inconsistent with the covered agreements. Prior Reports by Panels in *US – Softwood Lumber V, EC – Salmon (Norway)* or *Korea – Certain Paper* found that the Anti-Dumping Agreement did not provide any guidance on the way in which the product under consideration had to be determined, reasoning that also applies to the AS.

9. As regards the **determination of the directly competitive domestic product**, it is clear that it was based on what FERSAN, the petitioner in the procedure before the Commission, stated in its request for initiation of the investigation. It is necessary to emphasize, however, that the Commission's reports and resolutions show that numerous factors were evaluated affirming that the domestic product and the product under consideration were directly competitive. The complainants also contend that there must be symmetry between the definition of the product under consideration and the definition of the domestic product. This symmetry would be lacking as the product has been defined as "produced from resin". The technical reports and the resolutions show, however, that the criterion "produced from resin" was not a priori imposed when defining the directly competitive product, but is the logical result of the exclusion from the definition of the domestic industry of those manufacturers which import the product under consideration. Furthermore, the complainants do not indicate the legal basis from which the alleged obligation to respect symmetry in the definition of products that are in direct competition derives.

10. The complainants also put forward an order for the analysis which the Dominican authorities should have followed in their reports, based solely on a finding by the Appellate Body in its Report in *US – Lamb*, without indicating how such an obligation could be derived from Article 3.1, last sentence, or Article 4.2(c) of the AS. Even though the Dominican Republic questions the existence of such an obligation, it should be noted that the logical sequence of the preliminary and definitive reports that are an integral part of the respective resolutions are consistent with the order of analysis put forward by the complainants.

11. In definitive, the Dominican authorities defined the product under consideration as "polypropylene bags and tubular fabric" and the directly competitive domestic product as "polypropylene bags and tubular fabric"; the direct competition relationship is obvious and, furthermore, similar practices in anti-dumping investigations have been approved in a manner consistent with the Reports of the various Panels, as is the case for *US – Softwood Lumber V*, *Korea – Certain Paper* or *EC – Salmon (Norway)*. As the definitions of the product under consideration and the directly competitive domestic product are valid, they constitute an appropriate basis for the Dominican authorities' determination of the domestic industry.

12. With regard to the **determination of the domestic industry**, the Dominican authorities pointed out that three producers declared themselves to be interested parties, in two of which most of the output used imported tubular fabric, in other words, the product under consideration. Those manufacturers which import the product under consideration were excluded, in accordance with Law No.1-02, whose consistency with the AS was not questioned by the complainants, following an adequate and reasoned explanation. Consequently, there was no a priori exclusion of certain categories of producer, and the procedure was not based on an erroneous interpretation of the word "producers", there is no violation of Article 4.1(c) or other provisions of the AS in this sense, and the selection of FERSAN as the only component of the domestic industry is valid. Moreover, independently of the exclusion of certain manufacturers in the present case, the Dominican Republic points out that it reserves the right to require a minimum level of processing or value added before an economic actor can be deemed to be a "producer" within the meaning of Article 4.1(c) of the AS, so the idea that whoever cuts and sews tubular fabric is considered to be a "producer" of polypropylene bags is highly questionable.

13. With regard to unforeseen developments pursuant to Article XIX of the GATT, the Dominican Republic considers that their determination does not constitute a binding obligation as a prerequisite for the application of a safeguard measure. This understanding is based on the fact that the AS does not contain such an obligation and therefore derogates from Article XIX in this sense. This interpretation is corroborated by the intention of the States which negotiated the Uruguay Round, by the text, and the exhaustive nature of the AS, the legislation of other WTO Members, and by ambiguous declarations and the absence of clear guidelines in this respect on the part of the WTO's decision-making bodies. For these reasons, the Dominican Republic also expresses its disagreement with the prior Reports of the Appellate Body in *Argentina – Footwear* and *Korea – Dairy*, which require proof of the unforeseen developments that resulted in increased imports.

14. Despite the foregoing, if the Panel decides that proof of unforeseen developments constitutes a binding obligation, both the Preliminary Technical Report and the Final Technical Report contain detailed findings and conclusions in this regard, mentioning the tariff reduction process with the entry into force of the DR-CAFTA and the DR-Central America Treaty. Reference is also made to the form submitted by FERSAN, in which the rising cost of producing polypropylene bags and tubular fabric is addressed, as well as the increase in energy costs, which harmed its competitive position and opened the way to use of less costly imports. The Dominican authorities therefore provided a reasoned and

adequate explanation of the unforeseen developments whose effect was an increase in imports, complying with Article XIX.1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

15. Regarding the effect of GATT obligations, the Dominican Republic gave a 40 per cent tariff concession for products classified under subheadings 5407.20.20 and 6305.33.90, concerning polypropylene bags and tubular fabric. The Dominican Republic therefore complied with this requirement in Article XIX of the GATT to the effect that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations, including tariff concessions, in accordance with the words of the Appellate Body in its Report on *Argentina – Footwear*.

16. Concerning the increase in imports, the Commission's findings indicated a recent enough, sudden enough, sharp enough and significant enough increase, both in qualitative terms and qualitatively, to cause serious injury. Despite the existence of this increase, there was a 14.68 per cent drop recorded in the last year of the investigation period, whereas the increase was 50.06 per cent over the whole period investigated, also taking into account the aforementioned drop. According to the findings of the Dominican authorities, this decrease towards the end of the investigation period was more of an incidental and temporary nature as it was caused by the lower rate of economic growth in the Dominican Republic in 2009, which saw a decrease of 30.03 per cent in total imports, while during this period, imports of the product under consideration fell by a lesser amount. In addition, the Commission determined that there was a recovery in imports of tubular fabric and polypropylene bags in early 2010.

17. Moreover, contrary to what is asserted by the complainants, the Dominican Republic did not limit itself to comparing the end points in the investigation period but undertook a point-by-point analysis for each period separately, taking into account both the rate and the volume of the increase. It thus fully complied with the obligation to analyse the trend in imports, as specified by the Appellate Body in *Argentina – Footwear*. The Commission also conducted an analysis of the relative increase in imports, finding an increase in 2007 alone. Nevertheless, having previously proven the existence of an increase in absolute terms, it complied with Article 2.1 of the AS, which requires an increase in absolute terms or relative to domestic production, compliance with one of these requirements being sufficient. The claims by the complainants that there was no increase in imports or that its existence was not determined in accordance with Articles 3.1, last sentence, 4.2(c) and 11(a) of the AS should therefore be rejected.

18. With regard to the determination of serious injury, the claim that the Commission did not undertake a separate and comprehensive analysis of the numerous segments of the domestic industry should be rejected as there is no positive obligation in the AS requiring that serious injury be evaluated by segment or separately. It clearly emerges from the reports, moreover, that there was a joint analysis of the polypropylene bags and tubular fabric segments, and that the analysis was not limited to the production of bags alone, as contended by the complainants. Both the wording of the technical reports and the figures provided by the domestic industry (which are expressly mentioned in the reports) show that the investigating authority proceeded on the basis of aggregate data for polypropylene bags and tubular fabric.

19. Regarding the alleged failure to evaluate the "productivity" indicator in the preliminary determination, the Dominican Republic affirms that a finding by the Panel in this regard would clearly not be necessary in order to ensure a positive settlement of the dispute inasmuch as the measure is no longer in effect and has been replaced retroactively by the final determination, about which the complainants have not made the same claim. In addition, the trend in this indicator compares

production in volume and value terms with the number of employees, and both indicators are to be found in the preliminary report. When the complainants require that productivity be evaluated under a specific heading in the preliminary report, they are adopting a purely formalist approach, which is obviously inappropriate for a preliminary determination. In fact, Article 6 of the AS, concerning provisional measures, indicates that Article 4.2 of the AS applies to the investigation subsequent to the provisional measure and not to the preliminary determination, inasmuch as the obligation to evaluate all indicators of injury concerns the "subsequent investigation" after the adoption of a preliminary measure.

20. With regard to proof of serious injury, the Dominican authorities found conclusive indications of significant overall impairment, based on consistent and growing losses suffered by the domestic industry, the negative impact on increases in inventories, the relative contraction in the value of production, negative cash flow and the problems encountered by the domestic industry in gaining a larger market share despite its large investment and loss-making selling prices. In definitive, the investigating authority gave an adequate and reasoned explanation of the serious injury suffered by the domestic industry, so the Dominican Republic fully complied with Article XIX.1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the AS.

21. Concerning the alleged failure to prove the critical nature of the circumstances that justified the imposition of the provisional measure, the Dominican Republic sees no need to reach findings regarding the provisional measure, which has expired and been replaced by the definitive measure. Even so, the investigating authority proved the existence of injury difficult to repair in terms of Article 6 of the AS if no provisional measure was adopted. The investigating authority noted, among other indicators, a 206 per cent decline in financial performance and a 199 per cent increase in inventories.

22. Regarding the claims relating to the alleged failure to determine a causal link, many of the complainants' claims are biased. They mention that the domestic industry's share of domestic apparent consumption showed a sharp rise, whereas in fact it only exceeded its 2006 share in 2009, but remained below it in 2007 and 2008. The same applies to their interpretation of the share of imports, which only from 2009 onwards and by selling at a loss on the part of FERSAN, managed to fall below the 2006 levels. The same also applies to the alleged downward trend in imports, whereas they increased steadily from 2006 to 2008, with only an incidental and temporary drop in 2009.

23. The complainants also allege that the DEI and the Commission did not act consistently with the AS in attributing the financial losses to the imports, although it is shown in the preliminary and final reports that, if it had not been for the flow of imports, the domestic industry could have coped with the loans it contracted through economies of scale resulting from its investment without suffering financial losses. Likewise, the technical reports, by showing how imports replaced sales of domestic products, indicated how the increase in inventories is attributable to the increased imports. As regards cash flows, the decrease follows FERSAN's strategic decision to keep its prices low and its production levels high, precisely because of the pressure exercised by imports, so the negative trend in this factor as well has to be attributed to the imports, contrary to what is contended by the complainants.

24. The argument that injury caused by competition from the domestic producers excluded was wrongly attributed to the imports should be rejected as well. The reason why these producers were excluded was, precisely, because they imported the product under consideration, so the injury resulting from competition on their part was directly caused by the imports. It should, therefore, be found that the investigating authority conducted an appropriate analysis of the causal link between the increased imports and the serious injury to the domestic industry.

25. Regarding the parallelism requirement, the Dominican Republic points out that the final resolution provides for the application of a 38 per cent tariff, whereas the DEI had found that a tariff of 40 per cent was justified. Bearing in mind also that the imports not excluded from the investigation only represent 1.21 per cent of total imports, the Dominican Republic maintains that the findings in the technical reports did not vary, given this infinitesimal share.

26. Concerning the notice of the measure in accordance with Article XIX:2 of the GATT, this provision requires that the safeguard measure be notified to the Committee on Safeguards immediately after and not before its adoption, so the notice of the measure to the Committee only three days after the decision to impose it should be considered as immediate notice in conformity with Article XIX:2 of the GATT and Article 12 of the AS.

27. It also emerges clearly from the final report that the Dominican authorities gave adequate opportunity for consultations pursuant to Article 12.3 of the AS. The final technical report contains evidence of a large number of communications and notifications between the Commission and the complainants, as well as the holding of a public hearing on 12 May 2010. It cannot, therefore, be validly claimed that adequate opportunities for consultations were not given to Members having a substantial interest.

28. As regards the complainants' claim concerning Article 8.1 of the AS, which requires the maintenance of a substantially equivalent level of concessions and other obligations to that existing, it simply cannot be asserted that such a level was not maintained as, even after the imposition of the measure, the tariffs were lower than the bound tariffs, which set a ceiling of 40 per cent.

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX B-1

EXECUTIVE SUMMARY OF THE SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia is participating in this dispute because of its systemic interest in the application of Article XIX of the General Agreement on Tariffs and Trade (GATT 1994) and the Agreement on Safeguards (AS) and in the belief that safeguards are vital tools for the management of a country's trade policy and that, in practice, their use should not be prohibited but allowed, in conformity with Members' obligations under the aforementioned agreements.

2. In this statement, Colombia expresses its views on the six points set out below.

II. APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND OF THE AS TO THE PRESENT DISPUTE

3. In a request for a preliminary ruling the Dominican Republic asked the Panel to rule on the non-applicability of Article XIX of the GATT 1994 and of the AS with respect to the measures at issue in this dispute. The complainants responded to this request by rejecting the claims of the Dominican Republic. On 12 May 2011, the Panel sent the parties and third parties a communication stating that it considered it inappropriate to decide this point by means of a preliminary ruling and that it would pay special attention to the arguments of the third parties. In the light of the above and without prejudice to the decision already taken by the Panel concerning the timing of its ruling on the applicability of Article XIX of the GATT and the AS to the present dispute, Colombia is taking this opportunity to comment on certain aspects of the Dominican Republic's request for a preliminary ruling.

4. Specifically, the Dominican Republic suggests that Article XIX of the GATT 1994 and the AS are not applicable to the measures challenged by the complainants. Colombia believes that the main reason put forward by this Member is that the 38 per cent tariff surcharge does not exceed its bound tariff of 40 per cent for tariff headings 5407.20.20 and 6305.33.90, and that consequently there is no suspension, in whole or in part, of tariff concessions, as indicated in Article XIX of the GATT 1994.[1]

5. With respect to the possibility of pleading the non-applicability of certain provisions within the context of a preliminary ruling, the Dominican Republic argues that paragraph 15 of the Panel's working procedures in this case establishes the possibility of requesting preliminary rulings, at the latest, with the respondent's first written submission.[2] The Dominican Republic then connects this procedure with the provisions of Articles 7.1, 7.2 and 11 of the DSU.[3] The Dominican Republic develops its arguments on the basis of a panel's obligation to make an objective assessment of the facts of the case, the applicability of the covered agreements and the conformity of the former with the latter, and asserts that it would be more useful to settle this question of the applicability of

[1] Dominican Republic, Request for a preliminary ruling, Section 3.4, paragraphs 37-46.
[2] Paragraph 15 of the Panel's working procedures.
[3] Dominican Republic, Request for a preliminary ruling, Section 3.1.

Article XIX of the GATT 1994 and of the AS by means of a preliminary ruling, this being a preliminary and global matter.[4]

6. Colombia notes, in particular, two arguments made by the complainants in response to the request for a preliminary ruling: (i) Article XIX of the GATT 1994 and the AS are applicable to the measures in question, considering that the latter were the result of an investigation initiated, conducted and concluded under their provisions and those of the national safeguards legislation; moreover, the measures were notified in conformity with the procedures laid down for safeguard measures[5]; and (ii) preliminary rulings deal with procedural issues and not matters of substance.[6]

7. The parties to this dispute disagree about what issues can form the subject of a preliminary ruling. Colombia notes that preliminary rulings arose out of a practice among Members which has been endorsed by panels and the Appellate Body[7]; however, there is no provision in the DSU that regulates this practice. On the other hand, Articles 11, 12, 13, 14, 15 and 16 of the DSU contain specific provisions regarding panel reports. In this connection, Colombia notes that the general rule is to issue a panel report and exceptionally a preliminary ruling. Colombia also notes the relevance to the analysis of this case of certain rules identified by panels and the Appellate Body. In particular, it wishes to draw attention to the panel report in *Canada – Aircraft* in which, in relation to a discussion over jurisdiction, the panel declined to give an advance ruling, as requested by one of the parties (Canada), considering that there was no requirement in the DSU or any established practice that indicated an obligation to rule on a preliminary issue in advance of the panel report.[8] Moreover, neither does paragraph 15 of the Panel's working procedures specify when the Panel should rule on preliminary issues.

8. For Colombia, the rules that can be extracted from certain panel and Appellate Body reports show that it is incumbent on whoever raises the preliminary question to demonstrate that the issuing of a ruling in advance of the final report is justified.[9] In this connection, it should be borne in mind that the general rule is for rulings to be made in the final report.

9. In Colombia's opinion, if a Member has stated that it is implementing a procedure aimed at applying a safeguard measure and its actions throughout the investigation and notification process have been consistent with the application of a measure of this kind, then it would seem that to maintain, during the course of panel proceedings, that its measure was not really a safeguard measure would be inconsistent with its previous course of action. Within this context, it is relevant to consider the application of Article 3.10 of the DSU and in particular the reference to the spirit of good faith in which the parties should engage in the proceedings.

---

[4] Dominican Republic, Request for a preliminary ruling, Section 3.2.

[5] Objection of the complainants to the request for a preliminary ruling, Section III.B.3 and 4, paragraphs 90, 124, etc.

[6] Objection of the complainants to the request for a preliminary ruling, Section III.A.1 and 3, paragraphs 14 to 21, 24 to 34.

[7] The complainants acknowledge this in paragraph 14 of their written objection to the request for a preliminary ruling and the Dominican Republic does so in paragraphs 13 and 27 of its request for a preliminary ruling.

[8] Panel Report in *Canada – Aircraft*, paragraph 9.15.

[9] Considering that the argument used in this case is that of the usefulness of the preliminary ruling for settling the present dispute, it is clear that this usefulness must actually be specifically identified and demonstrated, not just mentioned. This conclusion is reinforced by the Appellate Body ruling in *EC – Hormones* (paragraph 152), where an objection raised by a party had to be sufficiently specific to enable the Panel to address it.

III. THE DETERMINATION OF THE PRODUCT BEING IMPORTED AND THE DOMESTIC PRODUCT IN THE AS

10. The complainant claims that the Dominican Republic: (i) failed to establish correctly that the products imported and the domestic products were like or directly competitive[10] and (ii) wrongly interpreted the term "producers" as used in the AS, with the result that domestic producers of directly competitive products were excluded.[11] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the AS was not properly established.

11. Colombia notes that the legal problem facing this Panel is specifically centred on determining whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the Dominican Republic's obligations under the AS, especially with respect to the concept of "domestic industry".

12. A fundamental element used in defining the domestic industry is the determination of the product under investigation, from the outset of the investigation, since the scope given to this term defines the context for determining where the "like or directly competitive products" are to be situated, while also forming the basis for identifying the domestic producers that make up the domestic industry and the data needed to analyse the injury. An incorrect identification of the products under analysis would necessarily lead to an inappropriate definition of the domestic industry. Furthermore, according to the findings of the Appellate Body in *US – Lamb*, the identification of the products which are like or directly competitive is the first step in determining the scope of the "domestic industry".[12]

13. Like the complainants, Colombia is of the opinion that this particular order of analysis established in cases of anti-dumping investigations[13] should be applied to safeguard cases *mutatis mutandis*, since it is the rational order for any safeguard investigation, insofar as both its main purpose and its scope revolve around the *product under investigation*.

14. Colombia agrees with the observations made by the Dominican Republic in paragraph 138 of its first written submission, where it points out that there are no previous determinations concerning how the product under investigation should be defined under the AS and that there are no express rules on this point. However, it does not agree with the Dominican Republic that this question is completely unregulated by the AS and that there are therefore no clear criteria for defining how this finding should be made.

15. Colombia suggests that a systemic interpretation of the AS under Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) would yield sufficient evidence to establish the meaning of "product under investigation" and how that product should be identified in a safeguard investigation. The second paragraph of the preamble to the AS expressly states that the Agreement clarifies and reinforces Article XIX of the GATT 1994 entitled "Emergency Action on

[10] First written submission of the complainants, paragraphs 77-80.
[11] First written submission of the complainants, paragraphs 160-163.
[12] Appellate Body Report in *US – Lamb*, paragraph 87.
[13] Footnote 89 of the first written submission of the complainants reads as follows:
"We note that in disputes concerning anti-dumping duties at least two panels have confirmed that the starting point in the analysis of likeness is the definition of the imported product under investigation, so that this product can be compared with the domestic product. See Panel Reports in *US – Softwood Lumber V*, paragraphs 7.152 and 7.153, and *EC – Salmon*, paragraph 7.51."

Imports of Particular Products" (emphasis added), which suggests that the product it is intended to investigate should be delimited and established using some sort of criterion. Likewise, Article 2.1 of the AS specifies that "a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities […]" (emphasis added). This Article is even more emphatic in stipulating that the scope of the product on which the safeguard measure is imposed (which should be taken to mean the product under investigation itself) is fairly limited, inasmuch as it uses the term *product* in the singular and not in the plural, as in other parts of the AS. If an exegetical interpretation of the ordinary meaning of the words is applied, in accordance with the rule envisaged in paragraph 1 of Article 31 of the Vienna Convention, Article 2.1 of the AS would appear to indicate that the product under investigation could only be a single product and could not comprise multiple products. However, Colombia considers that, in fact, the product under investigation can be made up of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the systemic interpretation of the AS.

16. Colombia considers that the rule in Article 4.1(c) of the AS also applies to the determination of the product under investigation because of the close relationship between the definition of the domestic industry and the product investigated. If it were not accepted that the products investigated ought to be, at least, like or directly competitive, it would not be possible to make this finding with respect to domestic products since it would be impossible to compare dissimilar categories of products. The present case involves precisely this situation: although it might perhaps be said that the imported tubular fabric competes with or is like the domestic product, the same cannot be said about the imported tubular fabric and domestic polypropylene bags.[14] Insofar as the standard of Article 4.1(c) requires the domestic and imported products to be like or directly competitive, if the "product investigated" contained products which in themselves were not, it would be impossible to prove the existence of such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry for the purposes of the investigation.

17. Colombia notes that the Dominican Republic has not specified any criterion for establishing how several products, i.e. tubular fabric and polypropylene bags, can be included in a single category. Apparently, this finding is based solely on considerations of a customs nature, as follows from Section 3 et seq. of the final report of the Investigations Directorate of the Dominican Republic's Regulatory Commission on Unfair Trade Practices and Safeguard Measures.[15] Acceptance of this interpretation would run contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[16], inasmuch as it would enable products of virtually any kind to be included as a single product in an investigation, whatever the relationship between them. Under this interpretation products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules that can be applied, a result that is manifestly absurd and contrary to the AS.

[14] As will be explained later, Colombia considers that the argument according to which inputs are part of a production chain is not sufficient to demonstrate a relationship of likeness or direct competitiveness.

[15] Final Technical Report of the DEI, dated 13 July 2010.

[16] In the following cases the Appellate Body referred to the application of the principle of effectiveness in the interpretation of treaties in the course of settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

18. In Colombia's opinion, the Panel should reject the Dominican Republic's argument according to which, for reasons of a customs nature, the two products should be treated as the same product investigated.[17]

19. Colombia concludes that the grouping together of tubular fabric and polypropylene bags in a single category of products under investigation, without making an analysis of likeness or direct competitiveness between the products in question, is inconsistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

IV. THE "UNFORESEEN DEVELOPMENTS AND EFFECT OF THE OBLIGATIONS" REQUIREMENT UNDER ARTICLE XIX:1(a) OF THE GATT 1994 AND THE AS

20. With respect to this point, according to the complainants, the Dominican Republic was unable to demonstrate the existence of unforeseen developments, insofar as it failed to give a reasoned explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis, and (iii) the entry of China into the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the Dominican authorities' explanations of why these events were unforeseen developments are inadequate.[18]

21. In Colombia's opinion, the Panel should take into account the fact that although there are certain requirements which any Member of the WTO must satisfy in order to prove this element, the standard cannot be construed in such a way as to preclude the application of the said developments de facto by establishing requirements that are difficult to satisfy in practice.

22. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to permit a clear and workable application of the concept, for the purpose of enabling the application of safeguard measures under the conditions envisaged in Article XIX of the GATT 1994 and the AS.

V. ASSESSMENT OF THE INCREASE IN IMPORTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AS

23. The complainants and the Dominican Republic are at one in accepting that the requirements that must be met in determining the nature of the increase in imports for the purposes of Articles XIX:1(a) of the GATT 1994 and 2.1 of the AS are those outlined by the Appellate Body in its report in *Argentina – Footwear*.[19] Moreover, they also agree that, as decided by the Appellate Body[20],

[17] See footnote 35.

[18] Paragraph 197 of the first written submission of the complainants reads as follows:
"The Commission recognized the obligation incurred under Article XIX:1(a) of the GATT to the effect that, in order to apply a safeguard measure, it is necessary to show that the unforeseen developments and the effect of the obligations incurred under the GATT are giving rise to increased imports which are causing serious injury to the domestic industry. However, the Commission did not establish any finding or well-founded conclusion that would demonstrate the existence of unforeseen developments, or a logical connection between those developments and the increased imports said to have caused serious injury to the domestic industry. This omission by the Commission is therefore incompatible with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS."

[19] First written submission of the complainants, paragraph 241, and first written submission of the Dominican Republic, paragraph 309.

in evaluating the increase the authorities should take the trend in imports during the period of investigation into account rather than concentrate on one or more points.[21]

24. Nevertheless, the complainants consider that the Dominican Republic's assessment of the behaviour of imports during the period of investigation does not satisfy the above-mentioned legal requirements and is therefore at odds with Articles XIX:1(a) of the GATT 1994 and 2.1, 3.1, 4.2(c) and 6 (solely with respect to the preliminary determination) of the AS.[22] For its part, the Dominican Republic claims to have made a proper assessment of the increase in imports, which showed that that increase was sudden, sharp, significant and recent.[23]

25. Colombia considers that certain additional elements could help to clarify how, in this specific case, the increased imports criteria should be taken into account. Colombia therefore wishes to draw attention to the following aspects mentioned in panel and Appellate Body reports: (i) the increase in imports should be assessed on a case-by-case basis[24]; (ii) the analysis of the increase in imports should be conducted with a view to establishing whether it is such as "to cause or threaten to cause serious injury to the domestic industry", that is to say, the increase in imports should be analysed in the light of all the actions of the investigating authority, in the same way as the determination of injury and the causal link between the increased imports and the said injury[25]; (iii) the increase should be assessed over a specific period of time and, rather than a comparison of the end points, should involve consideration of the trends in imports over the period investigated.[26] Moreover, special emphasis should be placed on analysing the data from the end of the period of investigation.[27]

26. Within this context, Colombia disagrees with the complainants' contention that there is a general rule according to which a decrease towards the end of the period of investigation indicates that there has not been an absolute increase in imports.[28] As the analysis should be made on a case-by-case basis, there could be a case in which a decline in imports towards the end of the period might not be significant and from a consideration of the whole of the increase during the period of investigation it might be concluded that there was in fact an absolute increase in imports, despite their decreasing towards the end of the period.[29]

27. Colombia considers that in examining whether the Dominican Republic made a proper and reasoned assessment of the increase in imports, the Panel should take into consideration the general assessment criteria described above.

---

[20] Appellate Body Report in *Argentina – Footwear*, paragraphs 129 and 130, and *US – Steel Safeguards*, paragraph 354.

[21] First written submission of the complainants, paragraph 243, and first written submission of the Dominican Republic, paragraph 326.

[22] First written submission of the complainants, paragraphs 27-284.

[23] First written submission of the Dominican Republic, paragraphs 302-343.

[24] Appellate Body Report in *US – Steel Safeguards*, paragraph 360.

[25] Appellate Body Report in *US – Steel Safeguards*, paragraphs 345 and 346.

[26] Appellate Body Reports in *Argentina – Footwear*, paragraph 129, and *US – Steel Safeguards*, paragraph 354.

[27] Appellate Body Reports in *US – Lamb*, footnote 88 to paragraph 138, and *US – Steel Safeguards*, paragraph 370.

[28] First written submission of the complainants, paragraph 247.

[29] This was the analysis made by the Panel in *US – Steel Safeguards* with respect to increased imports of rebar, paragraphs 10.224-10.225.

28. In addition, although in the light of the findings of an increase in imports and the reasons given by the Dominican Republic in the Final Technical Report it might be concluded that the Dominican Republic made a reasoned assessment of that increase[30], Colombia has doubts about whether the analysis was properly conducted, since following the determination of the product investigated, the Dominican Republic restricted its assessment to the cumulative increase in imports of tubular fabric and polypropylene bags.[31] That is to say, it did not specify which of the two products it was whose imports accounted for the increase revealed in the above-mentioned trends. Therefore, following the line of reasoning in Section III concerning the close relationship between the determination of the product under investigation and its treatment in the AS, the conclusion concerning the increase in imports and its causal link with the alleged injury is inadequate inasmuch as it is not made clear which imports increased: imports of tubular fabric or imports of polypropylene bags.

29. As this analysis is linked with that described in Section III, Colombia considers that if the Panel were to conclude that the conditions described in that section for two products to be grouped together in a single category and under the same safeguard investigation were satisfied, the conclusion with respect to this point should be consistent with that determination concerning the definition of the product investigated. In Colombia's opinion, the Panel could make the AS much clearer by taking the rule incorporated in Article 3.6 of the Anti-Dumping Agreement into account in the cumulative analysis.

VI. DEFINITION OF THE CONCEPT OF "CRITICAL CIRCUMSTANCES" IN ARTICLE 6 OF THE AS

30. The complainants consider that the Dominican Republic has failed to show the "critical" nature of the circumstances invoked in justification of the imposition of the provisional measure.[32] For its part, the Dominican Republic considers that a finding concerning this measure would not help to achieve a positive settlement of the dispute and that in any case it has explained the critical circumstances and assessments required to establish the need for the provisional measure.[33] Colombia considers that the debate between the parties affords a unique opportunity for the Panel to rule on a question which has not yet formed the subject of panel or Appellate Body rulings, namely: what should be understood by "critical circumstances" in Article 6 of the AS.

31. In Colombia's opinion, based on a systemic interpretation of Article 6 of the AS[34], the Panel could take into consideration as factors that make the damage "difficult to repair" aspects of the economic reality of the enterprise such as: its stocks, its sales, its profit margins and the price of like products, which should be compared with the most recent fluctuations (in the last six months) in imports, in order to determine whether, if no provisional measure were imposed, the damage would be difficult to repair.

---

[30] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, viewed at: http://www.cdc.gob.do/docweb/informes/Informe%20Tecnico%20Final%20-Publico-.%20Caso%20SG%20Tejido%20Tubular%20y%20Sacos%20de%20Polipropileno.pdf.

[31] First written submission of the Dominican Republic, paragraph 307.

[32] First written submission of the complainants, paragraphs 370-379.

[33] First written submission of the Dominican Republic, paragraph 409.

[34] That is to say, taking into account the fact that the purpose of safeguard measures is to counteract the serious injury or threat of serious injury that increased imports may cause to domestic producers of like or directly competitive products. Article XIX:1(a) of the GATT 1994.

VII. NOTIFICATION AND CONSULTATION REQUIREMENTS WITH RESPECT TO SAFEGUARD MEASURES IN THE AS

32. According to the complainants, the Dominican Republic imposed the definitive measure without making timely notification or providing Members having a substantial interest in the products investigated with an opportunity to hold the consultations mentioned in Article 12.3 of the AS and Article XIX:2 of the GATT 1994. Likewise according to the complainants, the Dominican Republic failed to afford an opportunity to obtain adequate means of trade compensation under Article 8.1 of the AS and the Article XIX:2 of the GATT 1994.[35]

33. Colombia considers that the failure of a Member to hold adequate prior consultations before imposing a safeguard measure is a violation of the procedure laid down in Article 12.3 of the AS. Moreover, the non-notification of a safeguard measure before it is imposed is contrary to Article XIX:2 of the GATT 1994.

VIII. CONCLUSION

34. Colombia considers that the present case raises important questions concerning the application of Article XIX of the GATT 1994 and the AS. Although not taking a final position on all aspects of the substance of the dispute, Colombia requests the Panel carefully to review the scope of the claims of the parties in the light of the observations made in this submission. Colombia reserves the right to make additional comments in the section of the first hearing with the parties and the Panel in which third parties are allowed to participate.

[35] First written submission of the complainants, paragraphs 46-460.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE UNITED STATES

I. THE COMPLAINANTS PROPOSE THE WRONG APPROACH FOR DETERMINING CAUSATION OF SERIOUS INJURY

1. Article 2.1 of the Safeguards Agreement states that a Member may apply a safeguard measure only if the Member finds that the product in question is being imported "in such increased quantities ... as to cause or threaten to cause serious injury to the domestic industry". In their first written submission, Costa Rica, El Salvador, Guatemala, and Honduras (collectively "complaining parties") argue that, under Article 2.1, the increase in imports of the product in question must be "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry.[1] The complaining parties rely upon the Appellate Body's report in *Argentina – Footwear (EC)* in support of their interpretation of Article 2.1.[2] As shown below, and contrary to the complaining parties' assertion, the Safeguards Agreement does not require such an approach to determine the causation of serious injury under Article 2.1.

2. In *United States – Steel Safeguards (AB)*, the Appellate Body referenced the same passage from *Argentina – Footwear (EC)* that the complaining parties rely upon in their first written submission. The Appellate Body clarified that the statement in question was about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement" and that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e. their consideration of serious injury/threat and causation)".[3]

3. Consequently, there is no basis for the complaining parties' assertion that Article 2.1 of the Safeguards Agreement requires the competent authorities to conduct a separate analysis of the volume of imports to determine whether it is "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry before proceeding to the rest of the analysis. It is sufficient to find that they have increased, and then address through the remainder of the analysis whether those increased imports cause serious injury or threat of serious injury.

II. THE METHOD OF PRODUCTION CAN BE RELEVANT FOR DETERMINING THE LIKE OR DIRECTLY COMPETITIVE PRODUCT

4. Article 4.1(c) of the Safeguards Agreement defines the "domestic industry" for purposes of the injury analysis as the "producers ... of the like or directly competitive products". The complaining parties argue that the Dominican Republic incorrectly defined the like or directly competitive product under Article 4.1(c) in the course of its investigation. They argue that the competent authority for the Dominican Republic, the Department of Investigations of the Regulatory Commission for Unfair

[1] Complaining Parties' First Written Submission, paragraphs 239-248.

[2] Complaining Parties' First Written Submission, paragraph 241.

[3] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted 10 December 2003, paragraph 346 ("*United States – Steel Safeguards (AB)*").

Trade Practices and Protection Measures of the Dominican Republic ("DEI"), defined the like or directly competitive product based, in part, on the production process used - i.e. tubular fabric and polypropylene sacks made *from virgin resin*.[4] According to the complaining parties, DEI did not treat polypropylene sacks made from a different production process (e.g. polypropylene sacks made from tubular fabric rather than virgin resin) as a like or directly competitive product. The complaining parties contend that the exclusion of producers who did not use virgin resin from the domestic industry is inconsistent with Article 4.1(c) of the Safeguards Agreement.

5. The United States takes no position regarding the adequacy of the Dominican Republic's approach to this issue in the challenged investigation, especially in light of the fact-intensive nature of the analysis. It is helpful, however, to consider certain observations regarding the determination of like or directly competitive products under the Safeguards Agreement.

6. In *United States – Lamb Meat (AB)*, the Appellate Body concluded that while the focus of the like or directly competitive product inquiry must be on the identification of *the product*, the production process may provide information on the like or directly competitive nature between products.[5] The Appellate Body further observed that "{w}e can ... envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products".[6]

7. Indeed, one can envisage a scenario in which the production process is highly relevant to the like or directly competitive nature between two products due to the qualities the process imparts on the product. For example, customers may demand items produced via a certain method because only that method guarantees the requisite level of quality or adherence to a given tolerance level. Under this scenario, products manufactured according to a different process may not be like or directly competitive.

III. THERE IS NO GENERAL RULE REGARDING THE IMPACT OF DECREASES IN IMPORTS TOWARD THE END OF THE PERIOD OF INVESTIGATION

8. Under Article 2.1 of the Safeguards Agreement, the competent authority must determine that there are increased quantities of imports, either absolute or relative to domestic production, in order to apply a safeguard measure. In paragraph 247 of their first written submission, the complaining parties argue that, as a general rule, a decrease toward the end of the period of investigation is an indication that there has been no absolute increase in imports.[7] According to the complaining parties, where the record shows a decline in imports toward the end of the period of investigation, only exceptional circumstances justify a finding by the competent authority of increased absolute imports under Article 2.1. The complaining parties purport to base their argument on the Appellate Body's report in *United States – Steel Safeguards (AB)*. But *United States – Steel Safeguards (AB)* does not support the complaining parties' proposed approach, and their position is otherwise unsupportable under the Safeguards Agreement.

[4] Complaining Parties' First Written Submission, paragraph 129.

[5] Report of the Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paragraph 94, footnote 55 ("*United States – Lamb Meat (AB)*").

[6] *United States – Lamb Meat* (AB), fn. 55.

[7] Complaining Parties' First Written Submission, paragraph 129.

9. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports, nor does it place special emphasis on the level of imports at the end of the period of investigation. Article 2.1 states that the competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production ... as to cause or threaten to cause serious injury to the domestic industry". Article 4.2(a), in turn, states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms." Neither article provides any reference to the period of time near the end of the period of investigation, nor otherwise indicates any special role for any particular period of time within the overall period of investigation. Accordingly, there is no textual basis in the Safeguards Agreement for the complaining parties' position.

10. Moreover, in *United States – Steel Safeguards (AB)*, the Appellate Body has explicitly rejected the argument on decreased imports toward the end of the period of investigation now made by the complaining parties. In that dispute, the Appellate Body stated that "Article 2.1 does *not* require that imports need to be increasing at the time of the determination" and that it did "*not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'".[8] Indeed, for a number of the products in question in *United States – Steel Safeguards (Panel)*, the Panel found that the investigating authority's determination of imports in such increased quantities was consistent with Article 2.1 notwithstanding a decline in imports toward the end of the period of investigation.[9]

11. In sum, the Appellate Body did not establish in *United States – Steel Safeguards (AB)* a general rule regarding decreases in imports toward the end of the period of investigation. The Appellate Body found, rather, that given the magnitude of the decrease in imports toward the end of the period of investigation for certain (but not all) products in that particular dispute, the competent authority had not provided a reasoned and adequate explanation of how the facts supported its determination that the product was "being imported in … such increased quantities".[10]

12. Accordingly, the complaining parties' assertion that there is a general rule regarding the impact of decreases in imports toward the end of the period of investigation is erroneous.

IV. IMPORTS EXEMPTED FROM APPLICATION OF THE SAFEGUARD MEASURE UNDER ARTICLE 9.1 ARE NOT EXEMPTED FROM THE INJURY AND CAUSATION DETERMINATIONS UNDER ARTICLE 2.1

13. In their first written submission. the complaining parties also allege that the Dominican Republic violated the requirements of "parallelism" under Articles 2.1 and 2.2 of the

[8] *United States – Steel Safeguards (AB)*, paragraph 367.

[9] Report of the Panel, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, paragraph 10.224 (rebar), paragraph 10.233 (welded pipe), and paragraph 10.253 (stainless steel bar) ("*United States – Steel Safeguards (Panel)*"). The Appellate Body did not review the section of the Panel's report regarding increased imports of rebar, welded pipe, and stainless steel bar.

[10] *United States – Steel Safeguards (AB)*, paragraph 368.

Safeguards Agreement.[11] The principle of parallelism derives from the use of the same text - "product ... being imported" - to describe both the investigation conducted by the competent authorities under Article 2.1 of the Safeguards Agreement and the authority to impose a safeguard measure under Article 2.2. The Appellate Body explained that "{i}n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in Articles 2.1 and 2.2."[12]

14. The complaining parties assert that (1) the DEI exempted imports from developing country Members (i.e. Mexico, Panama, Colombia, and Indonesia) from application of the safeguard measure under Article 9.1 of the Safeguards Agreement[13], but that (2) the DEI included imports from these countries in its analysis of injury and causation under Article 2.1.[14] According to the complaining parties, the fact that imports from these four countries were exempted from the application of the safeguard measure, but included in the injury and causation analysis, violates the requirements of parallelism between analysis of injury and application of the safeguard measure. The complaining parties' argument is fatally flawed, however, because it compares Article 2.1 of the Safeguards Agreement with Article 9.1, which is not included in the parallelism requirement.

15. Article 9.1 of the Safeguards Agreement states that "{s}afeguard measures *shall not be applied* against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned".[15] Thus, while Article 9.1 acts as an exception to the obligation under Article 2.2 of the Safeguards Agreement to apply safeguard measures to "a product being imported regardless of its source", it does not create an exception from the obligation under Article 2.1 to reach a determination with regard to all of the product. Assuming that the Dominican Republic found that each of the four countries accounts for less than 3 per cent of total imports and that it also found that the four countries collectively (and any other developing countries that individually account for less than 3 per cent of total imports) do not account for more than 9 per cent of total imports, there is no support in the text of the Safeguards Agreement for the complaining parties' argument that exemption from application of the safeguard measure for imports from developing countries under Article 9.1 also necessitates exclusion from the injury and causation analysis under Article 2.1.

16. Indeed, the Panel in *Argentina – Footwear (Panel)* affirmed that an exemption from application of the measure pursuant to Article 9.1 of the Safeguards Agreement does not mandate exclusion from the analysis under Article 2.1. The Panel observed that "Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures *where the injury and causation fully reflect the effects of those imports from developing countries*".[16] In deciding not to extend the exemption from application of the safeguard measure to the injury and causation analysis, the Panel reasoned "that where the

[11] Complaining Parties' First Written Submission, paragraph 449.

[12] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, paragraph 96 ("*United States – Wheat Gluten (AB)*").

[13] *See* Complaining Parties' First Written Submission, paragraph 54.

[14] Complaining Parties' First Written Submission, paragraph 446.

[15] Emphasis added.

[16] Report of the Panel, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121, paragraph 8.85 ("*Argentina – Footwear (Panel)*") (emphasis added).

Safeguards Agreement provides for an exception it does so in clear and explicit terms" and that no such exemption was provided for in Article 2.1.

17. Accordingly, there is no basis for the complaining parties' assertion that the requirements of parallelism under Articles 2.1 and 2.2 of the Safeguards Agreement apply to imports exempted from application of the safeguard measure by operation of Article 9.1.

ANNEX B-3

SUBMISSION OF NICARAGUA

I. INTRODUCTION

1. Nicaragua welcomes the opportunity to present its views in the proceedings initiated by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") with respect to the consistency of the provisional safeguard measure and the definitive safeguard measure imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20 and 6305.33.90 of the Dominican Republic Tariff, with the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards ("AS")*.

2. Nicaragua has decided to participate as a third party in this dispute because of its systemic interest in the correct interpretation of the provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")*.

3. As a general matter, Nicaragua is of the view that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as is made clear by the title of Article XIX of the GATT 1994. In the Appellate Body's words, "Article XIX is clearly, and in every way, an extraordinary remedy".[1] It should only be invoked when all of the strict requirements set out in WTO law have been fulfilled, in particular because reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters.

4. Nicaragua will limit its submission to the Dominican Republic's request for a preliminary ruling by the Panel ("Request") and to the issue of failure to comply with the requirement of parallelism of the measures at issue, and reserves its right to comment at the third party session on other issues of legal interpretation which it considers to be of particular interest.

II. REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING ON THE NON-APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

5. The Dominican Republic has requested the Panel to issue a preliminary ruling on the non-applicability of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards* ("AS") with respect to the measures at issue in this dispute.

[1] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, paragraph 86 ("*Korea – Dairy*"); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, paragraph 93 ("*Argentina – Footwear*").

6. In support of its Request, the Dominican Republic relies, *inter alia*, on the following claims and assertions:

Paragraphs 37 and 38, in which it claims that the legal provision in GATT Article XIX:

"is worded conditionally and consists of two parts: a first part establishing a series of conditions ("If ... any product is being imported ... in such increased quantities...") that must be met in order that a WTO Member may take the course of action described in the second part (the ... party shall be free ..."). The remainder of Article XIX sets forth a series of procedural requirements and disciplines that must be observed in the event that such a measure is adopted. In other words, if the conditions in the first part are satisfied, the WTO Member is authorized under the preceding provision to adopt the course of action outlined in the second part, provided that it complies with the disciplines and procedural requirements contained in the remainder of Article XIX. If the first part is not fulfilled, no such authorization will exist.

Conversely, if the course of action described in the second part of Article XIX:1(a) of the GATT is not adopted, there is no need to meet the conditions set out at the beginning of this provision or to comply with the disciplines and procedural requirements in the remainder of Article XIX. The course of action which may, or may not, be authorized is to suspend the obligation, in whole or in part, in respect of the product, or to withdraw or modify the concession."

Paragraphs 39 and 40, in which it asserts that:

"The course of action adopted by the Dominican Republic through the measures at issue clearly does not constitute any of the actions that may be authorized under Article XIX of the GATT, because neither of the two measures, preliminary or definitive, nor the underlying investigation involved a suspension, in whole or in part, of the obligations in respect of such product. Nor was there any modification or withdrawal of the concession."

"Given that the measures challenged by the complainants make no use of the authorization established in the last part of Article XIX:1(a), the conditions, disciplines and procedural requirements established in the Article do not apply to the measures in question."

Paragraph 46, in which it concludes with the assertion that:

"the Dominican Republic has not suspended an obligation, in whole or in part, nor has it modified or withdrawn a concession through the measures challenged by the complainants. Hence, Article XIX of the GATT does not apply to the measures challenged by the complainants."

Paragraphs 47 and 48, in which it claims and concludes that:

"As stated in Article I of the AS:

"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.

Given that the measures at issue did not consist of any of those envisaged in Article XIX of the GATT, as explained above in the light of the ordinary meaning of the terms of Article XIX and its object and purpose, the rules established in the AS do not apply."

7. In order to justify the above, the Dominican Republic applies the definitive measure as an alternative duty to the MFN tariff, and this is not a measure that would have been provided for in the country's Schedule of Concessions, presumably in order to circumvent its WTO obligations.

8. Nicaragua submits that the Request of the Dominican Republic does not find support in, and is rather contrary to, *Article XIX of the General Agreement on Tariffs and Trade 1994* and the *Agreement on Safeguards* and unduly impairs the rights conferred upon Members by the *WTO Agreement*. Accordingly, it respectfully requests that the Panel reject the Dominican Republic's request.

9. Moreover, we consider that the *sui generis* application of the definitive safeguard measure by the Dominican Republic undermines the security and predictability of the multilateral trading system and that these should be assured by the WTO dispute settlement system.

III. FAILURE TO COMPLY WITH THE REQUIREMENT OF PARALLELISM OF THE MEASURES AT ISSUE

10. Nicaragua agrees with the complainants that, although Mexico, Panama, Colombia and Indonesia are excluded from the scope of the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic, the investigating authority of the Dominican Republic, i.e. the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, failed to conduct a new analysis of increased imports, the alleged serious injury and causality. Neither the reports nor the preliminary and final resolutions gave any reasons as to why it was not necessary to observe parallelism between the scope of the provisional and definitive measures and the scope of the imports under investigation.

11. We consider that the Appellate Body's statement in *US – Line Pipe* applies in this regard: ... "establish[ing] explicitly" implies that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[1] "… To be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[2]

[1] Appellate Body Report, *US – Line Pipe* (WT/DS202/AB/R), paragraph 181.
[2] *Ibid*., paragraph 194.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SUBMISSION OF PANAMA

I. INTRODUCTION

1. Panama intervenes in this dispute because it considers that the definitive safeguard measure of the order of thirty-eight per cent (38%) *ad valorem* imposed by the Dominican Republic on imports of tubular fabric and polypropylene bags, classified under subheadings 5407.20.20 and 6305.33.90 of the Fourth Amendment to the Dominican Republic's Customs Tariff, is inconsistent with the Agreement on Safeguards (AS) of the World Trade Organization (WTO).

2. The Dominican Republic failed to consider important elements of procedure set forth in the AS; the obligation stipulated in Articles 12.3 of the AS and XIX:2 of the GATT to give timely notice and hold prior consultations with Members having a substantial interest in the measure was not fulfilled, nor were opportunities provided to obtain adequate means of trade compensation, as established in Articles 8.1 of the AS and XIX:2 of the GATT.

3. Panama also considers that there are flaws in the investigation conducted by the Investigating Authority of the Dominican Republic, particularly in the approaches to the following: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination of increased imports; (iv) determination of injury; and (v) causal link between the imports and injury, as will be discussed below.

II. NO OPPORTUNITIES WERE PROVIDED FOR PRIOR CONSULTATIONS AND REACHING AN UNDERSTANDING ON TRADE COMPENSATION

4. The Dominican Republic initiated a safeguards procedure, which was notified to the Committee on Safeguards pursuant to Article 12.1(a) of the AS[1], without any opportunity being provided for prior consultations, as stipulated in Article 12.3 of the AS, with a view to reaching an agreement on trade compensation as required by Article 8.1.

5. The Dominican Republic failed to meet the obligation to notify the definitive safeguard measure in a timely fashion so as to allow Members having a substantial interest in the matter to hold prior consultations, as provided for in Article 12.3 of the AS.

III. INCONSISTENCY IN THE DEFINITION OF DOMESTIC INDUSTRY

6. The Dominican Republic defined the product as both the input (tubular fabric) and the final product (polypropylene bag), indicating that both are of the same nature and that they should be considered as a single product. In so doing, the Investigating Authority failed to prove in its investigation that the input and the final product are directly competitive or like products, as established by the Appellate Body in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*. The Dominican Republic thus defined the domestic industry in a manner inconsistent with Articles 4.1(c) and 2.1 of the AS.

[1] G/SG/N/6/DOM/3 of 14 January 2010.

7. As regards the domestic industry, in defining producers the Investigating Authority of the Dominican Republic failed to consider the provisions of the AS inasmuch as it: (a) excluded from the domestic industry other producers that qualified at the same level as those assessed in the investigation; and (b) for the purposes of applying the safeguard measure, it included the producers of the inputs (tubular fabric) and the producers of the final product (polypropylene bags) without distinguishing between the two.

IV. FAILURE TO DEMONSTRATE UNFORESEEN DEVELOPMENTS RESULTING IN INCREASED IMPORTS SUCH AS TO CAUSE SERIOUS INJURY

8. There was no indication that the Investigating Authority of the Dominican Republic demonstrated conclusively and with sufficient evidence that unforeseen developments directly affecting the domestic industry had occurred, nor did it successfully demonstrate a logical connection between the conditions set forth in Article XIX of the GATT and those unforeseen developments.

V. LACK OF DEMONSTRATION OF A RECENT, SUDDEN, SHARP AND SIGNIFICANT INCREASE IN IMPORTS

9. There is no supporting determination in the investigation to show that the imports underwent a recent, sudden, sharp and significant increase.

10. There is no indication, in the conclusions reached by the Investigating Authority of the Dominican Republic at the end of the import investigation, of a demonstration that the increase in imports displayed the characteristics of being sudden, sharp, recent and significant, as required under the AS for the purposes of substantiation. Therefore the measures imposed are, in our view, inconsistent with Articles XIX of the GATT and 2.1, 4.2(c), 6 and 11.1(a) of the AS.

VI. LACK OF PREMISES FOR THE DETERMINATION OF SERIOUS INJURY

11. Panama considers that the Investigating Authority of the Dominican Republic did not carry out a detailed analysis for purposes of determining the serious injury sustained by the domestic industry, nor did it produce objective and positive evidence in support of its investigation or the application of the safeguard measures adopted.

12. The lack of substantiation by the Dominican Republic of the factors corroborating serious injury is inconsistent with Articles 4.2(a) and 2.1 of the AS.

VII. LACK OF JUSTIFICATION OF CAUSATION

13. The Investigating Authority of the Dominican Republic provided no justification for the determination of serious injury and causation in respect of a domestic industry that enjoys a favourable position; moreover, it provided no supporting evidence to show that the industry is currently being affected by the alleged increase in imports, nor did it identify other factors that might have affected the domestic industry and that bear no direct relation to the imports.

14. Panama considers that in the investigation conducted by the Investigating Authority of the Dominican Republic there were flaws in establishing the causal link between the allegedly unforeseen increase in imports and the alleged injury to the domestic industry, since it was not demonstrated that the imports were a sufficient and necessary cause for the alleged serious injury sustained by the

domestic industry, particularly with respect to the financial losses and alleged decline in production and consumption of the domestic product.

VIII. CONCLUSION

15. The Panel is requested to examine the actions of the Investigating Authority of the Dominican Republic as regards compliance with the procedures set forth in the AS and in particular the consultation procedure established in Article 12.3 in conjunction with Article 8.1 of the Agreement; and to review the Dominican Republic's failure to comply with the provisions of the GATT and the AS, as shown in this document.

ANNEX B-5

SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in the proceedings of the dispute. Turkey is participating in this case because of its systemic interest in the interpretation and implementation of the Agreement on Safeguards. Turkey would like to highlight the importance of imposing such measures in conformity with WTO obligations and its basic principles.

2. In this submission, Turkey is not in the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements. Turkey wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

3. Therefore, with this submission, Turkey aims to contribute to the Panel's analysis by interpreting the relationship between two provisions of the Agreement on Safeguards; Article 2.2 which determines the general rule as to how safeguard measures are to be applied and Article 9.1 which encloses special and differential rules to be applied to developing countries.

II. APPLICATION OF SAFEGUARD MEASURES TO DEVELOPING COUNTRIES

4. As is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source.

> "Article 2: Conditions
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source."

5. Article 2.2 sets forth an important obligation that a safeguard measure be imposed on the imported product "irrespective of its source". In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

6. On the other hand, Article 9.1 of the Agreement on Safeguards offers special and differential treatment to developing countries. Article 9.1 of the Agreement reads as follows:

> "Article 9: Developing Country Members
>
> 1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

7. According to the wording of Article 9.1 of the Agreement on Safeguards, safeguard measures shall not be applied to a developing country Member on the account that two conditions exist. These are (i) the share of imports of a certain product originating from the developing country shall not exceed 3 per cent among the imports of that product by the country applying the safeguards measure and (ii) the amount of imports from developing country Members which meet the first condition shall account for less than 9 per cent of the total amount of imports of that certain product by the country applying the safeguard measure.

8. On the basis of this interpretation, Article 9.1 provides a mandatory "special and differential treatment" in favour of developing countries. Turkey would like to emphasize that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply "special and differential treatment" to all developing countries that meet the conditions provided above. Therefore, Turkey believes that safeguard measure shall not be applied to all developing countries, whose total export to that country is below the threshold level of 3 per cent. In this respect, pursuant to the Article 9.1 of the WTO Safeguard Agreement; Turkey, as a developing country, shall be excluded from this measure.

III. CONCLUSION

9. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review the comments stated in this submission, in interpreting the Agreement on Safeguards.

ANNEX B-6

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. The Complainants appear to argue, among other things, that the *Agreement on Safeguards* applies with regard to any measures which are aimed at preventing or remedying injury caused by an increase in imports. For the reasons set out below, the European Union considers that this is indeed a necessary condition for the application of the *Agreement on Safeguards*, but not a sufficient condition in itself.

2. The Dominican Republic's request must be examined in the light of Article 1 of the *Agreement on Safeguards*. Article 1 makes it clear that the *Agreement on Safeguards* is concerned only with the application of measures of the type "provided for in Article XIX of GATT 1994", to the exclusion of any other safeguard measures.

3. In the European Union's view, the determination of whether a measure belongs to the category of safeguard measures "provided for in Article XIX of GATT 1994" is an objective determination, to be made having regard to each measure's structure and design. The subjective intent of the Member applying the measure may provide a useful indication, but can never be dispositive. Otherwise, the applicability of the *Agreement on Safeguards* would be left to the applying Member's own discretion.

4. The European Union considers that a safeguard measure is of the type "provided for in Article XIX of GATT 1994" where it has the following two characteristics: (1) it purports to remedy injury caused by an increase in imports; and (2) it involves the suspension of an obligation or the withdrawal or modification of a concession under the *GATT 1994*. By denying the relevance of the second of the above-mentioned characteristics, the Complainants fail to recognize the specific function of Article XIX within the *GATT 1994*, which, as made clear by the last part of Article XIX:1(a), is to authorise emergency action that would be otherwise prohibited by the *GATT 1994*.

5. Should the Complainants' views prevail in this dispute, any Member would ever consider in its interest to subject itself to the strictures of the *Agreement on Safeguards* in order to take measures which it could, in any event, adopt without the requirements of that agreement, simply by refraining from characterizing those measures as a response to an increase in injurious imports.

6. Furthermore, the European Union is concerned about the possible unintended consequences of the Complainants' interpretation. For example, the trade laws of many WTO Members, including the European Union, provide for the possibility of suspending the tariff preferences accorded under a Free Trade Area ("FTA") Agreement or unilaterally as part of a GSP scheme in response to injury caused by an increase in the preferential imports concerned. Those measures are often referred to as "safeguard measures" under the relevant FTA agreements or applicable domestic laws. But it is generally understood that they fall outside the scope of Article XIX of *GATT 1994* because they do not involve the suspension of any obligation or the withdrawal or modification of any concessions under the *GATT 1994*.

7. First, in addressing the Dominican Republican's request it is relevant to consider also Article 11.1(a) of the *Agreement on Safeguards*. The terms "shall not take or seek" indicate that the applicability of the obligations provided in the *Agreement on Safeguards* is not conditional upon a Member having effectively taken a safeguard measure of the type "provided for in Article XIX of GATT 1994". The *Agreement on Safeguards* governs the conduct of investigations opened with a view to the possible imposition of a safeguard measure of the type provided for in Article XIX of *GATT 1994*, even if no such measure is eventually imposed as a result of the investigation.

8. Second, the measures at issue do involve the suspension of certain GATT obligations of the Dominican Republic in so far as they do not apply with regard to all imports of like products originating in all WTO Members. The Dominican Republic has exempted from their application certain developing countries whose imports do not exceed the thresholds set out in Article 9.1 of the *Agreement on Safeguards*. This exemption involves a manifest "suspension" of the Dominican Republic's obligations under Article I:1 of the *GATT 1994*.

9. On the other hand, the European Union does not see merit in the Complainants' allegation that the measures at issue also amount to a suspension of the Dominican Republic's obligations under Article II:1(b) of the *GATT 1994*. Clearly, the intention of the Dominican authorities was to increase the rate of the applicable "ordinary customs duty", rather than applying "other charges or duties" on top of the ordinary customs duty. Contrary to what the Complainants appear to argue, the fact that the measures in dispute apply in place of the pre-existing MFN ordinary duty, rather than cumulatively with that duty, does not support, but rather undermines their claim under Article II:1(b); and the same is true of their argument based on the fact that the measures in dispute are applied in parallel with the pre-existing duty rate, which continues to be applicable to imports originating in developing countries excluded from the scope of the measures in dispute.

II. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

10. Whilst not entering into the reasons provided by the investigating authority to treat both the final product (i.e. polypropylene bags) and the input (i.e. tubular fabric) as one single product under investigation, the European Union considers that Article 4.1(c) of the *Agreement on Safeguards* does not require an assessment of likeness or direct competition when defining the product under investigation.

11. The *Agreement on Safeguards* does not contain a definition of product under investigation or product concerned. It addresses the application of safeguard measures to "a product" in general and "irrespective of its source". The absence of a definition indicates the intention of the negotiators to leave Members with a wide discretion when defining the product concerned.

12. The definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. In this respect, Article 4.1(c) requires that "domestic industry" is composed of producers of the like or directly competitive domestic products. The concept of likeness or direct competition is relevant to maintain the parallelism between the product under investigation and the like or directly competitive domestic products.

13. The European Union considers that in *US – Lamb* the Appellate Body did not conclude that there are limits in the definition of the product concerned. In that case the Appellate Body noted that, under Article 4.1(c) of the *Agreement on Safeguards*, input products can only be included in defining

the "domestic industry" if they are "like or directly competitive" with the end-products. In this respect, the European Union agrees that the parallelism between the product concerned and the like or directly competitive domestic products that conform to the domestic industry is broken if inputs are not like or in direct competition with the product concerned. However, in a case where the product concerned is composed of both inputs and the final product, the European Union does not see any obstacle in the *Agreement on Safeguards* to include both inputs and the final products as the like or directly competitive domestic products for the purpose of defining domestic industry.

14. Consequently, the European Union considers that insofar as the parallelism between the product under investigation (including both inputs and the final product) and the like or directly competitive domestic products (including both inputs and the final product) is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

15. In the present case it would appear that there was no parallelism if the domestic products were limited to tubular fabric and polypropylene bags made out of raw resin, whereas the product under investigation covered tubular fabric and polypropylene bags regardless of whether they were made out of raw resin. Indeed, if the final products are identical or directly competitive regardless of their production process, then producers of those products cannot be excluded from the definition of domestic industry.

16. Moreover, the European Union observes that several domestic producers were excluded from the definition of domestic industry because they were themselves importers of the product under investigation (i.e. the input, tubular fabric). It would appear that under Article 4.1(c) of the *Agreement on Safeguards*, in order to consider whether a company is a "producer" of the like or directly competitive product which should be included in the definition of domestic industry, the focus lies on the essential nature of the business activities of a given enterprise, as manufacturing an article or bringing a thing into existence. If the company concerned is merely an importer of the product under investigation, it would not qualify as a "producer" and then it can be excluded from the definition of domestic industry. In any event, in a situation where the company imports 100 per cent of the input covered by the definition of the product under investigation but then produces the final product covered by the same definition, it would appear difficult to conclude that such a company is *not* a producer of the like or directly competitive product.

III. UNFORESEEN DEVELOPMENTS

17. Contrary to the suggestions made by the Dominican Republic, the Appellate Body has spoken unambiguously on this issue. In both *Argentina – Footwear Safeguard* and *Korea – Dairy Safeguard* the Appellate Body reversed the panel's findings to the effect that the "unforeseen developments" clause in Article XIX:1(a) of the *GATT 1994* imposes no additional obligations upon Members. In *US – Lamb* the Appellate Body confirmed the above findings and went out to rule that that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.

18. The Appellate Body has clarified that, although its reports are not binding, except with respect to resolving the particular dispute between the parties, subsequent panels "are not free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB".

19. The Dominican Republic has not invoked any "cogent reason" why the Panel should depart from the legal interpretations made by the Appellate Body in the reports cited above. Rather, the Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on the allegation that the *Agreement on Safeguard* "constitutes an exhaustive agreement" and does not provide for such an obligation. In view of this, the European Union considers that the Panel need not engage in a detailed examination of this argument, which could be summarily dismissed by referring to the existing case law of the Appellate Body.

20. The European Union notes that one of the "unforeseen developments" now mentioned by the Dominican Republic is the increase in duty free imports under certain FTA agreements with other Central American and North American countries. However, even assuming that such an increase could be regarded as a genuine "unforeseeable development", it is plain that it would not be the "effect" of the obligations incurred by the Dominican Republic under the *GATT 1994*, as required by Article XIX:1(a). Rather, it would be the "effect" of obligations incurred by the Dominican Republic under the FTA agreements in question. Therefore, that development could not provide a basis for the imposition of safeguard measures under Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. Instead, that development should have been addressed by the imposition of bilateral safeguard measures withdrawing the preferential duty-free treatment in accordance with the relevant provisions of each FTA agreement concerned.

IV. CONCLUSIONS

21. While not taking a final position on the merits of the case, the European Union requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

1. The Dominican Republic argues that Article XIX of the GATT and the AS are not applicable to the measures at issue since they are applied at a level below the bound tariff for the tariff headings concerned.

2. The Dominican Republic's defence relates only to the provisional and definitive safeguard measures that were imposed. It does not touch on the investigation and the acts preceding application of the measure, nor does it affect the applicability of the AS and of Article XIX to the claims concerning notification, the conduct of consultations and the offer of means of trade compensation, as provided for in Articles 8 and 12 of the AS.

3. The Dominican Republic seeks to ignore the fact that it initiated and carried out an investigation procedure under the AS and Article XIX, as well as under its own domestic legislation on trade remedies, with a view to imposing safeguard measures within the meaning of Article XIX and the AS. This was affirmed by the Dominican Republic itself.[1]

4. The Dominican Republic justified the exclusion of certain imports from the scope of the measure on the basis of Article 9.1 of the AS; it notified the WTO Committee on Safeguards of the opening of the investigation, the adoption of the provisional measure and the adoption of the definitive measure and ordered notification of the first stage in the phasing out of the measure; it replied to Colombia that the investigation and the measures at issue were subject to the provisions of Article XIX and the AS; and lastly, by means of a press release it publicly explained that the investigation and the imposition of provisional and definitive measures were carried out on the basis of the AS and Article XIX, as well as domestic legislation on trade remedies.[2]

5. Although the measures at issue do not exceed the bound tariff of 40 per cent *ad valorem*, they consist of duties and charges other than ordinary customs duties and they are applied in a discriminatory manner on imports of certain Members. The safeguard measures therefore effectively suspend the Dominican Republic's obligations under Articles II:1(a) and II:1(b), second sentence, as well as under Article I:1 of the GATT regarding the MFN principle, respectively.[3]

6. Any measure that exceeds what is "necessary", in magnitude or time-scale, stands in violation of Articles 5.1 and 7.1 of the AS, even if the measures are not inconsistent with general obligations under the GATT or are higher or lower than the bound tariff. Otherwise, if this level of "proportionality" between serious injury and the trade remedy were not maintained, "legitimate" trade

[1] Initial report, pages 4 and 5; preliminary report, pages 5 and 6.
[2] Exhibits CEGH-17, 18, 32, RDO-1 and CEGH 24 and 25, respectively.
[3] Reply of Costa Rica, El Salvador, Guatemala and Honduras to the request for a preliminary ruling of the Dominican Republic, submitted on 3 May 2011, paragraphs 109-111.

would be affected and "competition in international markets" would be limited rather than enhanced, which is in all respects at variance with the object and purpose of the AS.[4]

7. The action taken by other panels and by the Appellate Body in two safeguard disputes, *Argentina – Footwear* and *Korea – Dairy*, implicitly confirms that the applicability of Article XIX and of the AS does not depend on whether the safeguards are higher or lower than the respective bound tariffs.

II. PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE

8. Set out below are our replies to the objections to the complaints relating to Articles I:1, II:1(a) and II:1(b) of the GATT. Our second written submission will give a detailed reply to the other preliminary objections.

(i) Alleged withdrawal of certain complaints

9. The Dominican Republic contends that the complaining parties have decided to withdraw various complaints, including those relating to Article I:1 of the GATT and Articles II:1(a) and II:1(b) of the GATT, since, in its opinion, these were not developed in the first submission of the complainants.[5]

10. The Dominican Republic's request is invalid since the complaints it challenges were set out in our first written submission and they were subsequently developed in greater detail in our reply to the Dominican Republic's request for a preliminary ruling. The Appellate Body has indicated that there is no obligation to set out all claims in the first written submission to the Panel.[6]

(ii) Objection concerning complaints not contained in the request for consultations

11. The Dominican Republic also argues that certain complaints contained in our request for the establishment of a Panel should remain outside the terms of reference of the Panel, being "new complaints" because they are not included in the request for consultations.[7]

12. The Appellate Body has firmly upheld the view that the legal basis for the request for consultations and the basis of the panel request should not necessarily be identical, provided that the latter can reasonably be inferred from the basis for the request for consultations.[8] The Panel in *China – Audiovisual Products* concluded that it is important to analyse the relationship between the obligations imposed by the provisions cited in the request for consultations and those cited in the panel request.[9]

---

[4] Preamble of the AS, third paragraph.

[5] First written submission of the Dominican Republic, paragraph 86.

[6] Appellate Body Report, *EC – Bananas*, paragraph 145; see also Panel Report, *China – Audiovisual Products*.

[7] First written submission of the Dominican Republic, paragraphs 87-89.

[8] Appellate Body Report, *Mexico – Rice*, paragraph 138; Appellate Body Report, *Brazil – Aircraft*, paragraph 132; Appellate Body Report, *US – Cotton*, paragraph 293; Panel Report, *China – Audiovisual Products*, paragraph 7.121; Panel Report, *US – Poultry*, paragraph 7.46; Panel Report, *EC – Fasteners*, paragraph 7.24.

[9] Panel Report, *China – Audiovisual Products*, paragraph 7.121.

13. In view of the possibility that the Dominican Republic might seek to argue in its defence that the measure is not a safeguard measure, the complainants made clear in their request for consultations their intention to reserve the right to raise other claims under the GATT. This emerges from the penultimate paragraph of the request for consultations.[10] It is appropriate to point out that, during the consultations, there was an exchange of information on the discriminatory exclusion of certain imports from the scope of application of the measures, as well as on the nature of the measures in the context of the legal system in force in the Dominican Republic.

14. The complaint relating to the most-favoured-nation obligation is based on Article I:1 of the GATT, which is closely linked to Article 2.2 of the AS inasmuch as both articles deal with the most-favoured-nation principle. Article 2.2 of the AS is expressly included in the request for consultations.[11] The complaints concerning the nature of the duties adopted as import charges are based on Articles II:1(a) and II:1(b) of the GATT, which are linked to Article XIX itself of the GATT. The tariff concessions referred to in Article XIX are subject "to the obligations contained in Article II of the GATT 1994".[12]

15. In addition, the precedent from *US – Poultry* is applicable[13], given that, inasmuch as the request for consultations contains a clear reservation regarding the right to raise other matters under the GATT 1994 and on the basis of the discussions held during the consultations, the complainants reworded their complaints and included in their panel request arguments under Articles I and II of the GATT.

16. By reason of the foregoing, this Panel should conclude that the complaints under Articles I:1, II:1(a) and II:1(b) of the GATT fall within the terms of reference of this dispute.

III. CLAIM RELATING TO UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT

17. The Dominican Republic failed to issue adequate or reasoned findings, conclusions or explanations to demonstrate unforeseen developments.[14] In response to this claim, the Dominican Republic questions the binding nature of Article XIX:1(a) with regard to unforeseen developments.

18. The obligation to consider unforeseen developments is an issue that was decided by the Appellate Body, in conclusive and unequivocal terms, in 1999 in the *Argentina – Footwear* and *Korea – Dairy* disputes. The Dominican Republic has presented no compelling reason to justify deviating from the Appellate Body's viewpoint.[15]

19. The Dominican Republic's investigating authority itself, in its technical reports, stated that it agreed with the Appellate Body's jurisprudence on this specific legal point.[16] More important is the recognition of the mandatory nature of the unforeseen developments criterion, which is set out in the Dominican Republic's legislation, and more specifically in Articles 239 and 247 of the Regulation to Law No. 1-02.

[10] Documents WT/DS415/1, WT/DS416/1, WT/DS417/1, WT/DS418/1.
[11] See paragraph "(g)" of the legal basis of the request for consultations.
[12] Appellate Body Report, *Argentina – Footwear*, paragraph 91.
[13] Panel Report, *US – Poultry*, paragraph 7.46.
[14] First written submission of the complainants, paragraphs 207 to 226.
[15] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 160.
[16] Final Report, page 65; Preliminary Report, page 69.

20. In its first written submission, the Dominican Republic cites various passages from the preliminary and final technical reports which allegedly contain the Commission's conclusions on unforeseen developments.[17] However, these passages merely constitute *references* to the arguments of FERSAN on events that *could* constitute unforeseen developments. They are not reasoned and adequate conclusions issued by the investigating authority. In addition, the explanations put forward by the Dominican Republic in its first written submission are clearly *ex post* explanations which cannot cure the lack of findings in the corresponding determinations or reports.[18]

IV. CLAIM RELATING TO THE DOMESTIC INDUSTRY

21. In its submission, the Dominican Republic confined itself to confirming that there were various questions concerning the consideration of fabric and bags as the same product, and that it even had doubts itself on that subject and addressed a letter to Customs, and the latter confirmed that they are two different products. However, it misrepresents our claim and argues that there is no substantive obligation governing the definition of the product under investigation.

22. What we have claimed in the context of the definition of the domestic industry is that no paragraph in the reports or resolutions reflects the adequate and reasoned findings and conclusions required under Articles 3.1 and 4.2(c) on a subject as fundamental, important and relevant as the definition of the product under investigation for purposes of defining the domestic industry, in the light of the various factual questions raised in the investigation, which were even taken up by the DEI and the Commission in the public reports.

23. The Dominican Republic arbitrarily defined like or directly competitive domestic products as products produced *from resin*, without giving an objective reason for so doing. However, the *product under investigation* included fabric and bags, irrespective of the way in which they were produced, whether from resin or from fabric or from some other phase of the production process. Nor is there any justification for excluding domestic producers of the like or directly competitive domestic product, such as the firms FIDECA and TITAN.

24. In short, the domestic industry was defined in a manner such as to be adapted solely and exclusively to the profile of the applicant, FERSAN, so that the latter is the only enterprise constituting the domestic industry. This was done through the use of arbitrary or inadequate definitions and criteria which do not conform to the requirements of Articles 2.1, 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

V. CLAIM RELATING TO THE ALLEGED INCREASE IN IMPORTS

25. The Dominican Republic acknowledges that there was no finding with regard to a relative increase in imports compared with domestic production, despite the fact that the final resolution determined that imports had increased "in absolute and relative terms".[19]

26. Regarding the absolute increase in imports, the complainants note that the Dominican Republic's defence, which seeks to play down the importance of the drop in imports towards the end of the period of investigation, applies only to the final determination, but not to the

[17] First written submission of the Dominican Republic, paragraphs 285-295.
[18] Panel Report, *Chile – Price Bands*, paragraph 7.147 and footnote 705. Appellate Body Report, *US – Lamb*, paragraph 72.
[19] Definitive resolution, first article.

preliminary determination. The Dominican Republic cannot, therefore, argue that this alleged increase was taken into consideration in order to justify the conclusion concerning increased imports in the preliminary determination.

27. As regards the final determination, the Dominican Republic claims that it explained that the decrease in imports towards the end of the period of investigation was transitory and incidental. The Dominican Republic acknowledges that the decrease towards the end of the period of investigation would have been due to the overall slowdown in the Dominican economy.[20] However, it does not follow from this assertion that the decrease in imports was characterized as transitory and incidental or that there was an explanation of the reasons for considering that the decrease in imports had those characteristics, as is now argued *ex post*.

28. Finally, the Dominican Republic acknowledges that the evaluation of the rate of increase in imports consisted of an "end to end" analysis of the period of investigation, and was based on figures showing the percentage variation of imports from year to year.[21] As can be seen from the determinations, there are no findings regarding the rate of imports. The "rate" is a specific requirement of Article 4.2(a) of the AS.

VI. CLAIM RELATING TO THE ALLEGED SERIOUS INJURY

29. The preliminary and final determinations of serious injury go beyond the definitions and basic criteria contained in Article XIX and the AS. Leaving aside the erroneous definition of the domestic industry, there are fundamental errors of methodology.

30. For example, the determinations are based on information about "the volumes of production of the product investigated, assuming it to be a single product, i.e. finished bags".[22] Despite the fact that the like or directly competitive product was defined as tubular fabric and polypropylene bags, the Dominican Republic evaluated only production performance for finished bags, and no analogous evaluation was carried out on production performance, in volume terms, in the other segment making up the domestic industry, i.e. the production of tubular fabric.

31. There are two different segments: production of tubular fabric and production of polypropylene bags. The evidence shows that not all tubular fabric production was destined for the production of finished bags. Although part of this production was "assumed" to be an input for finished bags, another part was destined for the commercial market (e.g. sales to FIDECA) and a further part went into increasing FERSAN's stocks. The production outcomes for one or the other product are not therefore necessarily the same.

32. The Dominican Republic presents evidence to establish that it conducted a joint analysis of the indicators relating to tubular fabric and polypropylene bags because it evaluated aggregate information from the *Bags Division* of FERSAN.[23] However, the information from the Bags Division includes the production of other products which are not like or directly competitive products (bags made of netting, rope or string), and which are destined for both the domestic and the international market.[24] Moreover, with regard to stocks, the information covers raw material and inputs which do

[20] First written submission of the Dominican Republic, paragraph 318.
[21] First written submission of the Dominican Republic, paragraph 328.
[22] Initial report, page 14.
[23] First written submission of the Dominican Republic, paragraph 358.
[24] Exhibits RDO-13, RDO-14, RDO-15.

not form part of the like or directly competitive product. This erroneous methodological basis invalidates the evaluation that was made of earnings and losses, stocks, cash flows and production value.

33. As regards the discrepancy between the factual findings relating to production and the conclusions of the DEI and the Commission, the Dominican Republic provides an *ex post* explanation of the way in which the fall in production is to be understood.

VI. CLAIM RELATING TO THE ALLEGED CAUSAL LINK

34. Causation: The complainants contend that the Commission determined the causal link between imports and serious injury to the domestic industry inconsistently with Article 4.2(b), among other provisions of the AS, and Article XIX:1(a) of the GATT.[25]

35. The replies provided by the Dominican Republic in its first written submission indicate, in summary, that the causation analysis is composed of two elements: (i) two paragraphs of the final resolution (more specifically, paragraphs 37 and 38)[26]; and (ii) the serious injury analyses contained in the preliminary and definitive technical reports.[27]

36. Regarding the first element, the two paragraphs of the final resolution are not sufficient to establish a causal relationship, since they consist of new assertions lacking analytical substantiation in the technical reports.[28] Regarding the second element, the existence of serious injury is only a necessary premise for the causation analysis, but it is not sufficient to establish a causal link.

37. Non-attribution: The complainants also contend that the Dominican Republic failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS, which consists in separating the harmful effects of factors other than increased inputs which are the cause of serious injury.[29]

38. In reply, the Dominican Republic puts forward *ex post* explanations and offers arguments regarding those factors other than increased imports which, in the complainants' opinion, should have been taken into account on examining the causes of financial losses, increased stocks and reduced cash flows, as well as the injury caused by domestic competitors. Even these *ex post* arguments are insufficient to justify the lack of a non-attribution analysis.

VII. CLAIM RELATING TO THE LACK OF PARALLELISM

39. The Dominican Republic failed to respect the requirement of parallelism since, despite having excluded imports from certain countries from the application of the measures, those imports were in fact included in the evaluation of increased imports, serious injury and causation.[30]

40. The Dominican Republic states that the exclusion of imports from Mexico, Panama, Colombia and Indonesia from the application of the measures was in conformity with Article 9.1 of the AS, which permits the exclusion of developing countries with less than 3 per cent import share.[31]

[25] First written submission of the complainants, paragraphs 380-404.
[26] First written submission of the Dominican Republic, paragraph 441.
[27] First written submission of the Dominican Republic, paragraphs 439 and 442 and footnote 341.
[28] First written submission of the complainants, paragraph 395.
[29] First written submission of the complainants, paragraphs 410-433.
[30] First written submission of the complainants, paragraphs 436-450.
[31] First written submission of the Dominican Republic, paragraphs 472-474.

The parallelism obligation is enforceable *irrespective* of the reasons why the Member applying the safeguard has decided to exclude such imports. The Dominican Republic also submits that "[e]ven if an investigation excluding imports from Mexico, Panama, Columbia and Indonesia were conducted, the conclusions concerning increased imports would not change, given the negligible share of 1.2 per cent [of those imports] during the period of investigation".[32] This line of argument has already been presented and rejected in *US – Steel*.[33]

VIII. INCONSISTENCY WITH ARTICLES XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

41. The Dominican Republic accepts that its notification was in fact made three days after the *adoption* of the measure[34] and seeks to justify this action by referring to the English and French versions of the GATT, which indicate that the notification must be made prior to the *application* of the measure, and not prior to its *adoption*, as stated in the Spanish version. We observe, however, that the explanatory note contained in paragraph 2(c)(i) of the GATT 1994 explicitly provides that "[t]he text of GATT 1994 shall be authentic in English, French and Spanish".

42. Even on the interpretation of the Dominican Republic regarding the obligation under Article XIX:2 of the GATT, the complainants submit that the Dominican Republic acted inconsistently with that provision, since the WTO Members were notified on 18 October 2010, i.e. on *the same day* as the entry into force of the measure. Moreover, the Dominican Republic claims to treat (i) the participation of the complaining countries as interested parties in the context of the safeguard investigation under the national jurisdiction of the Dominican Republic on the same basis as (ii) the conduct of multilateral consultations as provided for by Article 12.3 of the AS.

IX. CLAIMS UNDER THE GATT

43. In the event that it is determined that the provisional and definitive measures are not subject to Article XIX and to the AS, the Panel should find that the provisional and definitive measures are border measures subject to the basic disciplines of Articles I:1, II:1(a) and II:2(b) of the GATT, and that they are inconsistent with those provisions.

44. Claims under Article I:1 of the GATT: According to the most-favoured-nation clause, any measure that qualifies as an advantage, favour, privilege or immunity granted to imports of specific origin shall also be granted to imports of like products from the other WTO Members. In this case, the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of application of the measures constitutes an advantage, favour, privilege or immunity granted to imports of those origins.

45. The criterion for the granting of this advantage, favour, privilege or immunity is also discriminatory, even where there is compliance with the criterion that imports should not exceed 3 per cent, by individual origin, of total imports and nine per cent collectively of that total, in the

[32] First written submission of the Dominican Republic, paragraph 479.
[33] Panel report, *US – Steel*, paragraph 10.607.
[34] First written submission of the Dominican Republic, paragraphs 493 and 495.

period of investigation.[35] For example, that criterion was not applied for the purpose of excluding imports from Thailand, which are less than three per cent.[36]

46. Claims under Articles II:1(a) and II:1(b), second sentence, of the GATT: the provisional and definitive measures consist of duties or charges other than ordinary customs duties that are applied to imports of polypropylene fabric and bags.

47. Article II:1(b) prohibits the imposition of import duties and charges other than ordinary customs duties. Pursuant to the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, a surcharge other than an ordinary customs duty shall be inconsistent with Article II:1(b), second sentence, of the GATT unless that surcharge had been recorded by 15 April 1994 at the latest.

48. In the preliminary and final reports, the DEI undertook an evaluation of the most effective alternatives for the imposition of the measure at issue, in which the DEI explicitly affirmed that the purpose was to establish a "second tariff" in addition to the applicable tariff.[37] This intention to establish a duty different and distinguishable from the ordinary customs duty was confirmed at the time of establishment of the measures and their time-frame. In the final resolution, the Commission stated that, for those countries subject to "an MFN tariff higher than the percentage of the definitive safeguard measure … the said MFN tariff shall apply". The MFN tariff in the Dominican Republic is the ordinary customs duty applicable to imports that do not benefit from tariff preferences[38], while under the final resolution, the surcharge constitutes an alternative duty to the MFN tariff, and either the surcharge or the ordinary customs duty is applied, whichever is higher. As can be seen from the Customs Tariff of the Dominican Republic, that country does not maintain an ordinary customs duty possessing the modal quality of an alternative duty. It follows from this that the provisional and definitive measures impose a duty of a nature distinct from the ordinary customs duty applicable in the Dominican Republic.[39]

49. Pursuant to Articles 5, 6 and 7 of Tariff Reform Law No. 146-00 (which governs the application of tariffs in the Dominican Republic), ordinary customs duties or tariffs can only be modified by a legislative act, but not by administrative means.[40] Inasmuch as the provisional and definitive measures were not imposed in accordance with the procedure provided for in Dominican legislation for the imposition of ordinary customs duties, the provisional and definitive measures do not qualify as ordinary customs duties.

50. For all of the above reasons, the provisional and definitive measures qualify as other duties or charges within the meaning of Article II:1(b), second sentence, of the GATT. It should be mentioned additionally that the Dominican Republic did not record in its Schedule of Concessions the possibility of applying measures of this nature. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and, by implication, with Article II:1(a) of the GATT.

[35] Preliminary Resolution, paragraphs 50 and 51; Final Resolution, paragraphs 42 and 43.
[36] Preliminary Report, Annex I; Final Report, Annex I.
[37] Final Technical Report, page 97.
[38] Customs Tariff of the Dominican Republic, Exhibit CEGH-27.
[39] Preliminary Report, page 93; Final Report, page 97.
[40] Tariff Reform Law No. 146-00, Exhibit CEGH-22.

X. CONCLUSIONS AND REQUEST FOR RECOMMENDATIONS AND SUGGESTIONS

51. In addition to the request for findings and rulings contained in our first written submission[41], the complainants request the Panel to issue the following findings and rulings:

- The application of the provisional and definitive measures excluding imports from specific origins is inconsistent with Article I:1 of the GATT.

- The provisional and definitive measures constitute other duties and charges distinct from ordinary customs duties within the meaning of Article II:1(b), second sentence, of the GATT and grant less favourable treatment than that provided for in the Dominican Republic's Schedule of Concessions within the meaning of Article II:1(a) of the GATT, for which reason both measures are inconsistent with the provisions of the GATT.

52. Despite the fact that the complaints concerning Articles I and II of the GATT have been submitted as alternatives, the applicants request the Panel to rule on them even if it concludes that the measures at issue *are* safeguard measures. This is important given the possibility of an appeal for which the Appellate Body would need to have factual findings for the purpose of completing the legal analysis relevant to the case.

[41] First written submission of the complainants, paragraph 477.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the AS, in other words, all the rules duly cited by the complainants in the request to hold consultations[1], in the request for the establishment of a panel[2] and in their first written submission, do not apply to the measures at issue. This makes it impossible to evaluate the consistency of the measures contested with the disciplines cited.

2. The Dominican Republic wishes to reaffirm the reasons why the rules cited by the complainants do not apply on the basis of five arguments. Firstly, the applicability of Article XIX of the GATT and the AS depends on objective criteria that cannot be replaced by statements made by the Dominican authorities. Secondly, the measures at issue are not covered by the objective applicability criteria in Article XIX of the GATT and the AS. Thirdly, Article 11.1(a) of the AS does not cover action prior to the adoption of the measures contested. Fourthly, the measures at issue did not lead to suspension of Article 1:1. Fifthly, the measures at issue do not constitute suspension of the second sentence of Article II:1(b) of the GATT.

1. The applicability of Article XIX of the GATT and the AS is not defined on the basis of statements by Members

3. A large part of the arguments put forward by the complainants concerning the applicability of Article XIX of the GATT and the AS consisted of indicating that the measures at issue are the result of an investigation initiated, conducted and concluded by the Dominican Republic on the basis of Law No. 1-02[3] with the Dominican authorities having cited Article XIX of the GATT and several provisions of the AS.[4] The complaining parties also attach considerable weight to notifications to the WTO Committee on Safeguards.[5]

4. Nevertheless, as stated by the Appellate Body, an examination of applicability is an objective analysis of the content of the measures at issue, rather than on the basis of nominal aspects such as the statements made by the Dominican authorities.[6] If it is considered that the classification of a measure in national law or the intention of the authorities are decisive for the purposes of classifying a measure, as underlined by the European Union, this would mean that WTO Members could impose measures that comply with their obligations by describing them in a particular way.[7]

5. The legal basis for the measures at issue, Law No.1-02, provides in Article 73 that safeguard measures may consist of an increase in tariffs, in tariff quotas or maximum rates[8], making

[1] WT/DS415/1, WT/DS416/1, WT/DS417/1 and WT/DS418/1.
[2] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.
[3] Exhibit RDO-11.
[4] *Idem*. paragraphs 43-74.
[5] *Idem*. paragraphs 75-82.
[6] Appellate Body Report, *US – Shrimp (Thailand)*, paragraph 241; Appellate Body Report, *US – Softwood Lumber IV*, paragraph 65; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87 to paragraph 87.
[7] See paragraph 10 of the Third Party Written Submission of the European Union.
[8] Above, note 23.

no reference to a suspension of obligations or the withdrawal or modification of concessions, which are the objective criteria for application of Article XIX of the GATT and the AS. Consequently, a safeguard adopted under Law No. 1-02 does not necessarily constitute a safeguard in terms of the GATT or the AS.

6. In the present case, as the Dominican Republic granted a tariff concession of 40 per cent for the products in question, it is free to impose a lower tariff, pursuant to Article II:1(a) of the GATT, as confirmed by the Appellate Body.[9] By adopting a safeguard measure pursuant to Law No. 1-02 that increased the tariff to 38 per cent, in GATT terms the measure consisted of an increase in the MFN tariff to below the bound level, a measure which the Dominican Republic was free to adopt. In definitive, the fact that the Dominican Republic's authorities adapted their conduct to the AS and to Article XIX of the GATT does not imply that the complainants can call the measures at issue into question in the light of those provisions.

7. Essentially, the Dominican Republic complied with a more onerous procedure than that imposed by the GATT. The complainants were aware of the nature of the measures and expressed doubts about the applicability of Article XIX of the GATT prior to the adoption of the provisional measure.[10] Nevertheless, they insisted on questioning the measures in the light of Article XIX of the GATT and the AS.

2. The measures issue do not fall within the scope of Article XIX of the GATT and the AS

8. The scope of the AS is defined in Article 1 thereof, which provides that 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 …".[11] The material scope of Article XIX of the GATT is set out in paragraph 1(a) thereof.[12] The form of this paragraph is conditional, the first part describing a series of conditions that must be verified to enable the WTO Member in question to make use of the authorization defined in the last part of the paragraph, which provides that the Member *"shall be free, …, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession"*. If the course of action defined in the last part of Article XIX:1 of the GATT is not followed, there is no need to meet the conditions set out at the beginning of this provision, or to comply with the disciplines and procedural requirements in the remainder of Article XIX of the GATT.[13]

9. Article XIX:1(a) of the GATT may authorize the total or partial suspension of an obligation undertaken or the withdrawal or modification of a concession. The measures contested are based on Law No. 1-02 and consist of an increase in the MFN tariff up to a level lower than that bound. In other words, there was no suspension of any obligation or withdrawal or modification of any concession, so Article XIX of the GATT and the AS do not apply.

10. The context of Article XIX confirms the statement above. The Dominican Republic was entitled to adopt the measures at issue pursuant to Article II:1(a) of the GATT, so no obligation was suspended and there was no withdrawal or modification of any concession. If it is found that there

[9] Appellate Body Report, *Argentina – Textiles and Apparel*, paragraph 46.
[10] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, page 85. Exhibit RDO-9.
[11] AS, Article 1.
[12] Request by the Dominican Republic for a preliminary ruling, paragraph 37.
[13] *Idem*. paragraph 38.

must be compliance with the provisions in Article XIX of the GATT and the AS even if no concession is withdrawn or modified, and no obligation is suspended, Article XIX of the GATT and the AS would be distinct from the series of rights and disciplines laid down in the WTO Agreement, contrary to the criteria determined by the Appellate Body.[14] Considering a tariff increase up to a level that does not exceed the bound level to be a safeguard measure would make the GATT provisions that serve as basis meaningless.

11. Another relevant provision in this regard, Article 11.1(c) of the AS, provides that the Agreement does not apply to measures which a Member seeks to adopt, adopts or maintains in accordance with other provisions in the GATT 1994, other than Article XIX, and the multilateral trade agreements contained in Annex 1A, other than the AS, or in conformity with protocols, agreements or conventions concluded within the framework of the GATT 1994. This provision reaffirms the non-applicability of Article XIX of the GATT and the AS to the measures at issue, which are in accordance with Article II:1(a) of the GATT.

12. Moreover, Article 8.1 of the AS provides the following:

> *"A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure [...] to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 […]. To achieve this objective, the Members concerned may agree on adequate means of trade compensation ...".*

13. If no agreement is reached, Article 8.2 of the AS allows the exporting Members affected to suspend the application of concessions or other equivalent obligations under the GATT to the trade of the Member applying the safeguard. This once again confirms that only a measure that involves withdrawal, modification or suspension of an obligation or concession must comply with the disciplines imposed by Article XIX of the GATT and the AS. If this is not the case, WTO Members may have the right to compensation for action that may be freely adopted.

14. The object and purpose of Article XIX of the GATT and the AS, which have been described by the Appellate Body as "to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members"[15], also confirm this interpretation. The object and purpose have been confirmed by the history of the Uruguay Round negotiations, where the function of safeguard clauses was described as "*offering certain possibilities for easing contracted obligations, they encourage importing countries to enter into commitments which would otherwise be of unconditional rigidity*".[16]

15. The history of negotiations reaffirms the interpretation described. For illustrative purposes, statements such as the following can be taken into account: "*GATT safeguard clauses permit the application […] of measures not otherwise permitted under the rules*"[17] or "*the scope of the issue to be negotiated in the Negotiating Group on Safeguards […] should be confined to the rules and disciplines applicable for the withdrawal of GATT concessions*" and "*Since safeguard measures*

[14] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 81.
[15] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 94.
[16] Submission by Switzerland to the Negotiating Group on Safeguards, 14 July 1988, MTN/GNG/NG9/W/20.
[17] Note by the Secretariat of the Negotiating Group on Safeguards, 7 April 1987, MTN/GNG/NG9/W/1.

invariably imply the withdrawal of GATT concessions ...".[18] Moreover, the Secretariat, when explaining the history behind the drafting of Article XIX and its role in the GATT, indicated that "*Article XIX is one of a number of safeguard provisions in the General Agreement which permit contracting parties, subject to specific conditions, to re-impose trade barriers otherwise prohibited by the Agreement. It permits the imposition of tariffs and quantitative restrictions otherwise prohibited by the provisions of Articles II and XI …*".[19]

16. In the light of the above, the Dominican Republic also expresses its disagreement with the complainants' argument that the use of the word "*podrá*" in the Spanish text of Article XIX:1(a) of the GATT ("shall be free" in the English text) implies that in the terms of the GATT or the AS a safeguard measure may consist of a measure that does not suspend a concession or obligation.[20] In addition to contradicting the context, object and purpose and the history of the negotiations and drafting of Article XIX of the GATT and the AS, it also relies on an incorrect reading of the text, ignoring the conditional structure of Article XIX:1(a) of the GATT, making the disciplines and conditions set out therein subject to the adoption of a measure consisting of a suspension, modification or withdrawal of an obligation or concession.

17. This can be confirmed in the light of the Panel Report in *Chile – Price Band System*. The measures at issue were specific duties which, depending on the circumstances, exceeded Chile's bound tariff. Chile claimed that, as the price band system exceeded the bound tariff, it constituted a safeguard. Consequently, the duty applied was considered to be a safeguard in the terms of Article XIX of the GATT solely to the extent that it exceeded the bound rate.[21]

3. The applicability of Article XIX of the GATT and the AS to the investigation prior to the adoption of the measures at issue

18. According to the complainants, the formula "*tratar de adoptar medidas*" in the Spanish text of Article 11.1(a) of the AS ("seek any … action" in the English text) includes the intention or the steps taken towards the specific act of adopting measures such as those in Article XIX of the GATT. The investigation prior to the adoption of the provisional and definitive measures would constitute such an act and therefore Article XIX of the GATT and the AS would be applicable.[22]

19. The complainants propose applying the AS to an investigation, even when the ensuing measures do not fall within the scope of these provisions, without making this possibility subject to any criterion. A more logical interpretation would be to limit the time-frame for application of Article 11.1(a) and not to apply it when it is clear that the Member concerned did not adopt or seek to adopt a safeguard measure in accordance with Article XIX of the GATT. In fact, although it might be considered that in the first stages of the investigation the Dominican Republic *sought* to adopt a safeguard measure in accordance with the provisions in Article XIX of the GATT, such a statement is no longer possible after the adoption of the definitive measure in October 2010.

[18] Communication by the Nordic Countries to the Negotiating Group on Safeguards, 30 May 1988, MTN/GNG/NG9/W/16.

[19] Background note by the Secretariat of the Negotiating Group on Safeguards, 16 September 1987, MTN/GNG/NG9/W/17.

[20] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 95.

[21] Panel Report, *Chile – Price Band System*, paragraph 7.109.

[22] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraphs 86-91.

20. Furthermore, Article 11.1(a) of the AS has to be read in conjunction with Article 11.1(c), whose relevant text provides that: "*This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX* …". The use of the conjunction "or" means the AS does not apply to measures adopted pursuant to another provision of the GATT, namely, Article II:1(a).

21. If the line of reasoning put forward by the complainants is followed, the only plausible interpretation in order to avoid the contradictions that arise from removing from the investigation the measures adopted as a result of it, would be to identify the obligations in the AS which specifically apply to the investigation. The complainants, however, have not indicated what these obligations are, which they cite with reference to the stage of the investigation, and have simply indicated that they "also question the way in which the notification and consultation procedure were conducted …".[23]

4. The alleged suspension of Article II:1(b) of the GATT

22. The complainants contend that the measures suspend the second sentence of Article II:1(b) of the GATT as the tariff constitutes a duty other than ordinary customs duty. The measures would therefore result in a safeguard measure within the meaning of Article XIX of the GATT.[24] According to Dominican legislation, however, a safeguard may be in the form of three possible measures: an increase in tariffs, tariff quotas, or maximum rates.[25] By providing for an *increase* in already-existing tariffs, the measure constitutes an increase in ordinary customs duty and not a separate duty.

23. Furthermore, the measures at issue replace the MFN tariff normally applicable. If the duty was distinct from ordinary customs duty, there would be no such replacement but, as is the case for anti-dumping duties or countervailing measures, it would be applied in addition to the duty normally applicable. The following statement by the Appellate Body in *India – Additional Import Duties* is relevant: "*Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates*".[26] (emphasis added)

5. The alleged suspension of Article I:1 of the GATT

24. The complainants stated that the exclusion of Mexico, Panama, Colombia and Indonesia from the measures at issue represents suspension of Article I:1 of the GATT, which the Dominican Republic justified by citing Article 9:1 of the AS.[27] This would mean that the measures at issue constitute safeguards in terms of Article XIX of the GATT and the AS.

25. This argument has two flaws. Firstly, safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT. This can be confirmed by Article 2.2 of the AS. The history of negotiations contradicts the interpretation that a safeguard measure may

[23] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 91.
[24] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 111.
[25] Law No. 1-02 on Unfair Trade Practices and Safeguard Measures, Article 73.
[26] Appellate Body Report, *India – Additional Import Duties*, paragraph 159.
[27] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 110.

consist of the suspension of Article I:1 of the GATT. During the Uruguay Round, it was decided to incorporate Article 2.2 in order to prevent the selective application of safeguards.[28]

26. Secondly, Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure as an exception to Article 2.2 of the AS. An exception to Article 2:2 of the AS can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists, which is not the case.

[28] See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991, section M, paragraphs 5 and 9.

ANNEX C-3

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Members of the Panel, members of the Secretariat, representatives of the Dominican Republic:

1. Our closing statement will be very brief. Our complaints and arguments are clear, and we merely wish to make four very specific comments on subjects that were addressed during the last two days of our discussions.

2. Firstly, on the issue of the interpretation of the "obligations" in Article XIX:1(a) of the GATT, it is important to note that the last phrase draws a distinction between "to suspend the obligation in whole or in part" in respect of such product, and "to withdraw or modify the concession". The term "obligation" clearly means something different from "concession", and consequently, the Dominican Republic's argument that the "obligation" involves only that relating to "tariff concessions" is without foundation. In fact, the Dominican Republic's interpretation would render the term "obligation" as it appears in the last phrase of Article XIX:1(a) of the GATT redundant and meaningless. Our understanding, which is shared by some of the third parties to this dispute, is that the scope of the term obligation goes beyond the concept of "concession". Furthermore, the Dominican Republic's interpretation is contrary to the principle of effectiveness in the interpretation of treaties.

3. Secondly, the complainants would also like to make it clear that they are not claiming violation of any regional trade agreement. As indicated in our request for the establishment of a panel, our complaints concern only violations of covered agreements.

4. As we have stated since the beginning of this dispute and as understood by the Dominican Republic up until it submitted its statement of preliminary objections, our position has been, and continues to be, that the measures at issue are safeguard measures within the meaning of Article XIX of the GATT and the AS.

5. Thirdly, the Dominican Republic stated yesterday that the measures at issue were simply a "tariff increase". It also stated that its authorities had taken the more difficult path in adopting the alleged tariff increase, since they could have done so without conducting an investigation. The truth, as we see it, is that the only reasonable explanation why the Dominican Republic decided, at the time, to apply safeguard measures under Article XIX of the GATT and the AS rather than a simple tariff increase, was that a simple tariff increase would not have enabled it to exclude the Central American countries from the scope of application of those measures in view of the existence of bilateral preferential obligations. We trust that this clarification will dispel any doubt with respect to the Dominican Republic.

6. Although the Dominican Republic could have adopted a tariff increase without conducting a safeguard investigation, the fact remains that this is not the option that it chose. Instead, it took the decision to initiate an investigation and adopt safeguard measures. The Dominican Republic cannot rid itself of the general obligations laid down in the AS and Article XIX while at the same time using Article 9.1 of the AS to justify the discriminatory application of those safeguards.

7. Indeed, if the Dominican Republic had opted for a simple tariff increase that did not exceed the WTO bound rate, we would not be here today in these WTO dispute settlement proceedings. As

we have repeatedly argued, the Dominican Republic is denying the obvious: that it conducted a safeguard investigation, following which it imposed a safeguard measure. To accept that a Member can impose safeguard measures and then describe them as something different for the purposes of a dispute settlement procedure would have serious systemic implications for the WTO. This is yet another reason why the Dominican Republic cannot be allowed at this point to deny its obligations under Article XIX and the AS.

8. Finally, we would like to note that in paragraph 47 of its First Oral Statement, the Dominican Republic confirmed that the safeguard measure was a measure other than ordinary customs duties: "as long as the increased tariff is in force, the MFN tariff *normally applied* is not in force" (emphasis added). To quote a legal proverb, "Where the party confesses, no proof is needed".

Thank you.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chair, members of the Panel:

1. The Dominican Republic welcomes your efforts and questions yesterday and today at this first substantive meeting, in the hope that they will lead to a positive settlement of this dispute.

2. The Dominican Republic wishes to take the opportunity of this meeting to clarify certain aspects of the safeguard measures adopted on the basis of Law No. 1-02, as a consequence of previous exchanges of views.

3. The Dominican Republic's tariffs are defined in Law No. 146-00, which specifies that tariffs may only be determined through legislative channels. The measures that are the subject of this dispute were adopted on the basis of Law No. 1-02 on Unfair Trade Practices and Safeguard Measures.[1] In Title IV on "Safeguard measures", this Law defines safeguard measures in Article 57 as "those intended to regulate imports temporarily … [with] the objective of preventing or remedying serious injury to a domestic industry and facilitating adjustment for domestic producers". Pursuant to Article 73, the measures in question may consist of a temporary increase in tariffs.

4. From the foregoing statement, it follows that, on the one hand, tariffs must have a legal basis in a law, in this particular case Law No. 146-00. On the other hand, Law No. 1-02 allows a temporary increase in the tariffs determined therein subject to the adoption of a safeguard measure, as defined in the Law.

5. In Dominican law, therefore, the same rules apply to any tariff increase resulting from a procedure conducted pursuant to Law No. 1-02. In other words, there is no distinction between the way in which a domestic safeguard measure that does not lower the bound tariff is adopted and the adoption of a measure that exceeds this tariff and can be considered a safeguard in terms of Article XIX of the GATT and the Agreement on Safeguards.

6. The fact of following the procedure defined in Law No. 1-02 and citing the provisions of the Agreement on Safeguards in no way implies any intention on the Dominican Republic's part to make measures that do not lower the bound tariff subject to Article XIX of the GATT and the Agreement on Safeguards. In fact, it would be unnecessarily complicated to follow different procedures depending on the type of safeguard in question.

7. The measures at issue consist of the adoption of a safeguard pursuant to Law No. 1-02. As this measure does not consist of an increase above the Dominican Republic's bound tariff in the WTO however, as has been shown, the measure does not suspend any obligation, or modify or withdraw any concession in terms of Article XIX. Certainly, according to WTO law, the Dominican Republic could have adopted the measures at issue without complying with the onerous obligations imposed by the Agreement on Safeguards. But by adopting the measures at issue pursuant to Law No. 1-02 and as this domestic Law reflects the Agreement on Safeguards, the adoption procedure followed the Agreement on Safeguards. As the Dominican Republic has already stated, this does not imply that

[1] Exhibit RDO-11.

the domestic safeguard measures are subject to the disciplines of Article XIX of the GATT and the Agreement on Safeguards.

8. To summarize, the complainants contend that, solely for the reason that the measures at issue have the title "safeguard" and that the procedure in Law No. 1-02 was followed, they can question these safeguard measures before the WTO Dispute Settlement Body.

9. This position is not acceptable. The Dominican Republic notes that many free trade agreements have ad hoc safeguard mechanisms. The complainants' position would mean that any bilateral safeguard would be subject to examination by the WTO Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards.

10. To give just one example, the second paragraph of Article 8.02(2) of the Dominican Republic-Central America Free Trade Agreement provides that:

> *For the application of bilateral safeguard measures, the competent authorities shall conform to the provisions in this chapter and, supplementarily, to Article XIX of the GATT 1994, the Agreement on Safeguards of the World Trade Organization and the respective domestic legislation.*

11. How can it be found, in the light of this provision, that any bilateral safeguard adopted pursuant to the Dominican Republic-Central America Free Trade Agreement would be subject to examination by the Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards? A reply in the affirmative would be absurd. Nevertheless, this is the conclusion reached using the logic put forward by the complainants in their response to the request by the Dominican Republic for a preliminary ruling and in their oral statement made at this first substantive meeting.

12. The complainants have indicated that adopting a safeguard measure under Law No. 1-02 when such a measure does not lower the tariff in the WTO schedule of bindings would be contrary to the principle of good faith and could have harmful systemic implications.

13. The Dominican Republic does not understand why the complainants consider it reprehensible to increase a tariff temporarily under a safeguard procedure in its domestic law when the same increase could be effected under a simpler procedure and with fewer guarantees for the parties involved. The guarantees afforded are obvious from the broad participation of the complainants in the procedure prior to the adoption of the measure, when they were informed in detail of all aspects of the proposed measure, including the fact that it did not exceed the bound tariff. It cannot, therefore, be considered that the Dominican Republic's conduct was unexpected or inconsistent with the principle of good faith.

14. The Dominican Republic thinks it relevant to refer to the record of the hearing held at the headquarters of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures on 12 May 2010. At this hearing, the representative of the Government of Honduras took the floor to indicate that:

> *"[T]he amount of the provisional measure adopted is 38.5 per cent ad valorem, while the Dominican Republic's bound rate for the products in question is 40 per cent*

> *ad valorem, so it cannot be claimed that there is any reason to turn to a safeguard measure …"*[2] (emphasis added)

15. This observation was preceded by other comments prior to the adoption of the provisional measure.[3] In other words, not only were the complainants informed that the measure would not exceed the bound tariff, but the complainants themselves in their statements expressed serious doubts about the applicability of Article XIX of the GATT. Today, however, the complainants insist on a point of view that is contrary to these statements made throughout the procedure for adoption of the measures which they are now questioning in the light of rules which they themselves declared to be irrelevant.

16. With regard to the question of whether a safeguard measure in terms of Article XIX of the GATT may consist of suspension of Article I:1 of the GATT, the Dominican Republic would like to refer to paragraphs 51 and 52 of its oral statement at the beginning of this first substantive meeting.

> *"51. … [T]he safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT can be confirmed by Article 2.2 of the Agreement on Safeguards, which provides: 'Safeguard measures shall be applied to a product being imported irrespective of its source.'.*
>
> *52. … Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure. More accurately, it constitutes an exception to Article 2.2 of the Agreement on Safeguards. An exception to Article 2.2 of the Agreement on Safeguards can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists …"*

17. Mr Chair, members of the Panel, before concluding this oral statement, the Dominican Republic would like to refer to one aspect that has arisen during this substantive meeting. Article 72 of Law No. 1-02 provides for the exemption of developing countries from safeguard measures adopted pursuant to the Law, thereby reflecting the provision in Article 9.1 of the Agreement on Safeguards. As has become apparent during this meeting, however, the definition in Article XIX of the GATT does not correspond to the possible forms which a safeguard measure may take in the light of Article 73 of Law No. 1-02. It is thus possible that situations may arise in which certain WTO Members are exempt from a safeguard measure adopted pursuant to Law No. 1-02, even though such exemption may not be based on Article 9.1 of the Agreement on Safeguards because the safeguard measure is not one of the measures covered by Article XIX of the GATT. The Dominican Republic is aware that exempting developing countries from a domestic safeguard measure may be problematic in specific cases in which the measure adopted does not constitute a safeguard measure in the terms of Article XIX of the GATT.

[2] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, Exhibit RDO-10, page 179.

[3] See, for example, Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, Exhibit RDO-9, page 85.

18. In this connection, it might be desirable to do away with the granting of an exemption when the domestic safeguard measure is not covered by Article XIX of the GATT. This is not a question that can be resolved in the present dispute, however, inasmuch as Article I:1 of the GATT is not part of the Panel's terms of reference.

19. Mr Chair, members of the Panel, I thus conclude my oral statement. The Dominican Republic remains at your disposal to respond to any questions that might arise.

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT THE SPECIAL SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF COLOMBIA

I. THE DETERMINATION OF THE IMPORTED PRODUCT AND THE DOMESTIC PRODUCT IN THE AGREEMENT ON SAFEGUARDS

1. The present case has given rise to a discussion of the rules that should be applied in determining the product investigated in a safeguard process, taking into account the relevance of that determination to the national authority's analysis, under the Agreement on Safeguards, of the similarity between the imported product and the like or directly competitive product manufactured by the domestic industry.

2. In its first written submission, the complainant argues that the Dominican Republic: (i) failed to determine correctly that the imported products and the domestic products were like or directly competitive[1]; and (ii) wrongly interpreted the concept of "producers" in the Agreement on Safeguards, leading to the exclusion of domestic producers of directly competitive products.[2] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the Agreement on Safeguards was not properly established.

3. Colombia proposes to comment on the discussion concerning whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the obligations of the Dominican Republic under the Agreement on Safeguards, especially with respect to the concept of "domestic industry" and the means of identifying it.

4. Colombia agrees with the statement by the Dominican Republic that there are no precedents in panel or Appellate Body proceedings concerning how the product under investigation in a safeguards investigation should be defined and that there are no express rules relating to this matter. However, it does not agree that this is a question unrelated to the provisions of the Agreement on Safeguards and that, consequently, there are no clear criteria for determining how this finding should be made.

5. The determination of the product under consideration or investigation is a fundamental part of the process of properly identifying the domestic industry in a safeguards investigation. This decision establishes the context for determining where the "like or directly competitive products" are to be situated, while forming the basis of the analysis for identifying the domestic producers that make up the domestic industry and the data that will be needed for the analysis of injury.

6. Colombia proposes that, despite the term "product investigated" not being used in the Agreement on Safeguards, a systematic interpretation of the Agreement under Article 31 of the Vienna Convention yields sufficient evidence to establish what product under investigation should be taken to mean and how that product should be identified in a safeguards investigation.

7. In this respect, an exegetical reading of the second paragraph of the preamble and Article 2.1 of the Agreement on Safeguards, consistent with Article 31 of the Vienna Convention, would suggest

[1] First written submission of the complainants, paragraphs 77-80.
[2] First written submission of the complainants, paragraphs 160-163.

that an investigation can only be conducted into "a product" and not several. However, Colombia believes that it can be argued that the product under investigation may be composed of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the provisions of Article 4.1(c) of the Agreement on Safeguards.

8. Article 4.1(c) of the Agreement on Safeguards, which defines domestic industry, reads as follows:

> "[…] a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". (emphasis added)

9. Although the Article in question relates to the determination of the domestic industry and to how the imported products should be compared *vis-à-vis* the domestic products, for Colombia this rule also applies to the determination of the product under investigation, because of the close relationship between the definition of domestic industry and the product investigated. If it is not accepted that the products investigated should be, at least, like or directly competitive, this finding could not be made with respect to domestic products, since it would be impossible to compare dissimilar categories of products.

10. Insofar as the standard of Article 4.1(c) of the Agreement on Safeguards requires that the domestic and imported products be like or directly competitive, if the "product investigated" contained products which in themselves were not, or was composed of several individual products which needed to be considered individually, it would be impossible to prove that there was a parameter for defining such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry within the investigation.

11. A similar argument was upheld in an analogous situation by the Panel in *United States – Steel Safeguards*, when the relationship between a suitable definition of the imported products and the causal link envisaged in Article 4.2(b) of the Agreement on Safeguards was analysed. In this connection, the panel stated that:

> "In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken."[3]

12. Colombia considers that this reasoning is also applicable to Article 4.1(c) of the Agreement on Safeguards inasmuch as the definition of the product investigated could prevent the proper identification of the domestic industry, a situation which would necessarily lead to a violation of the above-mentioned Article.

13. For this reason, the criterion for establishing whether two different products can be regarded as a single product investigated means that there must, at least, be a relationship of likeness or direct

[3] Panel Report in *United States – Steel Safeguards*, paragraph 10.416.

competitiveness between them. Otherwise it would be impossible to comply with the requirement for the determination of the domestic industry in Article 4.1(c) of the Agreement on Safeguards.

14. Colombia notes that the Dominican Republic does not mention any criterion for establishing how several products, in this case tubular fabric and polypropylene bags, could be included in a single category. Apparently, this finding was based solely on considerations of a customs nature, which, in Colombia's opinion, is not a reasonable and sufficient basis for making such a determination. In the words of the last sentence of Article 3.1 of the Agreement on Safeguards, the identification of the product investigated by the Dominican Republic would not be a finding or reasoned conclusion.

15. To accept that products investigated can be grouped together without any justification of their likeness or competitiveness would be contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[4], insofar as it would allow virtually any kind of products to be included as a single whole in a safeguard investigation, regardless of the relationship between them. Under this interpretation, products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules applicable to this situation, a conclusion that is manifestly absurd and contrary to the Agreement on Safeguards.

16. Colombia therefore concludes that the grouping of tubular fabric and polypropylene bags in a single category of products under investigation is inconsistent with the obligations under Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

II. THE REQUIREMENT OF "UNFORESEEN DEVELOPMENTS" UNDER ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

17. On this point, the complainants allege that the Dominican Republic has not demonstrated the existence of unforeseen developments insofar as it has not given a reasonable explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis and (iii) China's accession to the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the reasons given by the Dominican Republic's authorities for treating these events as unforeseen developments are inadequate.

18. In Colombia's opinion, the Panel should take into account the fact that, although there are certain requirements that every Member of the WTO must meet to prove this element, the standard cannot be construed in such a way as to make it de facto impossible to recognize these developments, by laying down requirements that are difficult to meet in practice.

19. Colombia agrees with the statement by the Dominican Republic to the effect that the rule for the application of the concept of "unforeseeability" is not clear and, on the contrary, makes it difficult for any Member of the WTO to use the safeguard measures for which the Agreement on Safeguards provides. In *Argentina – Footwear*, the Appellate Body defined the concept of unforeseen developments as "unexpected" or "unforeseeable".[5] Likewise, the Panel in *Argentina – Preserved Peaches* stated that: "*The text of Article XIX:1(a) cannot support an interpretation that would equate*

[4] In the following cases the Appellate Body has referred to the application of the principle of effectiveness in the interpretation of treaties in settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

[5] Appellate Body Report in *Argentina – Footwear*, paragraph 91.

increased quantities of imports with unforeseen developments."[6] However, later in its report the same Panel considered that "*a statement that the increase in imports, or the way in which they were being imported, was unforeseen does not constitute a demonstration as a matter of fact of the existence of unforeseen developments*".[7]

20. In recent years, the Appellate Body has ruled on several occasions on how the standard relating to the existence of unforeseen developments should be met. Both these decisions and those already mentioned have created some uncertainty as to how States should demonstrate the existence of this situation.

21. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to enable it to be applied clearly and effectively, with a view to allowing the application of safeguard measures under the conditions envisaged in Article XIX of the GATT and the Agreement on Safeguards. In Colombia's view, as long as this standard on unforeseen developments perpetuates the uncertainty with regard to its application, it will be very difficult to show that situations such as those submitted by the Dominican Republic can be regarded as meeting the aforementioned requirement.

22. In Colombia's opinion, given the lack of clarity in this respect, the Panel's examination cannot be *de novo* or involve a judgment that goes beyond the elements reasonably available to the Member at the time the disputed measure was applied. Colombia takes the view that there is simply no support in either the Agreement on Safeguards or Article XIX of the GATT for the opposite course of action which, moreover, could potentially infringe essential legal principles of due process and substantive justice.

23. These comments are without prejudice to Colombia's arguments as set out in its submission to the Panel.

[6] Appellate Body Report in *Argentina – Preserved Peaches*, paragraph 7.18.
[7] *Ibid*., paragraph 7.24.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES

1. Mr Chairman and members of the Panel, it is a pleasure to appear before you today to present the views of the United States as a third party in these proceedings. The written submission of the United States addressed the submissions of the complaining parties, and we will not repeat those points here. Today, the United States will address the Dominican Republic's written submissions, including its request for a preliminary ruling as to whether the *Agreement on Safeguards* ("Safeguards Agreement") and Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") apply to the measures at issue in this proceeding.

Whether the Safeguards Agreement Is Applicable

2. The first issue we would like to discuss today is the applicability of the Safeguards Agreement to the measures at issue.

3. Specifically, the Dominican Republic argues that the Safeguards Agreement does not apply because the increased tariff rates associated with the measures do not exceed the relevant tariff bindings of the Dominican Republic for the product or products in question – i.e. polypropylene bags and tubular fabric.[1]

4. Although the United States takes no position on the consistency of the measures at issue with the WTO, it may be relevant to the question of the applicability of the Safeguards Agreement that the Dominican Republic apparently considered that the measures were safeguards when it imposed them, including notifying them as safeguard measures to the Committee on Safeguards.[2] It would also appear as a general matter that it would be relevant as to exactly what the measures at issue entail. For example, the Dominican Republic represented that it relied on at least one of the provisions of the Safeguards Agreement in structuring its measures - it relied on Article 9.1 of the Safeguards Agreement as a basis for not applying the increased duties to certain Members.

5. As a result, the Dominican Republic apparently relied on the measures as safeguards to justify not applying its duties on the products at issue in a most-favoured-nation manner pursuant to Article I:1 of the GATT 1994 when it exempted imports from certain developing countries (i.e. Mexico, Panama, Colombia, and Indonesia) from the application of the measures. As a result, imports of polypropylene bags and tubular fabric from these countries are treated more favourably than imports from other Members.

6. Accordingly, the question of whether the Dominican Republic needed to suspend its tariff concessions on the products at issue in order to impose the measures at issue is only part of the relevant legal analysis.

Definition of "Producers" Under Article 4.1(c) of the Safeguards Agreement

7. In addition, the United States would like to address the Dominican Republic's "reservation" of the "right" to apply a minimum transformation or value-added test (at paragraph 251) to define

[1] Dominican Republic's request for a preliminary ruling (18 April 2011).
[2] G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (18 October 2010).

producers for purposes of Article 4.1(c) of the Safeguards Agreement. According to the Dominican Republic, it reserves the right to exclude entities, such as downstream companies that provide low value-added finishing services, from the universe of producers of like or directly competitive products and, therefore, from the domestic industry.

8. It does not appear that the Dominican Republic applied a minimum transformation or value-added test in determining producers for purposes of the measures at issue in this proceeding. As a legal matter, the Panel should not reach hypothetical issues that do not arise from the actual determination of the competent authority that is at issue in a dispute. Such issues would not form part of the "matter" the Dispute Settlement Body has charged the Panel with examining and would therefore be outside the Panel's terms of reference under Article 7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

9. In any event, the United States notes that there is nothing in the Safeguards Agreement that prohibits the application of a minimum transformation or value-added test for purposes of defining producers under Article 4.1(c) of the Safeguards Agreement.

Conclusion

10. This concludes our statement. Thank you again for this opportunity to express our views.

ANNEX D-3

ORAL STATEMENT OF PANAMA

Mr Chairman, members of the Panel:

1. As a third party, Panama welcomes this opportunity to give the reasons why it considers the safeguard measures adopted by the Dominican Republic, which are the subject of these proceedings, to be inconsistent with GATT Article XIX and the WTO Agreement on Safeguards (AS).

2. Panama is of the view that this Panel will reach the same conclusion when it analyses the Dominican Republic's actions within the context of the national investigation procedure and the multilateral notification and consultation procedures established in Articles 8.1, 12.1 and 12.3 of the AS.

3. Panama believes that the investigation underlying the measures adopted by the Dominican Republic's Investigating Authority was flawed in its determinations with regard to: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination regarding the increase in imports; (iv) determination of injury; and (v) the causal link between imports and injury. These determinations are not based on adequate and reasoned findings or on a detailed analysis of the case, in accordance with Articles 3.1 and 4.2(c) and the substantive rules of the AS.

4. The lack of substantiation for these elements, which are vital for an action under the AS, has been argued extensively in these proceedings by the complaining parties and now by at least one of the third parties. We recall, for instance, the arguments put forward by the complainants in their first written submission (*see paragraphs 73 et seq.*). Therefore, as you requested, Mr Chairman, and to save time, we will refer to only three points concerning the Dominican Republic's violations within the framework of the AS and GATT Article XIX.

5. First, Panama reiterates its view that the Dominican Republic did not give timely notice or hold prior consultations with those Members having a substantial interest in the measure, as provided for in Article 12.3 of the AS and Article XIX:2 of the GATT; nor did it provide opportunities to obtain an adequate means of trade compensation for those Members, as established in Article 8.1 of the AS and Article XIX:2 of the GATT. We elaborate on this point in our first written submission, but feel it is important to reiterate it orally (see *First Submission of Panama, paragraph 14*).

6. Second, the Dominican Republic claims that GATT Article XIX and the AS are not applicable to the provisional and definitive measures adopted (see *First written submission of the Dominican Republic, paragraph 90*). In Panama's view, it is clear that the Investigating Authority of the Dominican Republic conducted the investigation and adopted the measures at issue under Article XIX of the GATT and the AS. This is shown by the fact that, when it excluded imports from Panama from the scope of the measure, the Dominican Republic cited Article 9.1 of the AS (see *Preliminary Resolution, fourth article, as amended by Preliminary Amending Resolution; Final Resolution, fourth article; CEGH-5 and 6*). Panama agrees with the Dominican Republic that Article 9.1 of the AS provides justification under WTO law for having excluded imports from Panama from the application of this measure.

7. Moreover, the Dominican Republic notified the investigation and the provisional and definitive measures to the WTO under Article 12 of the AS. It is therefore Panama's understanding that GATT Article XIX and the AS do indeed apply to the present proceedings, as affirmed by the Dominican Republic in its own statements in support of its action (*see notifications of the measure by the Dominican Republic, CEGH-18 to 21*).

8. Third, and lastly, Panama disagrees with the Dominican Republic's preliminary objection to this Panel's terms of reference. We understand that the Dominican Republic objects to the complainants having questioned the provisional and definitive measures in the light of GATT Article XIX, the AS, GATT Articles I:1 and II:1(a) and the second sentence of GATT Article II:1(b), and other issues relating to the investigation, notification and consultations in respect of the case (*First Written Submission of the Dominican Republic, paragraphs 86 and 87*). Panama participated as an associated third party in the consultation meeting and, while safeguarding the confidentiality of these consultations, believes that all the measures or complaints set forth in the requests for the establishment of the Panel reasonably reflect the requests for consultations and the developments that took place at the consultation meeting.

9. Panama understands that the Members of this Organization have the right to adopt measures to safeguard their domestic industry. These measures must, however, adhere to the legal principles and processes embodied in the agreements signed by the Members, as in the case of the AS, which is our current focus. Panama is concerned that the safeguard measure adopted by the Dominican Republic is inconsistent with the provisions and procedures established in the AS and the GATT. We trust that the Panel will reach the same conclusion, and that it will recommend that the Dominican Republic withdraw the measures immediately.

ANNEX D-4

ORAL STATEMENT OF TURKEY

Mr Chairman and members of the Panel:

1. Turkey welcomes this opportunity to present its views in this proceeding. I will summarize Turkey's position on the subject, to the extent possible, by refraining from repeating details presented in our written submission.

2. Although the dispute covers many issues, Turkey would like to focus on some major subjects and it is not the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements.

3. Turkey hereby wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

4. As it is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a Member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source. In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

5. On the other hand, Article 9.1 of the Agreement on Safeguards sets forth that the safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. Turkey's "developing country status" has been recognized by Member States, including the Dominican Republic, and export products from Turkey have been excluded from measures in safeguard investigations.

6. Turkey considers that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply the special and differential treatment to all developing countries that meet the conditions.

7. In Turkey's view, in the case where a developing country's export of the product at issue to the country applying the measure is 0 per cent, the applicatory country carries the obligation to include that developing country in the list of countries exempt from the scope of the safeguard measure. In this context, having in mind the fact that Turkey has no share in the Dominican Republic's imports in question; the list of the developing countries, which are exempted from the imposition of the safeguard measure in this case, should include Turkey, as well.

8. Turkey wishes to thank the Panel for this opportunity to submit its views during this hearing. Turkey looks forward to answering any questions that Panel may have.

Thank you, Mr Chairman.

ANNEX D-5

ORAL STATEMENT OF THE EUROPEAN UNION

Mr Chairman, distinguished members of the Panel:

I. INTRODUCTION

1. The EU makes this third party oral statement because of its systemic interest in the correct interpretation of Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. The EU respectfully requests this Panel to take into account the observations already made in our Third Party Written Submission when making findings in this case. Today, while not repeating those observations, the EU will recall some of them and will make some additional remarks in view of the comments made by other third parties.

II. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

2. The first issue the EU would like to recall is the applicability of the *Agreement on Safeguards* in the present case.

3. In the EU's view, Article 1 of the *Agreement on Safeguards* defines its scope by reference to the measures "provided for in Article XIX of the GATT 1994". Article XIX of the *GATT 1994* authorizes WTO Members to suspend the obligations incurred under that agreement provided that certain conditions are met. In this respect, it appears that the nature of a safeguard measure under Article XIX of the *GATT 1994* is of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it will not be considered as a safeguard measure pursuant to Article XIX of the *GATT 1994* and, consequently, will not fall under the *Agreement on Safeguards*.

4. Indeed, the EU observes that several provisions of the *Agreement on Safeguards*[1] make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

5. In any event, as noted in our written submission, this does not necessarily imply that the tariff measure at issue in this dispute falls entirely outside the scope of the *Agreement on Safeguards*. Such a measure also comprises a set of *actions* taken by the Dominican Republic which can be examined in view of the obligations contained in the *Agreement on Safeguards*. In the EU's view, actions when initiating and conducting the investigation are governed by the *Agreement on Safeguards* even if the investigation is terminated and no such measure is eventually imposed as a result of the investigation. Thus, *a fortiori* in cases where the investigation shows that "the extent necessary to prevent or remedy serious injury and … facilitate adjustment"[2] does not require going beyond the tariff binding, the EU

[1] *Agreement on Safeguards*, Articles 7.2, 8.1 and 12.3.
[2] *Agreement on Safeguards*, Article 5.1.

considers that the set of actions taken by the investigating authority should still comply with the *Agreement on Safeguards*.[3]

III. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

6. The EU would also like to address some of the comments raised by Third Parties as regards the need for an assessment of likeness or direct competition when defining the product under investigation.[4] As explained in our written submission, Article 4.1(c) of the *Agreement on Safeguards* does not require such an assessment. Thus, WTO Members are not limited when determining the product under investigation.

7. However, several obligations follow from that determination. In particular, the definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. Insofar as the parallelism between the product under investigation and the like or directly competitive domestic products is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

8. Furthermore, the EU notes that in *US – Lamb* the Appellate Body did not impose the requirement to *only* include like or directly competitive products in the definition of product under investigation. And certainly it did not say that inputs can *only* be included as part of the same product under investigation if they are like or directly competitive with the finished product. This issue was simply not addressed by the Appellate Body. Rather, in that case the Appellate Body questioned the definition of the domestic industry which included inputs (i.e. live lambs) and the final product (i.e. lamb meat) while the product under investigation was *only* the final product (i.e. lamb meat). In other words, the Appellate Body questioned the lack of parallelism between the product concerned and the like or directly competitive domestic products.

IV. UNFORESEEN DEVELOPMENTS

9. The EU also recalls its position that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.[5] This has been confirmed by the Appellate Body on numerous occasions. The Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on arguments that have been explicitly rejected by the Appellate Body. Thus, the Panel should follow previously adopted Appellate Body reports addressing the same issues.[6] This does not mean that the Panel can disagree with previously adopted Appellate Body reports and state so in its report. However, in order to ensure security and predictability of the system[7], it should not depart from the Appellate Body's consistent interpretation

[3] Colombia's Third Participant Written Submission, paragraphs 18-22; Nicaragua's Third Party Written Submission, paragraphs 5-9.
[4] Colombia's Third Participant Written Submission, paragraphs 25-37.
[5] Colombia's Third Participant Written Submission, paragraphs 47-50.
[6] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 161.
[7] *DSU*, Article 3.7.

of the covered agreements, and thus leave the dissenting WTO Member the possibility of invoking "cogent reasons" before the Appellate Body.[8]

V. PARALLELISM AND ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

10. Finally, the EU would like to add that the exclusion of certain developing countries from the scope of application of the safeguard measure pursuant to the application of Article 9.1 of the *Agreement on Safeguards* does not affect the parallelism under Articles 2.1 and 2.2.[9] Unlike other situations, such as the inclusion of members of a free-trade area[10], the exception of developing countries whose import share collectively does not exceed 9 per cent of the total imports of the product concerned is explicitly provided for in the *Agreement on Safeguards.* Absent any cross-reference to Article 2 or any clarification in Article 9 that those imports should also be excluded for the relevant analysis under Article 2.1, the logical conclusion is that the negotiators did not intend to require parallelism also with respect to an explicit exception to Article 2.2.

VI. CONCLUSIONS

11. To conclude, while not taking a final position on the merits of the case, the EU requests the Panel to carefully review the scope of the claims in light of these observations.

Mr Chairman, distinguished Members of the Panel, thank you for your kind attention.

---

[8] Panel Report, *US – Stainless Steel (Mexico)*, paragraph 7.105 as reversed by the Appellate Body in *US – Stainless Steel (Mexico)*, paragraph 162; and Panel Report, *US – Continued Zeroing*, paragraphs 7.181 and 7.182 ("As discussed above, we share a number of concerns raised by the Panel in *US – Stainless Steel (Mexico)*, particularly with regard to the US mathematical equivalence argument. We recognize, however, that the Appellate Body in its report reversed the Panel's findings and this report gained legal effect through adoption by the DSB. We note that this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments. Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case").

[9] US Third Participant Written Submission, paragraphs 14-17; Nicaragua's Third Party Written Submission, paragraphs 10-11.

[10] Appellate Body Report, *US – Line Pipes*, paragraph 197; Appellate Body Report, *US – Wheat Gluten*, paragraph 96; and Appellate Body Report, *US – Steel Safeguards*, paragraph 441.

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. In this second written submission, Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") will refute the arguments put forward by the Dominican Republic in the request for a preliminary ruling contained in its first written submission, as well as in its oral statements and its replies to the Panel's questions.

II. THE APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

2. First of all, as is clear from the design, structure and architecture of the provisional and definitive measures[1], the latter impose "other duties or charges" within the meaning of Article II:1(b), second sentence, of the GATT, given the following attributes of an objective nature, which distinguish them from ordinary customs duties: (a) the process of formulation of the measures (administrative process compared with the legislative process which characterizes ordinary customs duties)[2]; (b) the intention of the authority which gave rise to the measure ("second tariff")[3]; (c) its actual wording (alternative duty to the ordinary customs duty)[4]; (d) its actual administration (treatment different from ordinary customs duties)[5]; and (e) the express admission by the Dominican Republic that the measure *replaces* the ordinary customs duty ("as long as the increased tariff applies, the ordinary MFN tariff shall not apply").[6]

3. Secondly, the Dominican Republic argues that Article XIX:1(a) excludes the possibility of imposing safeguard measures that imply a suspension of Article I:1 of the GATT, suggesting that it is not legally feasible to suspend the obligation under this provision in the context of a safeguard action. For that purpose, it cites various views of individuals or relevant historical background concerning Article XIX.[7] However, the underlying issue is the fact that the text of Article XIX:1(a) does not make the distinction referred to by the Dominican Republic. The term "obligation" is not subject to any qualification. As mentioned by the EU, a note to the analogous provision to Article XIX in the Havana Charter (the predecessor to the GATT 1947) imposed the obligation of non-discrimination against imports from any member country. However, that note was deleted and does not appear in the text of the GATT.[8] The negotiating history plays a secondary role in the interpretation of an

[1] Replies of the complainants to questions 26 and 27.
[2] Exhibit CEGH-23. Reply of the Dominican Republic to questions 31 and 32. Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraphs 143 and 144.
[3] Exhibits CEGH-7 (page 93) and CEGH-10 (page 97). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 121.
[4] Exhibit CEGH-9 (pages 8 and 9 - second article). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 142.
[5] Exhibits CEGH-30 and CDGH-31. Reply of the complainants to question 26.
[6] Opening statement of the Dominican Republic, paragraph 47.
[7] Reply of the Dominican Republic to question 60 from the Panel.
[8] Reply of the EU to question 2 from the Panel.

international agreement. The complainants' view that the term "obligation" covers all obligations under the GATT is shared by the United States[9] and the EU.[10]

4. Thirdly, the Dominican Republic argues that the AS covers only measures that involve a suspension of obligations, but no other actions relating to a safeguard investigation, because Article 1 of the AS requires that the AS shall apply only to measures provided for in Article XIX of the GATT. Conversely, if a measure other than one of those provided for in Article XIX of the GATT is taken, it is not applicable.[11] The complainants contend that the measures at issue imply a suspension of obligations under Articles I:1, I:2(a) and II:1(b) of the GATT, for which reason, even under the Dominican Republic's interpretation, these measures are safeguard measures. Notwithstanding, even if it is considered that the measures do not imply a suspension of obligations within the meaning of Article XIX of the GATT, the complainants contend that the measures and all aspects of the investigation are covered by the AS and by Article XIX.

5. In the complainants' view, the reference to "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS does not mean that any safeguard measure necessarily implies the suspension of obligations or the withdrawal or modification of concessions. If that were the case, Article 11.1(a) of the AS would be deprived of any meaning. The approach suggested by the Dominican Republic would imply that a safeguard investigation, including the determination of the right to apply safeguard measures, could not be challenged until the adoption of a measure had been verified.

6. Through its interpretation, the Dominican Republic would appear to be suggesting the introduction of a rule analogous to Article 17.4 of the Anti-Dumping Agreement with regard to the scope of safeguard measures, via the interpretation of the Panel. Article 17.4 of the Anti-Dumping Agreement establishes an effective limit on the right to submit an anti-dumping dispute to a panel, unless an anti-dumping measure at least exists. However, in the matter of safeguards, there is no provision analogous to Article 17.4 of the Anti-Dumping Agreement that could be contained in the AS. Nor is it foreseen in Appendix 2 of the DSU that safeguard disputes should be subject to special or additional provisions as indeed provided for under Article 17.4 in respect of anti-dumping disputes.

7. Accordingly, the complainants consider that the "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS refers to any type of measure available to an importing Member that has established the right to apply a safeguard measure in accordance with the first part of Article XIX:1(a) and the AS; that is to say, a measure responding to the serious injury caused by increased imports as a result of unforeseen developments and the effect of the obligations incurred under the GATT, including tariff concessions.

8. The term "shall be free" in the last part of Article XIX:1(a) of the GATT means that, prior to verification of the circumstances and conditions provided for in the first part of Article XIX:1(a), a Member is entitled to suspend an obligation, or to withdraw or modify concessions. However, this entitlement does not mean that the action taken by the Member in response to the serious injury *should* necessarily involve a suspension of obligations or the withdrawal/modification of a concession. The purpose of the AS and of Article XIX of the GATT is to provide a mechanism to prevent or remedy serious injury to the domestic industry caused by increased imports as a result of unforeseen developments and the effect of obligations under the GATT, and to facilitate adjustment.

[9] Reply of the United States to question 2 from the Panel.
[10] Reply of the EU to question 2 from the Panel.
[11] Reply of the Dominican Republic to questions 62 and 77 from the Panel.

Articles 5 and 7 of the AS require that a safeguard measure be applied solely and exclusively to the extent and during the period "necessary" to prevent or remedy serious injury and to facilitate adjustment. Any measure that goes beyond what is "necessary" either in magnitude or time-scale is in violation of these provisions of the AS, even if the measures fall within the scope of bound measures or are not inconsistent with general GATT obligations.

9. The Dominican Republic's interpretation could lead to a circumvention of other trade policy instruments such as anti-dumping duties and countervailing duties. Under that interpretation, if a Member that initiates and carries forward an anti-dumping investigation (in accordance with Article VI of the GATT and with the Anti-Dumping Agreement) observes flaws in the investigation, that Member could evade questions under those instruments by terminating the investigation in question without applying an anti-dumping duty, and subsequently increase the tariff up to the level that would have corresponded to the anti-dumping duty, but below the bound level in order to be able to affirm that no anti-dumping measure has been imposed and that, at the same time, there is no violation of the bound tariff. Clearly, this interpretation would be contrary to the spirit of the WTO Agreement. The complainants trust that this Panel will not set a precedent that renders inoperative these trade policy instruments which are of fundamental importance in multilateral trade relations.

III. THE PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE OF THE PANEL

10. The Dominican Republic argues that the alleged inconsistency between the request for consultations and the panel request has changed the essence of the complaints.[12] The complainants note that the change in the essence of a complaint is a criterion that has been used in objections to the inclusion of additional *measures* but not in objections to the inclusion of additional *legal bases*[13], which are the kind of objections raised by the Dominican Republic in this dispute. In addition, the essence of the complaints has not changed inasmuch as the measures, the products at issue and the covered agreements relied upon have always been the same.

11. As part of another preliminary objection, the Dominican Republic also states that the complaints under Articles I and II of the GATT are new complaints since they were not included in the request for consultations[14] and "bear no relationship whatsoever to the submissions contained in the request for consultations".[15] As was explained above, these claims come within the Panel's terms of reference by virtue of the express reservation contained in the request for consultations.[16] Contrary to the contention of the Dominican Republic, the reservation in question cannot be characterized as "very full" since it refers only to the right of the complainants to raise additional matters *in accordance with the AS and the GATT 1994*, and in the context of concerns relating to provisional and definitive measures, as well as the related proceedings.

[12] First written submission of the Dominican Republic, paragraphs 67, 82, 84 and 89. Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, pages 62-65.

[13] Panel Report, *EC – IT Products*, paragraph 7.182; Panel Report, *Dominican Republic – Cigarettes*, paragraph 7.19; Appellate Body Report, *US – Zeroing (EC) (21.5)*, paragraph 383; Appellate Body Report, *Brazil – Aircraft*, paragraph 132.

[14] First written submission of the Dominican Republic, paragraph 89.

[15] Replies of the Dominican Republic to the questions from the Panel, page 64.

[16] Initial oral statement of the complainants at the first substantive meeting, paragraphs 34-45; replies of the complainants to the questions from the Panel at the first substantive meeting, paragraphs 152-160.

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

12. The claim concerning the domestic industry is a compound claim which subsumes various related complaints. The complaint relating to the definition of the imported product under investigation refers to the lack of "adequate and reasoned explanations" in the light of the requirements of Articles 3.1, last sentence, and 4.2(c) of the AS.[17] The complainants observe that in section 4.2.4, the Dominican Republic bases its argument on the mistaken idea that the claims concerning the imported product under investigation refer to the alleged existence of guidelines for their definition; this is not the case, as is clear from the first written submission, the opening statement at the first meeting with the Panel, the replies to the Panel's questions and this second written submission.[18]

13. It is clear that the Dominican Republic failed to demonstrate that its investigating authority had given an adequate and reasoned explanation concerning the various questions and factual information provided by the numerous interested parties which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had provided an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

14. Regarding the Dominican Republic's argument that "there are no Panel or Appellate Body determinations which explicitly interpret the terms "like product" or "directly competitive product" in the context of determinations covered by the AS"[19] the complainants fail to see the significance of that argument and observe that the Dominican Republic ignores the recent settled case law of the Appellate Body in the *EC – Civil Aircraft* case. The absence of determinations explicitly interpreting the terms "like product" and "directly competitive product" does not exempt the investigating authorities from making explicit findings and providing adequate and reasoned explanations in respect of both definitions. Nor does it exempt the investigating authorities from following a mandatory order of analysis in order to define the domestic industry.

15. Consequently, there are no grounds for rejecting the arguments relating to the inconsistency of the determination regarding the imported product under investigation. In particular, it is clear that the Dominican Republic failed to demonstrate that its investigating authority had provided an adequate and reasoned explanation concerning the various questions and factual information submitted by the numerous interested parties, which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had given an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

[17] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65.

[18] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65. Second written submission of the complainants, paragraph 85.

[19] First written submission of the Dominican Republic, paragraph 191.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

16. The Dominican Republic has explained that the following events were considered as unforeseen developments: (i) China's accession to the WTO; and (ii) the tariff cuts resulting from free trade agreements.[20]

17. As a factual matter, from the beginning of the process of China's accession to the WTO and at the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987. Hence, China's accession to the WTO in 2001 does not constitute a development that was unforeseen or unexpected for the Dominican Republic when the WTO Agreement entered into force in 1995. On the contrary, in 1995 it was foreseen that at some point in the future China would join the WTO once negotiations with the various Members of this Organization were completed.

18. The Dominican Republic also makes the *ex post* argument that the tariff cuts under the Central America-DR Agreement and DR-CAFTA constitute unforeseen developments.[21] The initial provisions of these free trade agreements indicate that both were entered into pursuant to Article XXIV of the GATT, which, following the establishment of the GATT 1947, stipulated the possibility for Members of the GATT/WTO system to form free trade areas or customs unions.[22] Upon joining the WTO, the Dominican Republic assumed the rights and obligations contained in the WTO Agreement, including the provisions of Article XXIV of the GATT.[23] This implies that, for the Dominican Republic as a WTO Member, the possibility of signing free trade agreements under Article XXIV of the GATT was not an *unforeseen* event.

19. Even assuming, *quod non*, that China's accession and the tariff cuts pursuant to the above-mentioned agreements had constituted unforeseen developments for the Dominican Republic and that the latter had made the relevant adequate and reasoned finding in its technical reports (or resolutions), it is clear that no logical connection whatsoever was established between these events and the alleged increase in imports of polypropylene bags and tubular fabric.

VI. THE ALLEGED INCREASE IN IMPORTS

20. In response to question 96, the Dominican Republic acknowledges that the treatment of tubular fabric and polypropylene bags as a single product affected the determination of increased imports, since the data relating to imports of both products were analysed in conjunction.[24] Given this explicit acknowledgement, the complainants consider that, if the Panel finds that there were

[20] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[21] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[22] Central America-DR Agreement, Article 1.01 ("The Parties establish a free trade area in accordance with the provisions of Article XXIV of the General Agreement on Tariffs and Trade 1994 and Article V of the General Agreement on Trade in Services (GATS) of the WTO Agreement"), Exhibit CEGH-37; DR-CAFTA, Article 1.01 ("The Parties to this Agreement, pursuant to the provisions of Article XXIV of the *General Agreement on Tariffs and Trade 1994* and Article V of the *General Agreement on Trade in Services*, establish a free trade area"), Exhibit CEGH-38.

[23] The Enabling Clause is another instrument that provides for the possibility of regional trade arrangements.

[24] Reply of the Dominican Republic to question 96 from the Panel.

no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation, which is not supported by the provisions of the AS. In other words, an element that is inconsistent with the provisions of the AS (in this case the definition of the imported product subject to investigation under Articles 3.1, last sentence, and 4.2(c)) and which is used as a basis for another analysis required by the AS, such as the determination of the increase in imports, cannot lead to an evaluation of that increase that is consistent with the AS. For this reason alone, the determination of increased imports should be declared inconsistent with Article XIX:1(a) and Articles 2.1, 3.1, last sentence, and 4.2(c) of the AS.

21. With regard to the final determination, specifically, the Dominican Republic uses information from outside the period of investigation in an attempt to explain the decrease in imports up to the end of the period of investigation. As this information lies outside the period of investigation, it is not appropriate to take it into consideration.

VII. THE ALLEGED SERIOUS INJURY

22. The Dominican Republic asserts that there was no need to carry out a separate analysis of certain sectors because it evaluated fabric and polypropylene bags as a whole and did not conduct an analysis by sector or segment.[25] The problem with this assertion is that, in actual fact, the Dominican Republic did conduct an analysis by sector with regard to production by volume - that of finished bags - as was acknowledged by its own investigating authority, since that was the only information which was available on that aspect.[26]

23. Thus, the investigating authority assumed that the finished bags sector comprised the total output of tubular fabric and polypropylene bags. However, the information from the Dominican Republic's own reports also shows that there was production of tubular fabric, beyond that used captively by FERSAN, which was destined for the commercial market (sales of tubular fabric to FIDECA), which could not therefore be considered as being included within the volume production of finished bags.

24. With regard to the market share of imports as a percentage of consumption, the Dominican Republic again puts forward an *ex post* explanation which has no basis in its determinations. This explanation should also be rejected. Nevertheless, even if it were taken into consideration, what the Dominican Republic is asserting is that, on account of the investments undertaken, FERSAN deserved to have a greater share of the market than that which it obtained at the end of the period.[27] The Dominican Republic leaves aside the objective figures which show precisely the opposite: that FERSAN was gaining market share at the expense of imports. Not even on an *ex post* basis does the Dominican Republic provide an explanation as to how investments in technology by FERSAN could justify an "adjustment" of market share beyond the objective figures found in the DEI reports.

25. Concerning the assessment in respect of stocks, the Dominican Republic admits that it made an end-to-end assessment without considering the trends in this indicator.[28] It is clear, therefore, that the evaluation required by Articles 4.2(a), 3.1 and 4.2(c) of the AS was not carried out. This point is

[25] Reply of the Dominican Republic to question 127 from the Panel.
[26] Initial report page 14.
[27] Reply of the Dominican Republic to question 127 from the Panel.
[28] Reply of the Dominican Republic to question 141 from the Panel.

supplementary to the other objections raised with regard to the valuation of inventories, which we have mentioned in our previous written submissions.[29]

26. Regarding the injury evaluation criterion in relation to the preliminary determination, the Dominican Republic presents an interpretation which would have the effect of lowering the standard of proof, by even eliminating the evaluation of the indicators referred to in Article 4.2(a) of the AS for this type of determination. The complainants strongly disagree with this approach. As the complainants mentioned in their reply to question 146, there is no reason to consider that the concept of serious injury or threat of serious injury is different in Articles 4 and 6 of the AS, especially since Article 4.1 defines both concepts "for the purposes" of the AS.

VIII. THE ALLEGED CAUSAL LINK

27. We note that the Dominican Republic has offered no defence arguments in addition to those put forward in its first written submission in connection with our complaints concerning causation and non-attribution. The complainants have already responded to the Dominican Republic's defence concerning these two complaints, as set out in our initial oral statement at the first substantive meeting.[30]

IX. PARALLELISM BETWEEN THE SCOPE OF APPLICATION OF THE MEASURE AND THE SCOPE OF THE INVESTIGATION

28. As was noted previously by the complainants, the obligation with regard to parallelism is enforceable irrespective of the reasons why a Member decides to exclude imports from certain origins from the application of the measure.[31] The complainants do not agree with the Dominican Republic's interpretation to the effect that Article 9.1 of the AS constitutes an exception to the parallelism requirement since: (i) the AS contains no textual basis for such an interpretation; (ii) the parallelism obligation has been defined in general terms by the Appellate Body, without providing for exceptions to its fulfilment.

29. Nor is the parallelism obligation limited to situations of exclusion of imports from countries that are trading partners under an FTA. Although the Appellate Body defined the parallelism obligation when examining safeguard measures that excluded imports from free trade areas, this does not imply that the obligation itself is limited to that context.

X. NOTIFICATION, LACK OF CONSULTATIONS AND OF MEANS OF TRADE COMPENSATION

30. The complainants reiterate their view that the proceedings and hearings carried out in the safeguard investigation under the jurisdiction of the Dominican Republic cannot be treated as equivalent to consultations at *multilateral level* as prescribed by Article 12.3 of the AS. The conduct of an investigation which provides adequate opportunity for the interested parties to put forward their arguments constitutes compliance with the obligation set out in Article 3.1, but no reference is made to the prior consultations provided for in Article 12.3. Accordingly, the Dominican Republic's interpretation would make Article 12.3 redundant, since it would mean that the conduct of the

[29] First written submission of the complainants, paragraphs 218-223; opening statement, paragraphs 89-90.
[30] Initial oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[31] Initial oral statement of the complainants at the first substantive meeting, paragraph 118.

investigation required by Article 3.1 would automatically imply compliance with Article 12.3. This proposition should be rejected as it would be contrary to the principle of effectiveness in the interpretation of treaties.[32]

XI. THE VIOLATIONS OF ARTICLES I:1, II:1(A), AND II:1(B) OF THE GATT

A. COMPLAINTS UNDER ARTICLE I:1 OF THE GATT

31. Both the provisional measure and the definitive measure are inconsistent with Article I:1 of the GATT, inasmuch as the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of those measures constitutes an advantage, favour, privilege or immunity granted to imports from those origins and is not granted "immediately and unconditionally" to any "like product" originating in the territories of all the other WTO Members.

32. Furthermore, the criterion for the granting of such an advantage, favour, privilege or immunity is discriminatory even where there is compliance with the principle that imports should not individually, by origin, exceed 3 per cent of total imports, or collectively account for more than 9 per cent of that total during the period under investigation.[33] For example, that criterion was not applied to exclude imports from Thailand, which are less than 3 per cent.[34]

33. The complainants note that the Dominican Republic shares this view. In its reply to question 2 from the complainants, the Dominican Republic stated that it "understands, as indicated in its final statement at the first substantive meeting of the Panel, that the exclusion of certain countries under this provision raises problems in situations where the safeguard measures adopted in accordance with this law do not constitute safeguard measures under the terms of Article XIX of the GATT and the Agreement on Safeguards".[35]

B. COMPLAINTS UNDER ARTICLE II:1(a) AND II:1(b) OF THE GATT

34. Article II:1(b) prohibits the application of import duties and charges other than ordinary customs duties. By way of exception to this prohibition, a Member may maintain a duty or charge of this nature which existed at "the date" of the GATT [1994] or which was enforceable under mandatory legislation in the territory of the Member before that date. Another exception is where other import duties and charges distinct from ordinary customs duties have been recorded in the Schedule of Concessions of the Member concerned. Both the provisional and the definitive measure imposed by the Dominican Republic are "tariff surcharges" or, in general terms, import charges or duties other than "ordinary customs duties", which are applied to imports of polypropylene fabrics and bags. The Dominican Republic's regulations do not describe them in this way. However, the complainants chose the term "tariff surcharges" because they represent rates different from the "normally applicable MFN tariff"[36]; different, that is, from an ordinary customs duty under Dominican legislation.[37]

---

[32] Appellate Body Report, *US – Gasoline*, page 25: see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81-82.

[33] Preliminary resolution, paragraphs 50 and 51; final resolution, paragraphs 42 and 43.

[34] Preliminary report, Annex I; final report, Annex I.

[35] Reply of the Dominican Republic to question 2 from the complainants; final statement of the Dominican Republic at the meeting with the Panel, paragraph 17.

[36] Opening statement of the Dominican Republic, paragraph 47.

[37] Exhibit CEGH-27.

35. It is important to emphasize that the tariff surcharge was designed by the investigating authority of the Dominican Republic as a "second tariff"[38] and that the definitive measure operates as an alternative to the MFN tariff, so that either the surcharge or the ordinary customs duty is applied, whichever is higher.[39] Moreover, in accordance with Tariff Reform Law No. 146-00 of 11 December 2000, ordinary customs duties or tariffs can only be amended by a legislative act.[40]

36. It should also be mentioned that the Dominican Republic failed to record in its Schedule of Concessions the possibility of applying other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of the GATT 1994.[41] This excludes the possibility of justifying the measures at issue under Article II:1(a) of the GATT.

37. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and by implication, with Article II:2(a) of the GATT.

[38] Exhibit CEGH-7, page 93. Exhibit CEGH-10, page 97.
[39] Exhibit CEGH-9, pages 8 and 9, second article.
[40] Articles 5, 6 and 7 of Tariff Reform Law No. 146-00, Exhibit CEGH-22.
[41] See Exhibit CEGH-27.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the Agreement on Safeguards ("AS") do not apply to the measures at issue. This makes it impossible to evaluate the consistency of these measures with the disciplines cited. In addition, the Dominican Republic affirms that, even if these provisions were applicable, the measures at issue are fully consistent with them.

1. ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS DO NOT APPLY TO THE PRESENT DISPUTE

2. The applicability of these provisions depends on objective criteria (namely, the fact that the measures imply the suspension of an obligation or the withdrawal or modification of a concession), without decisive subjective criteria such as statements by the national authorities.

1.1 Even if it is considered that the measures at issue constitute suspension of Article I:1 of the GATT, they do not fall within the scope of Article XIX of the GATT and the Agreement on Safeguards

3. Article I:1 of the GATT is not one of the "obligations" that may be suspended according to Article XIX:1(a). Consequently, even if it is concluded that the measures at issue suspend Article I:1, this does not mean that they constitute safeguards. There are five reasons for this.

4. Firstly, safeguards must be applied without discrimination (according to Article 2.2 of the AS), with Article 9.1 of the AS being an exception to this non-discriminatory application. To consider that Article XIX of the GATT allows the suspension of Article I:1 would amount to a contradiction between the WTO Agreements. Secondly, this is confirmed by the history of the Uruguay Round negotiations, which led to the inclusion of Article 2.2 of the AS. Thirdly, Article I:1 of the GATT is not the obligation whose effect is increased imports that cause serious injury in the terms of the first sentence of Article XIX:1(a) of the GATT and, hence, is not the obligation that can be suspended in the terms of the second sentence of Article XIX:1(a). Fourthly, Article 9.1 of the AS requires the previous existence of a safeguard measure in order to apply, so it is illogical to claim that reference to Article 9.1 of the AS is in itself indicative of the existence of a safeguard in the terms of Article XIX of the GATT. Fifthly, and finally, the Dominican Republic draws attention to the illogical interpretation put forward by the complainants: imposing a safeguard measure (*erga omnes*, as required by Article 2.2 of the AS) consisting of the suspension of Article I:1 of the GATT, which could only result from the exemption provided in Article 9.1 of the AS, would mean that the only content of the safeguard measure would be the exemption of certain countries from its scope; it would be a safeguard measure that would only provide for its non-application.

1.2 The measures at issue do not suspend Article II:1(b) of the Agreement on Safeguards as they cannot be classified as "other duties or charges"

5. The complainants contend that the objective of the measures was to create a "second tariff" to be applied in addition to the common tariff applicable (MFN). These measures, however, in fact replace this tariff, as recognized by the complainants, contradicting themselves, so they constitute

"ordinary customs duties"; if they were other tariffs, they could not replace the tariff previously applicable but only be added to it.

6. Mere modification of the tariff rate is not equivalent to the imposition of "other duties and charges", and this cannot be concluded either from the fact that the tariff was adopted as the result of an investigation initiated at the request of the domestic industry (as the Appellate Body indicated in *Chile – Price Band System*). As the measures did not affect the tariff in any other way, they cannot be termed "other duties or charges", and consequently the tariff resulting from the measures, as indicated in *India – Additional Import Duties*, naturally constitutes an ordinary customs duty.

7. The complainants also contend that, as Law No. 146-00 provides that existing customs duties can only be modified by means of a legislative act, the measures at issue are not ordinary customs duties but "other duties or charges" because they were established by means of an administrative act. This statement overlooks Law No. 1-02, which allows a temporary increase in the tariff determined by means of an administrative act, and also that the type of act created by the Members in the dispute is irrelevant from the point of view of WTO law.

8. Lastly, the fact that the duties applied by a Member do not appear in its schedule does not prevent such duties from being ordinary customs duties. As the measures at issue are not "other duties and charges", they come under the category of "ordinary customs duties" and as they apply at a rate lower than the pre-existing ordinary MFN tariff, they are consistent with the first sentence of Article II:1(b) and do not constitute safeguards.

1.3 The Agreement on Safeguards does not apply to the investigation prior to the adoption of the measures at issue

9. The complainants contend that Article XIX of the GATT and the AS apply to the investigation that preceded the adoption of the measures at issue, even though these do not constitute safeguard measures. The Dominican Republic considers that dissociating the investigation from the measures is an artificial distinction and is meaningless.

10. This is shown by the relevant provisions of the AS. Firstly, according to Article 1, the applicability of AS rules presupposes the application of a safeguard measure. Secondly, Article 3.1 does not impose any investigation obligation prior to the adoption of measures that are not safeguards. Lastly, this is confirmed by Article 11.1(a) because it is when the investigation is concluded that it becomes certain whether or not a safeguard measure is to be adopted, so it makes no sense to subject investigations that do not result in the adoption of such a measure to the disciplines in Article XIX. The contrary interpretation of this Article put forward by the complainants is contradicted by Article 11.1(c), which specifically excludes the application of the AS to measures, such as the measures at issue, that are consistent with the GATT.

11. The Dominican Republic affirms that it is not a question of "seek to adopt" a safeguard measure in the terms of Article 11.1(a) of the AS, as confirmed by the facts: at a very early stage in the investigation it became clear that the measure would not be an increase above the ceiling bound rate, as the complainants themselves mentioned prior to the adoption of the provisional measure. In any event, the investigation is exempt according to Article 11.1(c).

12. Be that as it may, the Panel should abstain from reaching findings regarding the claims concerning the investigation stage, as this is not required in order to ensure a positive settlement of this dispute, in conformity with Article 3.7 of the DSU.

13. The Dominican Republic also notes that the complainants request a recommendation on abstention from applying safeguard measures, whereas such a solution is not a possibility afforded by the WTO dispute settlement mechanism.

2. THE MEASURES AT ISSUE IN THE LIGHT OF ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS

2.1 The definition of the domestic industry is fully consistent with the requirements in the Agreement on Safeguards

14. In the first place, the determination of the product under investigation was clear and unequivocal, sufficient and reasoned, consistent with the AS, contrary to what is asserted by the complainants. As the parties agreed that there was no need to prove likeness or a competitive relationship between the articles comprising the product under investigation (as the complainants did not claim this) and having taken into account the questions posed by certain participants, the complainants' assertions regarding this determination do not stand up.

15. Secondly, the determination of the like and directly competitive domestic product was reached by the Commission after extensive consideration, even bearing in mind that it is obvious that the product under investigation and the like domestic product are directly competitive inasmuch as they are identical.

16. Contrary to the complainants' interpretation, the production process was not a decisive factor in defining the like domestic product, but was one of the criteria used to identify the domestic industry.

17. The Dominican Republic emphasizes that the like domestic product does not include flat tubular fabric, contrary to what the complainants appear to contend.[1]

18. Thirdly, in order to determine the domestic industry, it was not necessary to make a determination of likeness or direct competition between the input and the finished product, contrary to what is asserted by the complainants, because the determination of the domestic product used a basis for determining the domestic industry is identical to the product under investigation.

19. Article 4.1 itself of the AS specifically envisages the possibility that the domestic industry does not cover all producers of the like product, as confirmed by WTO case law.[2] In order to define the domestic industry, the Commission considered all the producers mentioned by FERSAN in its domestic producer form[3] and then excluded, by means of reasoned arguments, those producers that showed no interest in taking part in the procedure, those that were not producers (according to Article 4.1(c) of the AS and WTO case law[4]) and Textiles Titán.

20. Textiles Titán was excluded because production of the product under consideration represented only a very small percentage of its activities compared to import and conversion. The

[1] Replies by the complainants to questions by the Panel after the first substantive meeting, paragraphs 222 and 223.

[2] Panel Report, *US – Wheat Gluten*, paragraph 8.54, and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paragraph 7.341.

[3] Final Technical Report, pages 49-52. Exhibit RDO-10.

[4] Panel Report, *EC – Salmon (Norway)*, paragraph 7.115, footnote 289.

omission of such an exclusion possibility in Article 4.1(c) of the AS, unlike the Anti-Dumping Agreement, should not be seen in a dispositive sense. This is reaffirmed by Article 4.2(a) and (b) of the AS, which require an evaluation of injury and causal link based on reliable data that cannot be obtained from the aggregate data for enterprises which both produce and import the product under consideration.

2.2 The Dominican Republic correctly evaluated the increase in imports and made reasoned determinations in this respect

21. Contrary to what is asserted by the complainants, the Dominican Republic made a reasoned and adequate determination of the increase in imports based on data for the investigation period (2006-2009). The decrease in imports in 2009 did not prevent a finding of an increase in imports because it was incidental and cyclical, as stated by the Commission, in accordance with Article 2.1 of the AS.

22. The Commission encountered further support for this position in the data for 2010, but did not base itself on these, contrary to what is claimed by the complainants; this position had already been reached at the preliminary stage when the data for 2010 were not yet available. This quest for further confirmation of the findings using the most recent data is supported by WTO case law.[5]

23. The aforementioned findings sufficed for compliance with Article 2.1 of the AS, contrary to what is claimed by the complainants, not having been substantiated by *ex post* explanations (the 2010 data, according to the complainants); on the one hand, the reference to the 2010 data was included in the final determination (*ex ante*) and, on the other, these data were not used for substantiation purposes but for confirmation.

2.3 The determination of serious injury is consistent with the Dominican Republic's obligations under Article XIX of the GATT and the Agreement on Safeguards

24. Firstly, the complainants' assertion that the Commission based itself solely on the "bags" segment when evaluating the indicators of injury is not substantiated; the evaluation was made in respect of the like domestic product as a whole.[6] Moreover, the Commission was neither obliged to make separate evaluations for each segment of the industry[7], nor to include only identical or similar products in the definition of the product under investigation.[8]

25. Secondly, the Dominican Republic was entitled to base its determination of serious injury on the data concerning the "bags division" in its entirety, which it did because it was the smallest group of products for which there was audited information, and includes the domestic like product. This method is consistent with Article 4.2(a) of the AS, which requires that the factors evaluated be objective and quantifiable, and is envisaged in Article 3.6 of the Anti-Dumping Agreement.

[5] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160, confirmed by the Appellate Body, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 7.64.

[6] Final Technical Report, page 69. Exhibit RDO-10.

[7] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 190 and 204; first written submission of the Dominican Republic, paragraphs 350 to 354.

[8] Panel Report, *US – Softwood Lumber V*, paragraph 7.157; see also Panel Report, *EC – Salmon (Norway)*, paragraphs 7.45 and 7.68.

26. Contrary to what is asserted by the complainants, not only is there no obligation to restrict the evaluation solely to the product intended for the domestic market, excluding the exported product, but such an exclusion is not even permitted.[9]

27. Thirdly, and finally, the depreciation costs were correctly included in the production cost used to evaluate profitability. Although the complainants assert that costs should be ascribed *pro rata*, in accounting (and according to WTO case law[10]) the costs used to evaluate profitability are all those associated with the production and sale of the product in question, not only those of direct benefit. The "bags division's" audited profit and loss statements, on which the Commission based itself when evaluating profitability[11], show that the depreciation costs were correctly ascribed.

2.4 The "parallelism" theory does not apply when imports from developing country Members are excluded, in accordance with Article 9.1 of the Agreement on Safeguards

28. The scope of the "parallelism" theory is limited to the context of customs unions and does not apply in general, as has been attested by WTO case law.[12] Unlike what occurred in previous disputes, the exclusion of imports from application of the safeguard measure is based on Article 9.1 of the AS, an explicit exemption from the scope of *application* of a safeguard measure (Article 2.2 of the AS) but not from the scope of the safeguards *investigation* (Article 2.1 of the AS). Accordingly, the reference to the "product … imported" in Article 2.2 of the AS includes all imports, except those covered by Article 9.1, whereas the "product … imported" in Article 2.1 of the AS does not include exemptions; when the exemption in Article 9.1 of the AS is applied, the requirements concerning the investigation (and all the evaluations and determinations it involves) must be fulfilled for all imports, irrespective of whether or not some of them are subsequently excluded from application of the measure in accordance with Article 9.1 of the AS.

29. This position does not lead to unjustified results, prevented by the *de minimis* thresholds imposed by Article 9.1 of the AS, which require that the impact of the imports exempted may not be significant or distort the determinations of the increase in imports and serious injury.

30. Concerning the non-attribution requirement, which requires that the correct attribution of injury take into account the effects of the increase in imports and not "other factors", the Dominican Republic points out that imports from developing countries are not factors "other than the imports", on the basis of Article 2.1 of the AS, notwithstanding their subsequent exemption from application of the measure.

3. CONCLUSION

31. Based on the foregoing, the Dominican Republic requests the Panel to find that the measures at issue are not covered by the scope of Article XIX of the GATT and the Agreement on Safeguards or, alternatively, that they are consistent with these provisions, and to reject all the claims made by the complainants.

---

[9] Appellate Body Report, *US – Hot-Rolled Steel*, paragraph 190.
[10] Panel Report, *EC – Salmon (Norway)*, paragraph 7.483.
[11] Exhibits RDO-13, RDO-14 and RDO-15.
[12] Appellate Body Report, *US – Wheat Gluten*, paragraph 96, and *Argentina – Footwear (EC)*, paragraph 114.

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

I. PRELIMINARY OBJECTIONS TO THE CLAIMS RELATING TO THE NEED FOR THE MEASURES, ARTICLE I.1 OF THE GATT AND ARTICLE II.1 OF THE GATT

1. The Dominican Republic notes that among the claims not covered by the Panel's terms of reference because they were not the subject of consultations are those contained in subparagraphs (i), (l) and (m) of the request for the establishment of a panel.

2. With regard to these claims, the complainants contend that the Dominican Republic did not prove that its right of defence was affected.[1] The Dominican Republic points out that the effect on this right is a criterion followed when it is considered that a request for the establishment of a panel may be insufficient, in the light of Article 6.2 of the Dispute Settlement Understanding[2], and that it did not claim that the request for the establishment of a panel was *insufficient* but rather that no consultations on these claims were held pursuant to Article 4 of the Dispute Settlement Understanding. The failure to hold consultations excludes these claims from the Panel's terms of reference, irrespective of whether or not the Dominican Republic's right of defence is affected.[3]

3. Secondly, the complainants assert that the criterion of a change in the essence would not apply to this dispute as it has been used for objections to the inclusion of additional *measures* in the request for the establishment of a panel, but not for objections to the inclusion of additional *legal bases*.[4] Their arguments, however, disregard Appellate Body case law in *Mexico – Anti-Dumping Measures on Rice*[5] and the Panel in *China – Publications and Audiovisual Products*.[6]

4. Thirdly, the claimants contend that, even if the *test* of a change in the essence did apply, it was not used because the claims concerning Articles I.1, II.1(a) and II.1(b) of the GATT and Article 5.2 of the Agreement on Safeguards reasonably arose from the legal bases of the request for the holding of consultations.

5. As to the claim concerning the most-favoured-nation obligation based on Article I.1 of the GATT, the complainants contend that it arises from their claim concerning Article 2.2 of the Agreement on Safeguards, as set out in the claim in subparagraph (g) of the request for consultations.[7] This claim was, however, included solely in case the measures at issue did not constitute safeguard measures according to the terms of Article XIX of the GATT.[8] In fact, the aforementioned

[1] Second written submission of the complainants, paragraphs 47-50, 64 and 68.
[2] *Ibid*., see footnotes 32 and 33.
[3] First written submission of the Dominican Republic, paragraphs 51-58.
[4] Second written submission of the complainants, paragraph 52.
[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138. The Panel Report on *EC – Fasteners (China)*, paragraphs 7.507 and 7.508, applied this criterion of a change in the essence when considering that Article 6.9 of the Anti-Dumping Agreement was not included in the Panel's terms of reference as it had not been the subject of consultations.
[6] Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.
[7] Replies of the complainants to the questions from the Panel, paragraph 158.
[8] Oral statement of Costa Rica, El Salvador, Guatemala and Honduras at the first substantive meeting of the Panel, paragraph 37.

subparagraph (g) in no way relates to the claim concerning Article I.1 of the GATT in the request for the establishment of a panel but only refers to the non-exemption of certain developing countries pursuant to Article 9.1 of the Agreement on Safeguards.

6. The complainants also argue that the claim relating to Article II.1(a) and II.1(b) of the GATT is based on Article XIX of the GATT because the increase in imports must be a result of the effect of the tariff concessions subject to Article II of the GATT.[9] They do not, however, specifically indicate to which claim in the request for consultations they are referring.[10] Moreover, the complainants have not indicated how this legal basis could arise from Article XIX as the specific legal basis for any claim contained in the request for consultations.

7. It is obvious that the claim concerning the alleged omission of findings and conclusions on the need for measures was not the subject of consultations pursuant to Article 4.4 of the Dispute Settlement Understanding and does not stem from any legal basis contained in the request for consultations. Although Article 5.1 of the Agreement on Safeguards is indeed cited in subparagraph (g) of the request for consultations, the claim only refers to the alleged failure to comply with the "parallelism" requirement.

8. The complainants indicate that the claims concerning Articles I and II of the GATT are based on the reservation clause in the request for consultations.[11] Nevertheless, the fact that the measures at issue do not constitute safeguard measures under Article XIX of the GATT is not information obtained during the consultations, as required by WTO case law[12] and the reservation clause mentioned by the complainants because the latter were already well aware of the nature of the measures in question before the consultations.[13]

9. In the light of the foregoing, the Dominican Republic argues that the claims included in subparagraphs (i), (l) and (m) of the request for the establishment of a panel are not included within the Panel's terms of reference.

II. ADDITIONAL REASONS WHY A SAFEGUARD MEASURE MAY NOT CONSIST OF THE SUSPENSION OF ARTICLE I.1 OF THE GATT

10. In the complainants' view, a safeguard measure could imply the suspension of Article I.1 of the GATT.[14] This statement is not supported by Article 2.2 of the Agreement on Safeguards or any other provision.

11. In addition to the reasons already explained[15], it is relevant to quote the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which provides the following: "*It is understood that any suspension, withdrawal or modification*

[9] *Ibid*., paragraph 159.
[10] *Ibid*., footnote 89.
[11] Second written submission of the complainants, paragraph 58.
[12] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138; Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.
[13] Oral statement of the Dominican Republic at the first substantive meeting of the Panel, 15 June 2011, paragraph 17; closing statement of the Dominican Republic at the first substantive meeting of the Panel, 16 June 2011, paragraph 16; replies of the Dominican Republic to questions from the Panel, question 51.
[14] Reply of the complainants to the questions from the Panel, paragraph 77.
[15] Second written submission of the Dominican Republic, paragraphs 8-14.

under paragraphs 1 (a), 1(b) and 3(b) must not discriminate against imports from any Member country …".[16]

12. The foregoing logic has applied to Article XIX of the GATT since the very first days it came into force. When addressing Japan's request for accession, the Ad Hoc Committee on Agenda and Intersessional Business rejected the possible extension of this Article to constitute suspension of Article I.1.[17]

13. This was also supported by John H. Jackson already in 1969: "*Although nowhere expressly mentioned in the language, the preparatory work and subsequent GATT practice make it clear that the withdrawal or suspension shall be on a non-discriminatory MFN basis.*"[18]

14. Consequently, Article XIX of the GATT never envisaged the possibility of suspension of Article I.1 of the GATT.

III. THE ALLEGED NATURE OF "OTHER IMPORT DUTIES AND CHARGES" IN THE MEASURES AT ISSUE

15. The complainants use four arguments to claim that the measures at issue are inconsistent with Article II.1(a) and II.1(b) of the GATT as they constitute "other duties and charges" within the meaning of Article II.1(b), second sentence, of the GATT and the Dominican Republic had not included them in the relevant column in its Schedule of Tariff Concessions.

16. First of all, the complainants contend that, as they constitute a tax other than ordinary customs duty, the measures in question are "other duties and charges". This premise does not, however, mean that these are "other duties or charges". Quite the contrary, it indicates that the increased tariff is an ordinary customs duty because it replaces the tariff normally applicable: the only duty paid currently on imports of polypropylene bags and tubular fabric is the 28 per cent duty, in other words, the MFN tariff increased on the basis of the measures at issue.

17. Secondly, the complainants state that the fact that the duty imposed on the basis of the measures at issue applies as an alternative shows that the measures resulted in the application of other duties or charges. On the contrary, as underlined by the European Union in its written submission, the fact that the measures apply *in place of* and not *cumulatively with* the MFN tariff normally applicable is proof that these are not "other duties and charges".[19]

18. Thirdly, the complainants cite the Tariff Reform Law No.146-00, which provides that tariffs can only be amended by means of a legislative act, and from this infer that, as the measures at issue were established through an administrative act, they are "other duties and charges". The complainants disregard Article 73 of Law No.1-02, which allows temporary increases in the tariff established by the law through application of a safeguard measure.[20]

---

[16] United Nations Conference on Trade and Employment, held in Havana, Cuba, Final Act and related documents, page 113. http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[17] Ad Hoc Committee on Agenda and Intersessional Business, Report on the Accession of Japan, 13 February 1953, L/76, Exhibit RDO-27, paragraphs 6 and 7.

[18] John H. Jackson, *World Trade and the Law of GATT*, The Michie Company Law Publishers, Charlottesville, Virginia, 1969, page 564. Exhibit RDO-28.

[19] Third party submission by the European Union, 16 May 2011, paragraph 16.

[20] Exhibit RDO-11.

19. Lastly, the complainants cite some communications from which they infer that these are "other duties and charges".[21] These communications do not, however, lead to the conclusion that these are "other duties and charges", and the complainants have not indicated how they reached such a conclusion.

20. It would appear that the complainants are equating the safeguard measures with trade remedies (anti-dumping and countervailing measures). In fact, such a comparison is wrong because safeguard measures suspend obligations and do not lead to the imposition of other additional duties - as is the case for anti-dumping duties or countervailing measures. This emerges clearly from a comparison of Articles VI.2 and XIX.1(a) of the GATT. It is also the reason why safeguards are not listed in Article II.2(b) of the GATT together with anti-dumping and countervailing duties.

IV. CLAIMS RELATING TO THE DEFINITION OF THE DOMESTIC INDUSTRY

21. First of all, the complainants question the explanation of the definition of the product subject to investigation. They do not, however, make any claim regarding the determination of the imported product subject to investigation[22]; that is to say, the determination would be valid but not its explanation. The Dominican Republic would also like to clarify that neither in case law nor in the Agreement on Safeguards are there any grounds supporting the complainants' statement[23] that the Panel should only base itself on the published reports on the case.[24]

22. The Dominican Republic argues that the explanations given by the Commission on determination of the product subject to investigation are sufficient and comply with Articles 3.1 and 4.2(c) of the Agreement on Safeguards, that there are no legal grounds for requiring an "adequate and reasoned explanation of the reasons for the tariff classification"[25], and that the complainants have not explained how such an obligation arises from the aforementioned Articles. Likewise, it is not clear why Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards would require that the proposal by the participating parties not to deal with tubular fabric and polypropylene bags as a single product would have to be addressed.

23. The complainants quote the Appellate Body report in *EC – Civil Aircraft* to claim that the Panel was obliged to review the definition of the product subject to investigation. This finding is not relevant, however, as the Appellate Body differentiated between definitions under Part III of the Agreement on Subsidies and Countervailing Measures and the definition of the product investigated in accordance with Part V of the same Agreement and the Anti-Dumping Agreement. In other words, the case law does not relate to the definition of a product subject to investigation in a national safeguards procedure.[26]

24. Secondly, the complainants allege that determination of the likeness relationship between the domestic product and the imported product subject to investigation was composed of an implicit assertion of such a relationship. The Dominican Republic draws attention to paragraphs 163 to 181 of its first written submission and to the Commission's Preliminary Technical Report, page 58, where the

[21] Second written submission of the complainants, paragraphs 303 and 304.
[22] *Ibid*., paragraphs 85 and 106.
[23] Replies of the complainants to questions from the Panel, paragraph 18.
[24] See the Panel Reports in *US – Wheat Gluten*, paragraphs 8.19 and 8.21; and *Argentina – Preserved Peaches*, paragraph 7.6.
[25] *Ibid*., paragraph 85.
[26] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paragraph 1133.

determination of the like domestic product is reached, *inter alia*, on the basis of physical and chemical characteristics, tariff headings, and the production process.

25. It should be pointed out that the fact that the domestic product was defined as tubular fabric and polypropylene bags manufactured from resin only indicates a physical characteristic that also applies to the product subject to investigation. Although the production process plays an important role in the definition of the domestic industry, it was not preponderant when determining the like domestic product, where it was one of several criteria examined. The fact that the Commission, when defining the domestic industry, based itself on a series of producers that included Textiles Titán S.A., Filamentos del Caribe S.A., Agro-arrocera S.A. and Fibras Dominicanas CxA.[27], shows that the definition of the like domestic product includes bags obtained from tubular fabric.

26. Given the identical scope of the definitions of the product subject to investigation and the like domestic product (tubular fabric and polypropylene bags), the Dominican Republic considers that the fact that they are like products, and so are directly competitive, is obvious.

27. Thirdly, the complainants contend that the Commission failed to follow a logical order of analysis when determining the domestic industry, disregarding Appellate Body case law by claiming that the Agreement on Safeguards does not require any particular order when examining reports.[28] What the Appellate Body stated[29], however, only clarified the logical path to be followed when examining an issue before one, without seeking to stipulate that there is a mandatory order for analysis by national investigating authorities. Furthermore, there is a logical order in the Commission's analysis when defining the product subject to investigation, the like product and the domestic industry.[30]

28. The complainants also question the fact that the Commission considered tubular fabric and polypropylene bags to be part of the same domestic industry without proving that they were effectively competitors[31], basing themselves on the aforementioned Appellate Body Report. Nevertheless, in this Report the Appellate Body did not contend that it had to be proven that the products composing the domestic industry are like products.[32]

29. Fourthly, the complainants claim that certain categories of producers of the directly competitive domestic product were a priori excluded, based on an erroneous interpretation of the word "producers" in Article 4.1(c) of the Agreement on Safeguards.[33] The Dominican Republic recalls that Agroarrocera and Fibras Dominicanas did not take part in the procedure, that FIDECA *did not produce* the like domestic product (given that it only transformed imported or locally purchased tubular fabric bags)[34] and that Textiles Titán mostly transformed imported tubular fabric. It should be pointed out that Textiles Titán was excluded from the definition of the domestic industry using the provision in Article 26 of Law No. 1-02.

[27] Preliminary Technical Report, page 68. Exhibit RDO-9.
[28] Second written submission of the complainants, paragraph 159.
[29] Appellate Body Report, *US – Lamb*, paragraph 87. See also the reply by the Dominican Republic to question 102 from the Panel.
[30] First written submission of the Dominican Republic, paragraph 210.
[31] Second written submission of the complainants, paragraph 98.
[32] Appellate Body Report, *US – Lamb*, paragraphs 87 and 88.
[33] Second written submission of the complainants, paragraph 85.
[34] Final Technical Report, pages 51 and 52. Exhibit RDO-10.

30. The exclusion of Textiles Titán is justified according to the current meaning of the provisions in Article 4.1(c) of the Agreement on Safeguards and the context and case law in the WTO, which confirm that it is consistent with the Agreement on Safeguards to consider as "domestic industry" a major proportion thereof.[35] Moreover, Article 4.2(a) and (b) provide that investigating authorities must base themselves on reliable data. Where the main activity of an enterprise included in the definition of the domestic industry is to import and resell the product subject to investigation, the investigating authority may find it impossible to separate the data relating to the products produced from those imported when evaluating the indicators of injury or making the determination of the causal link.[36]

V. CLAIMS RELATING TO THE DETERMINATION OF THE INCREASE IN IMPORTS

31. The complainants consider that the Dominican Republic did not prove that there was an increase in imports, as required by Article XIX.1(a) of the GATT and Articles 2.1 and 4.2(c) of the Agreement on Safeguards because "if … there were no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation".[37] The complainants did not, however, claim that the determination of the product subject to investigation was inconsistent *per se* and the Dominican Republic considers that it constitutes valid grounds for determining the increase in imports.

32. The statement that the Dominican Republic "failed to demonstrate that there were adequate and reasoned explanations for an increase in imports in absolute terms that was recent, sudden, sharp, and significant"[38] is also wrong inasmuch as the Commission:

- Determined that, despite a 14.6 per cent decrease in 2009, overall during the investigation period imports increased by 50.06 per cent.[39]

- Indicated that the decline in imports in 2009 was explained by the reduced growth in the economy, which led to a 30.3 per cent decrease in imports in comparison with 2008.[40]

- Without extending the investigation period, confirmed the temporary nature of the decline in 2009 in the light of the figures for 2010 in the final report, showing that

[35] Panel Report, *US – Wheat Gluten*, paragraphs 8.54-8.56.
[36] See the reply by the Dominican Republic to question 91 from the Panel.
[37] Second written submission of the complainants, paragraph 203.
[38] *Ibid*., paragraph 210.
[39] Preliminary Technical Report, page 74, Exhibit RDO-9; Final Technical Report, page 58, Exhibit RDO-10.
[40] Preliminary Technical Report, page 80; Final Technical Report, page 68. Also: Central Bank of the Dominican Republic, *Resultados Preliminares de la Economía Dominicana*, January-September 2009, page 12. Exhibit RDO-12.

imports were increasing once again. It should be noted that the use of data not included in the investigation period has been confirmed by case law.[41]

33. The complainants' statement that the Dominican Republic failed to make findings regarding the rate of imports is also wrong as the percentage ratio of growth for each year and for the investigation period can be found in the Preliminary and Final Technical Reports.[42]

[41] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 167. Also: second written submission of the Dominican Republic, paragraph 88 to 90.

[42] Preliminary Technical Report, page 74 and Final Technical Report, page 58.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. INTRODUCTION

1. The central tenet of the Dominican Republic's defence is its claim that the provisional and definitive measures are not safeguard measures inasmuch as the 40 per cent tariff was not raised. To us, the reasons why the Dominican Republic adopted these measures and is today following a complex line of argument are quite obvious: the Dominican Republic sought to protect a particular company by means of measures intended to give the appearance of being consistent with (i) its regional free trade agreements (FTAs); and (ii) the WTO disciplines.

2. The only option was to apply a WTO safeguard measure, which is permitted both by the WTO disciplines and the regional agreements.

3. The problem arose when the Dominican Republic decided to state in this dispute that the measures are not safeguard measures but a straightforward tariff increase within the limits bound in the WTO. By closing the door to our complaints under the AS, the Dominican Republic opened up another door with equally serious legal implications. Basically, the statement that the measures contested are not safeguards immediately involves violation of Articles I and II of the GATT. Likewise, if the measures are considered not to be safeguards consistent with the WTO, the Dominican Republic would have to explain on what regional legal basis it applies an alleged 38 per cent tariff *ad valorem* on imports that should be subject to zero tariff under the regional agreements. We are explaining this as background and as evidence of the existence of safeguard measures in the WTO context. As we have explained, this procedure concerns neither violations of FTAs nor safeguards of a regional nature.

II. THE APPLICABILITY OF THE AS AND ARTICLE XIX

4. We do not think that the opinions expressed by the Dominican Republic solely for the purposes of this procedure are supported by the various objective elements indicating that the provisional and definitive measures are safeguard measures such as those provided by Article XIX and the AS: (a) these opinions of the Dominican Republic disregard *the design, structure and architecture of the measures*[1]; (b) they are not consistent either with the prior *actions* of the Dominican Republic; and (c) the Dominican Republic is trying to sidestep the fact that, even according to its restrictive interpretation based on an individualistic reading of Article XIX.1(a), the provisional and definitive measures imply the suspension of obligations under Articles I.1, II.1(a) and II.1(b).

A. SUSPENSION OF ARTICLE I.1 OF THE GATT

5. The Dominican Republic firstly indicates that the suspension itself which constitutes the safeguard measure, and is referred to in Article XIX.1(a) of the GATT, cannot refer to Article I.1 of the GATT.[2] The Dominican Republic does not, however, explain why, if this is the case,

[1] Second written submission of the complainants, paragraphs 14-22.
[2] Second written submission of the Dominican Republic, paragraph 9.

Article XIX.1(a) itself uses the generic term "obligations" and "obligation" and does not explicitly exclude Article I.1 of the GATT from its application. The Dominican Republic's reference to Articles 2.2 and 9.1 of the AS in connection with this discussion is not very clear and does not enable it to be determined what it is claiming.[3] The word "obligation" in Article XIX.1(a) is not qualified by the words *unless otherwise provided in Article I.1 of the GATT*, as the Dominican Republic suggests. To paraphrase the Appellate Body, this interpretation would imply "read[ing] into the text words which are simply not there", which has been prohibited by the Appellate Body.[4] Like the complainants, the European Union[5] and the United States[6] consider that the word "obligation" in Article XIX.1(a) includes the obligation in Article I.1 of the GATT.

6. Secondly, the Dominican Republic's argument is based on semantics when it indicates that the discussion on the possibility of applying a selective safeguard has been concluded.[7] The application of a safeguard measure that excludes imports from particular trading partners is a selective way of applying safeguard measures - the measure is applied to certain origins and not to others. Nevertheless, Members have not been prohibited from making such exemptions, and even the Appellate Body itself has recognized that the possibility of excluding specific imports from the application of a safeguard measure is open so there is no need to issue a ruling.[8]

7. Thirdly, the Dominican Republic argues that the words "obligations" and "obligation" in the first and second part of Article XIX.1(a) refer to the same thing and therefore "this term cannot refer to the most-favoured-nation principle in Article I.1 of the GATT, and cannot be the cause of an increase in imports".[9] The Dominican Republic does not, however, explain why the increase in MFN trade could not involve an increase in imports within the meaning of Article XIX.1(a) of the GATT and Article 2.1 of the AS.

8. Fourthly, the Dominican Republic states that Article 9.1 implies an obligatory exclusion of imports only after a measure has been qualified a safeguard measure. Consequently, in its opinion, a safeguard measure consisting of the suspension of obligations under Article I.1 of the GATT could not exist. It is clear that the obligation to exempt imports from developing countries pursuant to Article 9.1 of the AS does not imply that the word "obligation" in Article XIX of the GATT has to be read in the narrow sense, excluding Article I.1 of the GATT. It appears rather that the Dominican Republic is contradicting its argument that the measures in question are not safeguard measures.

9. Fifthly, the Dominican Republic indicates that suspension of Article I.1, together with application of Article 2.2 and the exemption mandate in Article 9.1, would imply that the only content of a safeguard measure would be the exemption of certain countries from its scope.[10] The obligation in Article 2.2 implies that there can be no discrimination when applying a safeguard measure with regard to all the imports subject to investigation. This provision does not, however, mention the possibility that a safeguard measure allows the exemption of certain imports. The Appellate Body has also deliberately been silent in this regard. Consequently, the Dominican Republic's argument that

[3] *Idem.*
[4] Appellate Body Report, *India – Quantitative Restrictions*, paragraph 94.
[5] Reply by the EU to question 2 from the Panel, paragraphs 9 and 10.
[6] Reply to the United States to question 2 from the Panel, paragraphs 7 to 9.
[7] Second written submission of the Dominican Republic, paragraph 10.
[8] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 114.
[9] Second written submission of the Dominican Republic, paragraph 11.
[10] *Ibid*., paragraph 12.

Article 2.2 would cease to apply to any safeguard that implies suspension of Article I.1 lacks substance.

B. SUSPENSION OF ARTICLE II.1(a) AND II.1(b), SECOND SENTENCE, OF THE GATT

10. The Dominican Republic now indicates that the provisional and definitive measures replace the pre-existing ordinary MFN tariff; in other words, they replace what in Spanish is called the "*derecho de aduana propiamente dicho*" (in English, the "ordinary customs duty") and the complainants wrongly consider that this is rather a "second tariff".[11] The Dominican Republic has explained that these measures *are not the same and do not have the same characteristics* as the ordinary MFN tariff or ordinary customs duty.

C. THE APPLICABILITY OF THE AS AND ARTICLE XIX TO THE INVESTIGATION AND PRELIMINARY AND DEFINITIVE DETERMINATIONS

11. The Dominican Republic affirms that a safeguards investigation can only be subject to certain requirements if it actually leads to the adoption of a safeguard measure.[12] The Dominican Republic disregards the Appellate Body's statement to the effect that there are two main factors when interpreting the AS: (i) the determination of the right to apply a safeguard measure, and (ii) the way in which the safeguard measure is applied.[13] Failure to impose a safeguard measure does not invalidate the determination a Member may make regarding the right to impose a safeguard measure, which may be exercised at any time.

12. The Dominican Republic contends that it fails to understand how reaching findings regarding the claims related to the investigation that did not lead to the adoption of measures would help in reaching a positive settlement of this dispute.[14] This is a new request by the Dominican Republic, that the Panel should abstain from reaching findings on this matter. We do not consider that such a request is admissible.

13. As found by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, "… any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[15] Accordingly, if the measures in question include the investigation and the specific determinations cited in this Panel's terms of reference, and there are specific claims about the way in which the investigation was conducted and these determinations were reached, there is then no reason why the Panel should abstain from reaching the relevant findings.

III. THE PRELIMINARY OBJECTIONS OF THE DOMINICAN REPUBLIC

14. The complainants responded in full to the preliminary objections at the first substantive meeting[16] and once again in their replies to the questions from the Panel.[17]

15. With regard to the objections against the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT, it is pertinent to repeat that these are not new claims, as argued by the

[11] *Idem.*
[12] *Ibid*., paragraph 27.
[13] Appellate Body Report, *US – Line Pipe*, paragraph 84.
[14] Second written submission of the Dominican Republic, paragraph 44.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paragraph 81.
[16] Opening oral statement by the complainants at the first substantive meeting, paragraphs 29-45.
[17] Replies by the complainants to questions 82, 85 and 86.

Dominican Republic.[18] The complainants included in the request for consultations a reservation that clearly allowed subsequent inclusion in the request for the establishment of a panel of claims relating to the GATT 1994, as was in fact done. Based on this reservation and on the discussions during the consultations, the complainants reformulated their arguments and included in the request for a panel alternative claims in conformity with the GATT 1994 relating to the most-favoured-nation principle and import charges other than customs duty. As confirmed by Panama, the issues relating to Articles I.1, II.1(a) and II.1(b) of the GATT were indeed discussed during the consultations.

16. The Dominican Republic has failed to prove how the alleged procedural defects have affected its right of defence.[19] The complainants have also rebutted the Dominican Republic's statement regarding the supposed change in the essence of the claims caused by the alleged inconsistency between the request for consultations and the request for the establishment of a panel.[20]

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

17. The Dominican Republic has not so far identified the paragraphs in its resolutions or reports in which the adequate and reasoned findings and conclusions on the definition of the imported product subject to investigation are to be found. On the contrary, it simply falls back on mere statements that do not reflect the reasoning or value judgement on the issue.[21]

18. The Dominican Republic asserts that the production process does not form part of the definition of the like domestic product, but was a decisive criterion when identifying the domestic industry.[22] With this statement, the Dominican Republic is recognizing that when it defined the domestic industry it based itself on criteria other than the nature of the domestic and imported products and the nature of like or directly competitive products. Already in *US – Lamb*, the Appellate Body considered that this criterion was not acceptable when defining the domestic industry.[23]

19. The Dominican Republic also mentions that Article 4.1(c) of the AS provides for the possibility of not taking into account all the domestic producers but only a major proportion.[24] Although Article 4.1(c) does allow for this possibility, what is certain is that in this case the Dominican Republic decided a priori to exclude certain "transformers" which it considered did not produce a domestic product.[25]

20. Moreover, the Dominican Republic excluded a producer which was at the same time an importer, even though Article 4.1(c) does not cover the eventuality of such exemption.[26] As can be seen, the Dominican Republic seeks to read into Article 4.1(c) rights that do not exist. Unlike the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, Article 4.1(c) of the AS does not allow for the possibility of a priori exemption of certain types of producers if these producers produce the like or directly competitive product. Nevertheless, only once

[18] First written submission by the Dominican Republic, paragraph 88.
[19] Second written submission of the complainants, paragraphs 47-50.
[20] *Ibid*., paragraphs 51-60.
[21] Second written submission of the Dominican Republic, paragraphs 58-60.
[22] *Ibid*., paragraphs 62 and 63.
[23] Appellate Body Report, *US – Lamb*, paragraphs 90 and 94.
[24] Second written submission of the Dominican Republic, paragraph 69.
[25] *Ibid*., paragraph 73.
[26] *Ibid*., paragraph 77.

all the producers producing the like or directly competitive product have been taken into consideration does Article 4.1(c) allow consideration of a major proportion rather than all of them.

21. Lastly, the Dominican Republic argues that the context of Article 4.1(c) of the AS endorses the possibility of basing oneself solely on a major proportion of the domestic industry inasmuch as the investigating authority must base itself on reliable data and collecting information from producers involved in other activities such as import and resale would raise problems in separating out the data concerning economic activities that are not related to the products produced by the producers.[27] The Dominican Republic's argument is no justification for excluding certain producers from consideration of the domestic industry. The investigating authority is obliged to process and separate information relevant to the purposes of the investigation. Using the same argument, it could be argued that any enterprise engaged in activities parallel to production of the like or directly competitive product could be excluded from the investigating authority's examination. This interpretation cannot be sustained.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

22. The Dominican Republic mentions that the clause on unforeseen developments in Article XIX(a) does not constitute a binding obligation.[28] The complainants have extensively rejected this defence based on Appellate Body case law.[29]

23. As a second line of defence, the Dominican Republic asserts that, even if the unforeseen developments clause is binding, its investigating authority complied with it. The Dominican Republic originally claimed before the Panel that the unforeseen developments comprised four elements: (i) China's accession to the WTO; (ii) tariff cuts resulting from free trade agreements; (iii) the 2008 economic and financial crisis; and (iv) the increase in production costs.[30] In its replies to the questions from the Panel, the Dominican Republic recently confirmed that only the first two of these elements constituted the alleged unforeseen developments.[31]

24. China's accession to the WTO cannot be considered an unforeseen development for the Dominican Republic.[32] At the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987.

25. The complainants also explained why the tariff cuts under free trade agreements are not an unforeseen development.[33] As the purpose of free trade areas is to achieve deeper liberalization than that within the WTO framework, it is not acceptable for the Dominican Republic to argue that its voluntary decision to implement tariff cuts under such agreements is an unforeseen development.

[27] *Ibid*., paragraph 79.
[28] First written submission of the Dominican Republic, paragraphs 258-293.
[29] Opening oral statement.
[30] First written submission of the Dominican Republic, paragraphs 287-289.
[31] Reply by the Dominican Republic to question 114 from the Panel.
[32] Second written submission of the complainants, paragraphs 176-184.
[33] *Ibid*., paragraphs 185-190.

26. In addition, in the relevant reports and resolutions there is no mention whatsoever of the *logical connection* which, according to the Appellate Body, must exist between the two events and the alleged increase in imports of polypropylene bags and tubular fabric.[34]

27. The complainants also contend that the Dominican Republic did not identify the relevant obligations incurred under the GATT and did not explain how those obligations resulted in the alleged increase in imports, as required by Article XIX.1(a).[35] In response to a question from the Panel, the Dominican Republic indicated that page 86 of the preliminary report supposedly contained identification of the corresponding tariff concessions.[36] We reiterate that nowhere in this paragraph does the investigating authority explicitly indicate that the alleged increase in imports was the result of obligations incurred under the GATT.[37]

VI. THE ALLEGED INCREASE IN IMPORTS

28. The investigating authority established that there was a "marked decline" in the trend in imports[38], but did not explain sufficiently and adequately why, despite a decline of such magnitude up to the end of the investigation period, here was an increase in imports in the form described by the Appellate Body.

29. The Dominican Republic claims that its conclusion regarding increased imports is valid because its technical reports clarify that the decline in imports was caused by the decrease in the country's total imports during 2009.[39] Subsequently, the Dominican Republic indicated that this decrease in imports was "incidental and temporary".[40]

30. As we have previously stated, the investigating authority's explanation is insufficient and invalid because the overall decline in the Dominican Republic's imports is a macroeconomic occurrence that affected imports in the whole of the tariff universe for goods.[41]

VII. THE ALLEGED SERIOUS INJURY

31. When defining a like or directly competitive product as one product, the investigating authority had to assume all the consequences of such a definition, for example, the need to make a separate analysis for each relevant segment. The Dominican Republic cannot take advantage of a broad definition of the domestic industry and at the same time absolve itself of the responsibilities inherent in opting for this definition.

32. As to the inclusion of information on products that are not those investigated, the Dominican Republic subsequently explains that these products account for around 15 per cent of domestic production.[42] It presents no further substantiation than its mere affirmation. The

[34] *Ibid*., paragraphs 180-184 and 189. See also the Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 92; Appellate Body Report, *Korea – Dairy*, paragraph 85.
[35] First written submission of the complainants, paragraphs 227-234; opening oral statement by the complainants at the first substantive meeting, paragraph 58.
[36] Reply by the Dominican Republic to question 115 from the Panel.
[37] Second written submission of the complainants, paragraphs 192-194.
[38] Preliminary report, page 68; final report, page 61.
[39] First written submission of the Dominican Republic, paragraphs 313-324.
[40] *Ibid*., paragraph 320.
[41] Reply by the complainants to question 118 from the Panel.
[42] Second written submission of the Dominican Republic, paragraph 99.

Dominican Republic's *ex post* explanation does not indicate whether the figure of 15 per cent of total output refers to the volume or total value of production.

33. Regarding the inclusion of information on export activities, it is meaningless to take into account this type of information for the purposes of the investigation. The purpose of the investigation is to examine the situation of the domestic industry producing the like product or the product directly competing with the imported product, in accordance with Article 4.1(c) of the AS. Obviously, the product intended for export does not compete with the imported product that is the subject of investigation.

34. Concerning depreciation and amortization costs, the Dominican Republic's explanation is *ex post*. The explanation now put forward cannot be found in any part of the technical reports or the resolutions. Furthermore, the Dominican Republic now acknowledges that the production of other products in the bags division accounts for around 15 per cent of domestic production, and that the bags division produces for export. On this basis, it is then necessary to make a *pro rata* calculation at least in proportion to this level of production for the product that is not a like or directly competitive product or is not sold on the Dominican market. As this explanation and *pro rata* calculation do not appear in the investigating authority's technical reports and resolutions, this confirms that the evaluation of losses and gains and cash flows based on the financial statements of the bags division was not a precise, sufficient and appropriate evaluation.

VIII. THE ALLEGED CAUSAL LINK

35. On previous occasions, the complainants fully responded to the Dominican Republic's arguments regarding the shortcomings in the determination of the causal link and the lack of a non-attribution examination.[43] We should like to point out that the Dominican Republic has presented no arguments in defence other than those to be found in its first written submission.

36. Consequently, for the purposes of this statement, the complainants reaffirm the claims mentioned and emphasize that the prima facie case already proven has not been effectively rebutted by the Dominican Republic.

IX. THE LACK OF PARALLELISM

37. The complainants reiterate their position that the parallelism obligation is mandatory irrespective of whether the imports excluded are imported from a free trade area or customs union, or are imports from developing countries under Article 9.1 of the AS.[44]

38. As the imports from Mexico, Panama, Colombia and Indonesia were exempt from application of the safeguard, logically, they should then have been exempt from the investigation. The Dominican Republic, however, did not do this and now argues that this basic concept of symmetry allows exceptions. The complainants reject this interpretation.

39. Precedents in the Panel and the Appellate Body Reports in *US – Wheat Gluten* do not support the Dominican Republic's position. First of all, the Appellate Body clarified that the United States

[43] Opening oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[44] *Ibid*., paragraph 118; second written submission of the complainants, paragraph 239.

was the one arguing that Article 9.1 is an exception to the parallelism rule.[45] Nevertheless, the Appellate Body never stated that it shared the United States' interpretation. Secondly, the Appellate Body then stated that Article 9.1 "is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members".[46] This statement does not mean that imports from developing countries should be exempt from application of the measure but not the underlying investigation. In mentioning that the exception to Article 9.1 concerns the *general rules* in the AS, the Appellate Body referred to the exceptional circumstance of excluding certain imports from the scope of the measure, hence without prejudice to also excluding these imports from the investigation. In fact, it is precisely the exceptional circumstances such as application of Article 9.1 or the exemption for imports from a free trade area or customs union which give rise to the parallelism obligation.

X. LACK OF NOTIFICATION, CONSULTATIONS AND MEANS OF TRADE COMPENSATION

40. In this connection, the Dominican Republic states that the hearings held during the safeguards investigation conducted by its investigating authority constitute the prior consultations referred to in Article 12.3 of the AS.[47] The Dominican Republic claims that "the consultations referred to in Article 12.3 of the Agreement on Safeguards were held on 12 May on the occasion of the public hearing" in the safeguards investigation.[48]

41. We reiterate that the hearings in the safeguards investigation conducted by the investigating authority cannot be cannot be treated as equivalent to consultations at the multilateral level as prescribed by Article 12.3 of the AS.[49]

42. In essence, the Dominican Republic argues that, by fulfilling Article 3.1 of the AS, there is automatically compliance with Article 12.3 of the AS. This goes against the principle of effectiveness in the interpretation of treaties as the Dominican Republic's interpretation would make Article 12.3 redundant.[50]

XI. VIOLATION OF ARTICLES I.1 AND II.1(A) AND II.1(B) OF THE GATT

43. If this Panel accepts that these measures are not safeguard measures within the meaning of Article XIX and the AS, the provisional and definitive measures are inconsistent with Articles I.1, II.1(a) and II.1(b) of the GATT.

A. VIOLATION OF ARTICLE I.1 OF THE GATT: THE MOST-FAVOURED-NATION PRINCIPLE

44. According to Article I.1 of the GATT, any advantage, favour, privilege or immunity granted to products of a particular country must be accorded immediately and unconditionally to the like

[45] Appellate Body Report, *US – Wheat Gluten*, footnote 96, first sentence ("The United States relies on Article 9.1 of the Agreement on Safeguards in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure.").

[46] *Ibid*., footnote 96, second sentence.

[47] First written submission of the Dominican Republic, paragraphs 502-549.

[48] Reply by the Dominican Republic to question 167 from the Panel.

[49] Second written submission of the complainants, paragraphs 248-251.

[50] Appellate Body Report, *US – Gasoline*, page 25; see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81 and 82.

product of other WTO Members. A violation of Article I.1 implies proof of various elements, which were set out in our second written submission[51] and which are summarized below:

- The decision not to apply the tariff surcharge to imports from Mexico, Panama, Colombia and Indonesia constitutes an advantage, favour, privilege or immunity related to import duties;

- this advantage, favour, privilege or immunity granted by the Dominican Republic to Mexico, Panama, Colombia and Indonesia is not extended to other WTO Members, because exemption from the measure only benefits these four countries.

45. The Dominican Republic has acknowledged on a number of occasions that, if the measures contested are not deemed to be safeguards, exempting certain countries from the measure becomes "problematic".[52] The Dominican Republic does not seek to justify this violation under any provision of the GATT. Accordingly, it is obvious that the Dominican Republic acted in a manner inconsistent with Article I.1 of the GATT by not applying the tariff surcharge on a most-favoured-nation basis.

B. VIOLATION OF THE PROHIBITION ON IMPOSING DUTIES AND CHARGES OTHER THAN ORDINARY CUSTOMS DUTY

46. The complainants have also contended throughout the procedure that the provisional and definitive measures are contrary to Article II.1(a) and II.1(b), second sentence, of the GATT. The Dominican Republic has not presented any better defence against these claims than the statement that these measures simply constitute a tariff increase and has put forward this statement only in the context of the applicability of the AS and Article XIX.[53]

47. We have already dealt with these arguments in regard to the applicability of the AS and Article XIX. In our view, the Dominican Republic has not submitted sufficient factual elements to refute those cited by the complainants.[54] We consider that this is the case because it is difficult to explain how a measure whose characteristics are not the same as a tariff, and which even the Dominican Republic recognizes is applied in replacement of the ordinary customs duty, could be termed a tariff. In addition, we reaffirm that the Dominican Republic has not registered any duty or charge other than the ordinary customs duty in its Schedule of Concessions. Consequently, the Panel will have to determine whether the complainants have proved that the provisional and definitive measures constitute duties and charges other than ordinary customs duty and that, accordingly, they are inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

XII. CONCLUSION

48. Based on the foregoing, the complainants request the Panel to confirm that the AS and Article XIX apply to the provisional and definitive measures and to find that the measures, and the investigation and substantive determinations contested, are inconsistent with Article XIX and the

[51] Second written submission of the complainants, paragraphs 256-282.

[52] Closing statement by the Dominican Republic at the first substantive meeting, paragraph 17; reply by the Dominican Republic to question 52 from the Panel; reply by the Dominican Republic to question 2 from the complainants.

[53] Second written submission of the Dominican Republic, paragraphs 15-25.

[54] See the complainants' response to the request for a preliminary resolution, paragraph 123; opening oral statement by the complainants at the first substantive meeting, paragraphs 136-145; reply of the complainants to questions 26 and 27.

various provisions of the AS cited. Likewise, the complainants request the Panel to find that the lack of notification, consultations and adequate means of compensation are inconsistent with Articles 8.1 and 12.3 of the AS and XIX.2 of the GATT.

49. Alternatively, the complainants request the Panel to find that the selective exemption of imports from the provisional and definitive measures is inconsistent with Article I.1 and that both measures are also inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

50. Lastly, in view of the serious and numerous anomalies in the investigation, and in the application of the provisional and definitive measures, the complainants consider that the Panel would be justified in exercising its authority, pursuant to Article 19.1 of the DSU, to make suggestions regarding implementation. In this connection, the complainants request the Panel to suggest that the Dominican Republic withdraw the definitive measure with immediate effect.

ANNEX F-3

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chairman, members of the Panel:

1. The Dominican Republic thanks you for your efforts and questions yesterday and today at this second substantive meeting of the Panel. As this meeting draws to a close, the Dominican Republic would merely like to make a few general remarks that it would ask the Panel to bear in mind when reaching its conclusions and findings.

2. It has become clear that the measures at issue before the Panel do not suspend any obligations or modify or withdraw a concession within the meaning of Article XIX:1(a) of the GATT. The complainants nevertheless maintain that GATT Article XIX and the Agreement on Safeguards apply to the measures in dispute.

3. To support their arguments, the complainants have resorted to interpretations according to which the essential function of a safeguard measure is to prevent or remedy serious injury to a domestic industry by adopting measures as a "safeguard" duty that is different from a simple MFN tariff increase. According to this interpretation, the idea of suspending an obligation or withdrawing or modifying a concession is not essential to the notion of safeguard in WTO law.[1] According to the complainants, the suspension of an obligation or the modification or withdrawal of a concession would only be necessary when the "safeguard duty" results in an increase that exceeds the bound rate. Thus, an additional duty below the bound level would constitute a "safeguard" duty although it does not involve the suspension, withdrawal or modification of an obligation or concession. This interpretation introduces an artificial distinction between the first and second parts of Article XIX:1(a) of the GATT in which the second part provides for cases in which such a safeguard measure is inconsistent with other GATT obligations.

4. Essentially, it became clear as the proceedings went forward that the complainants were trying to create a sort of *sui generis* trade remedy that is not provided for in the WTO Agreements. This remedy would cover any measure whose function consists of resolving injury or threat of serious injury situations without taking account of the objective conditions that define the notion of safeguard and the scope of application of GATT Article XIX and the Agreement on Safeguards. The Dominican Republic urges the Panel not to adopt this novel interpretation of Article XIX of the GATT, which would be tantamount to creating a new trade remedy and applying disciplines to measures that would otherwise be authorized under the GATT.

5. The interpretation of the complainants should not be adopted lightly: to apply disciplines to certain measures that can normally be freely adopted, as in the case of a tariff increase to a level below the bound rate, would be to undermine the flexibility that is inherent and essential to the WTO's system of tariff concessions, i.e. the margin for manoeuvre represented by the difference between the bound rate and the applied tariff.

6. For WTO Members, this margin of flexibility provided by the difference between the applied tariff and the bound rate is essential. Moreover, several of the complainants joined the Dominican Republic in defending this margin in recent non-agricultural market access negotiations,

[1] Reply of the complainants to question 58 of the Panel.

stressing that "[t]ariffs serve multiple purposes in small, vulnerable economies, the most important of which are to ensure the viability of vulnerable domestic industries …".[2] The Dominican Republic asks the Panel not to create a precedent that would undermine the incentives for Members to apply tariffs at a rate significantly below the bound rate, as this would affect one of the cornerstones of the GATT, namely the system of tariff concessions as a ceiling below which Members are given ample freedom of action.

7. The Dominican Republic trusts that the Panel will not adopt an interpretation that turns the notion of safeguard into a trade defence instrument similar to an anti-dumping procedure. The purpose of imposing a safeguard measure is the suspension, modification or withdrawal of an obligation or concession. This is why Article XIX is known as an escape clause. It would be counter-productive to impose the disciplines of the Safeguards Agreement on tariff increases within the margin of flexibility between the bound rate and the applied tariff. Such an increase does not require recourse to any escape clause, considering that there is no obligation being suspended or concession being modified.

8. Mr Chairman, members of the Panel, I thus conclude my oral statement. The Dominican Republic would like to thank you and the Secretariat once again for your efforts in this dispute.

[2] Market Access for Non-Agricultural Products: Treatment of Small, Vulnerable Economies in the NAMA Negotiations; Communication from Antigua and Barbuda, Barbados, Bolivia, Dominica, Dominican Republic, El Salvador, Fiji, Grenada, Guatemala, Honduras, Mongolia, Nicaragua, Papua New Guinea, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago, 10 November 2005, TN/MA/W/66, paragraph 4.

ANNEX F-4

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Mr Chairman, members of the Panel:

1. In this last statement, the complainants present some reactions to the opening statement by the Dominican Republic yesterday.

2. With regard to the preliminary objections that seek to exclude certain claims from the Panel's terms of reference, during this second hearing we have not heard any additional substantive argument from the Dominican Republic in support of its position. The Dominican Republic still fails to explain how its right of defence was specifically affected. It has not shown either how the alleged inconsistency between the request for consultations and the request for the establishment of a panel changed the essence of the claims.

3. The arguments concerning Articles I.1, II.1(a) and II.1(b) of the GATT fall fully within the terms of reference for this dispute because of the reservation contained in the request for consultations that enabled the complainants to bring up issues in conformity with the GATT during the consultations, and also because of the fact that these issues were in fact discussed during the consultations. Moreover, these arguments are clearly included in the request for the establishment of a panel. The Dominican Republic nevertheless continues to seek ways of depriving these facts of any substance; for example, by stating that the issues concerning Articles I and II of the GATT were not discussed during the consultations. In this connection, we repeat that Panama, being the only country which participated in the consultations as an associate member, clarified that these issues were effectively addressed in the consultations. Consequently, this discussion has already concluded.

4. We also note that the Dominican Republic has not put forward any formal defence concerning the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT. It simply addressed these issues in connection with the discussion on the applicability of Article XIX and the AS to the provisional and definitive measures.

5. Regarding the applicability of the AS and Article XIX, the Dominican Republic finds it pertinent to cite the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which indicates that any suspension, withdrawal or modification under what today would be Article XIX.1(a) must not discriminate against imports from any Member country. It then states that this logic has applied since the very first days Article XIX came into force.[1]

6. The complainants consider that the interpretative note referred to by the Dominican Republic does not form part of the ordinary meaning, context, object and purpose of the GATT, in particular, Article XIX, so it plays no role in the task of interpreting Article XIX.1(a). Article XIX has no interpretative notes and the meaning of the words "obligations" and "obligation" in its context is unequivocal and is not qualified.

[1] Opening oral statement of the Dominican Republic at the second meeting of the Panel, paragraphs 17 and 18.

7. Furthermore, even if this note played any interpretative role, the complainants consider that its import does not support the Dominican Republic's position, but rather supports what the complainants contend to the effect that it indicates that the GATT Contracting Parties decided to exclude this limitation from the scope of Article XIX of the GATT. Accordingly, the Dominican Republic failed to explain what happened to this interpretative note.

8. This interpretative note was included in the text of the Havana Charter in relation to Article 40 (now Article XIX). Unlike other provisions and interpretative notes, however, including Article 40 itself (i.e. Article XIX), it did not survive the transition from the Havana Charter to the GATT 1947 and was not incorporated into the text of the GATT 1947.

9. As can be seen from the document we are attaching as exhibit CEGH-39, the Havana Charter contains several provisions that are today included in the GATT. Article 40 almost literally reflects what we now know as Article XIX of the GATT. Moreover, the Havana Charter included interpretative notes on various of its substantive provisions. Many of these interpretative notes survived the transition from the Havana Charter to the GATT 1947. This was the case, for example, with the note concerning Article 18 of the Havana Charter, which is now the interpretative note to Article III.2 of the GATT concerning internal taxes. Other notes, however, were not incorporated into the GATT. This was the case for the note concerning Article 40 of the Havana Charter, cited by the Dominican Republic in its oral statement yesterday.

10. What does this omission signify? In our view, that the Contracting Parties to the GATT 1947 clearly rejected the limitation on the scope of Article XIX.1(a), which it was sought to establish by means of the interpretative note referred to by the Dominican Republic.

11. It should also be pointed out that the Dominican Republic did not quote the interpretative note to Article 40 of the Havana Charter in full. The text in full reads as follows:

> It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries.[2]

12. It should be noted that the last part of this note qualifies the measure in such a way that the action to be avoided, to the fullest extent possible, is causing injury to other Members suppliers of the product in question. These words cast doubt on the absolute nature of the "non-discrimination" which it is sought to establish in the first part of the interpretative note.

13. Consequently, the Dominican Republic only related part of the story, leaving out a detail which in fact backs up the position of the complainants in the sense that Article XIX.1(a) applies to all the GATT provisions, including Article I.1.

14. This position is supported by another fact that the Dominican Republic also omitted to mention concerning the early days of the GATT 1947. As can be seen from the document attached as Exhibit CEGH-40, page 13, in connection with the revision of the GATT in 1955, there was an attempt on the part of delegations of certain Scandinavian countries to reintroduce the interpretative note to Article 40 of the Havana Charter by means of a new provision. The proposal was submitted to

[2] Exhibit CEGH-39.

the sub-committee revising the GATT, which rejected it. There was no general agreement on it. In the end, it had to be withdrawn.

15. Contrary what is stated by the Dominican Republic, this shows that in the early years of the GATT the interpretative note to the Havana Charter did not have the effect which the Dominican Republic is now seeking to give it. Moreover, it also shows that, since the early days of the GATT 1947, the GATT Contracting Parties were not prepared to accept a limitation on the scope of Article XIX.1(a) of the GATT.

16. In addition, the Dominican Republic cites a report by the Ad Hoc Committee on the accession of Japan to the GATT 1947[3] in support of its statement that Article XIX.1 does not allow suspension of Article I.1 of the GATT. What the Dominican Republic does not indicate is that this report was situated in a context in which several Contracting Parties were concerned about Japan's accession to the GATT and wondered whether it would not perhaps be appropriate to apply a safeguard focusing on Japan with a view to remedying serious injury, not just for a specific producer but for various production sectors.[4]

17. It was in this context that some members of the Committee expressed the view that the measures adopted pursuant to Article XIX could not be discriminatory.[5] This was the limited opinion of some members of the Committee. It did not reflect a consensual or general opinion of the Committee, still less of the Contracting Parties to the GATT 1947. Accordingly, this position of *some parties during negotiations* has to be viewed in the light of its due and limited scope in the context of those negotiations.

18. The Dominican Republic states that in Japan's accession procedure the possible extension of Article XIX also to constitute suspension of Article I.1 was rejected.[6] What was in fact rejected, however, was extension of Article XIX to include conditions in addition to those provided in the first part of Article XIX.1(a) concerning imports from one Contracting Party in particular.[7] Perhaps this rejection was attributable to the opinion mentioned by the Dominican Republic, but it might also be attributable to the view that there was no need to extend Article XIX.1(a), either because the additional conditions sought were already covered by Article XXIII of the GATT[8], or because some of the Committee's members considered that Article XIX.1(a) allowed for the possibility of applying safeguards to imports from specific countries. The report cited by the Dominican Republic does not enable a conclusion to be reached either way, so it does not constitute elucidatory and relevant information.

19. For the foregoing reasons, the complainants do not consider that the additional elements presented by the Dominican Republic provide confirmation that Article XIX.1(a) excludes Article I.1 of the GATT from its application.

20. With regard to the definition of the domestic industry, the Dominican Republic indicates that the complainants argue that the Panel was obliged to revise the definition of the product subject to investigation in the light of the report of the Appellate Body in *EC – Aircraft*. The reason why the

[3] Exhibit RDO-27.
[4] *Ibid*., paragraphs 3-6.
[5] *Ibid*., paragraph 6.
[6] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 18.
[7] Exhibit RDO-27, paragraph 7.
[8] *Idem.*

Dominican Republic considers that this report is irrelevant is that the definition of subsidized product in a complaint of serious injury is submitted by a WTO Member and refers to the relevant market, whereas the definition of the product subject to investigation in a domestic procedure is made by the investigating authority.[9] This reason does not appear valid to us. The fact that the evaluation by a panel (in the case of serious injury) by comparison with a domestic authority (in the case of safeguards) does not have any consequences, it does not lessen the duty of objectiveness, impartiality and neutrality that must be the feature of investigations, whether by a panel or by a domestic investigating authority in the case of safeguards.

21. Moreover, a claim of serious injury concerns trade that is distorted by recurrent or unlawful subsidies, whereas a safeguards investigation concerns trade that is conducted lawfully along the lines to be expected in trade relations among Members. This fundamental distinction indicates even more clearly that the principles which govern determination of the product investigated in a claim of serious injury must be respected in an investigation relating to safeguard measures, and confirm to this Panel that the considerations taken into account by the Dominican Republic in order not to provide adequate and reasoned explanations of the product subject to investigation when defining the domestic industry are insufficient.

22. As to the alleged increase in imports, the Dominican Republic repeats its arguments that "overall during the investigation period imports increased by 50.06 per cent".[10] This spontaneous and abrupt statement by the Dominican Republic reflects its underlying assumption, namely, for it the criterion followed first and foremost to determine the increase in imports was increases at each extremity of the period.

23. Subsequently, concerning the decrease in 2009, the Dominican Republic indicated that this can be explained by the reduced growth in the Dominican economy and that the temporary nature of this decline was confirmed by the import figures for 2010.[11] The complainants ask themselves where, in the respective reports, it is determined that the decline was "incidental" and "temporary" in the light of these considerations? Reading these reports does not lead to such conclusions or to an explanation of how a macroeconomic occurrence that affects the economy in general (and hence questionably "incidental") or an increase based on imports distorted by the conduct of the investigation and the imposition of the provisional measure (and hence questionably proof of their "temporary" nature) can lead to the conclusion that the decline in imports up to the end of the investigation period was irrelevant.

24. Lastly, the complainants would like to emphasize the systematic repercussions of this dispute at three levels: at the level of consideration of safeguards within the WTO, at the level of trade remedies, and at the level of regional and multilateral trade policy.

25. As to the consideration of safeguards within the WTO, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, this would allow investigating authorities to initiate investigation procedures in order to apply safeguard measures, involving several interested parties and governments of exporting countries (with high costs for participation, legal representation, trade uncertainties, and political manoeuvring), and subsequently avoid *multilateral control*. In other words, it would encourage the initiation of supposedly "harmless" investigation procedures and there would be no form of control even if they

[9] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 35.
[10] *Ibid*., paragraph 50.
[11] *Idem*.

would undoubtedly have the effect of disguised barriers to trade and international competition. Such an outcome would be directly contrary to the object and purpose of the AS, as set out in its preamble, and would raise serious doubts about the feasibility of contesting such measures through the dispute settlement mechanism.

26. With regard to trade remedies, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, in anti-dumping or countervailing procedures investigating authorities could use this interpretation as a perverse incentive to avoid obligations under the anti-dumping and subsidies and countervailing measures agreements. An investigating authority following this line could then decide to initiate an anti-dumping or countervailing duty investigation into imports from several origins, collect the necessary information, evaluate whether there are "unfair practices", injury and a causal link, and if this evaluation did not yield the expected results, it could terminate the investigation and then impose a "tariff increase", even though this increase might exceed the margin of dumping or subsidization, as may be the case. Even if it was determined that there was an unfair practice, injury and a causal link, an investigating authority might deem it appropriate not to impose an anti-dumping or countervailing duty and *replace it* with a straightforward tariff increase in order to avoid the expiry period of five years applicable to such measures. It would also be a dangerous incentive that could place WTO Members in the situation prior to the existence of the GATT 1947: soon, there could be a proliferation of measures that were not only obstacles to international trade but, quite simply, escaped from any multilateral control.

27. Lastly, as regards regional and multilateral policy, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, there would be inconsistency between the regional provisions on safeguard measures and the WTO provisions. Many WTO Members have managed to negotiate a harmonious balance between these provisions by retaining the rights and obligations of Article XIX and the AS at the regional level in order to apply the so-called global safeguards. This balance has been reached not only between the Dominican Republic and the complainants in the DR-CAFTA and Central America-DR agreements, it is a common mechanism in several regional agreements and is desirable because it makes safeguards disciplines at the regional level and those envisaged at the multilateral level consistent.

28. This harmonious balance, however, could be distorted if, in order to abstain from compliance with its regional commitments, a party to these regional agreements makes use of and benefits from the WTO provisions and then, when facing questions in the WTO and in order to abstain from compliance with its WTO commitments, this party goes back on itself and contends that the measure from which it benefited is not a safeguard measure in WTO terms. The result of the foregoing would be that, in order to contest the measures in question, a complainant would first have to do so using the dispute settlement mechanism in the regional agreement in question; wait for the argument of the defence that it is a WTO safeguards measure; and only after this has been accepted, may it bring the matter up at the WTO, where the defendant still has the possibility of arguing that it is not a safeguard measure in accordance with the AS because it does not involve suspension of obligations or concessions.

29. In the light of the foregoing, as a matter of trade policy, it would not be acceptable to allow a country to benefit in two ways from acts that are unrelated, particularly if these acts are committed at the expense of the interests and expectations in good faith on the part of other trading partners.

30. For all the reasons explained during this procedure, we hope that the Panel will objectively evaluate this dispute and find that the provisional and definitive measures are inconsistent with Article XIX and the AS (or alternatively with Articles I.1, II.1(a) and II.1(b) of the GATT) and that the other measures at issue are also inconsistent with Article XIX and the AS.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY COSTA RICA

WORLD TRADE ORGANIZATION

WT/DS415/7
22 December 2010

(10-6862)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Costa Rica

The following communication, dated 15 December 2010, from the delegation of Costa Rica to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Costa Rica requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Costa Rica and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Costa Rica requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Costa Rica the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

---

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Costa Rica notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Costa Rica considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Costa Rica considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Costa Rica requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Costa Rica hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY GUATEMALA

WORLD TRADE ORGANIZATION

WT/DS416/7
22 December 2010

(10-6864)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Guatemala

The following communication, dated 15 December 2010, from the delegation of Guatemala to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Guatemala requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Guatemala and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Guatemala requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Guatemala notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Guatemala considers that:

(a) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Guatemala considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Guatemala requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Guatemala hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-3

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY HONDURAS

WORLD TRADE ORGANIZATION

WT/DS417/7
6 January 2011

(11-0013)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Honduras

The following communication, dated 20 December 2010, from the delegation of Honduras to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 18 October 2010, Honduras requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Honduras and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Honduras requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] The duration of the provisional safeguard measure was 200 days. On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4]

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Honduras, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Honduras notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Honduras considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Honduras considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Honduras requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Honduras hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-4

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY EL SALVADOR

WORLD TRADE ORGANIZATION

WT/DS418/7
6 January 2011

(11-0014)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by El Salvador

The following communication, dated 20 December 2010, from the delegation of El Salvador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 October 2010, El Salvador requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

El Salvador and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, El Salvador requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for El Salvador, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

---

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

El Salvador notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, El Salvador considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, El Salvador considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, El Salvador requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, El Salvador hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX H

COMMUNICATION FROM THE PANEL

ANNEX H

COMMUNICATION FROM THE PANEL IN RESPONSE TO THE REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING

(12 May 2011)

On 18 April 2011, the Dominican Republic, as the responding party in the dispute, requested the Panel to issue a preliminary ruling determining that GATT Article XIX and the Agreement on Safeguards were not applicable to the present dispute and that this dispute was therefore devoid of purpose. The Dominican Republic also requested the Panel to suspend the present proceedings until it had issued its preliminary ruling and to postpone the deadlines provided for in the timetable, including the deadline for the Dominican Republic to present its first written submission.

On 21 April 2011, the Panel invited the complaining parties to respond in writing to the Dominican Republic's request and informed the parties that, for the time being, the deadlines provided for in the timetable would be maintained, including those for the Dominican Republic and the third parties to present their written submissions. On 21 April and 3 May 2011, the complaining parties submitted their response to the Dominican Republic's request for a preliminary ruling.

Having considered the written submissions of the Dominican Republic and the complaining parties, the Panel considers it inappropriate to make a preliminary ruling on whether GATT Article XIX and the Agreement on Safeguards are applicable to the present dispute. The Panel thus considers it inappropriate to suspend the proceedings and postpone the deadlines provided for in the timetable.

The Panel also notes the argument put forward by the Dominican Republic concerning the Panel's alleged lack of jurisdiction to rule in a dispute that relates to the violation of concessions granted outside the WTO sphere. The Panel notes the response of the complainants in this respect. Since the Dominican Republic did not request a preliminary ruling on this argument, the Panel considers it unnecessary to refer to it at the present time.

The Panel invites the parties to develop their arguments on the issues raised by the Dominican Republic. It will also consider with interest any arguments put forward by third parties in relation to these issues. The Panel reserves the right to submit questions to the parties and third parties on the issues raised by the Dominican Republic.

The Panel will rule on the issues raised by the Dominican Republic in its final report.

WORLD TRADE ORGANIZATION

WT/DS415/R/Add.1
WT/DS416/R/Add.1
WT/DS417/R/Add.1
WT/DS418/R/Add.1
31 January 2012
(12-0543)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Final Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS415/R-WT/DS416/R-WT/DS417/R-WT/DS418/R.

LIST OF ANNEXES

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT THE SPECIAL SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX H

COMMUNICATION FROM THE PANEL

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. This dispute relates to the provisional safeguard measure ("provisional measure") and the definitive safeguard measure ("definitive measure") imposed by the Dominican Republic on imports of polypropylene bags and tubular fabrics. Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") consider that these measures are inconsistent with the Agreement on Safeguards ("AS") and with the General Agreement on Tariffs and Trade 1994 ("GATT").

2. These measures give rise to serious concerns about the conduct of trade policy in the region of Central America and the Caribbean. They are being used by the Dominican Republic as an instrument to circumvent its regional commitments under the Free Trade Agreement between Central America and the Dominican Republic ("Central America-DR Agreement") and under the agreement between the Dominican Republic, Central America and the United States ("DR-CAFTA"). For that purpose, the Dominican Republic carried out an investigation in accordance with its domestic legislation on safeguard measures, the AS and the GATT. The resulting safeguard measures were notified to the WTO.

3. In carrying out the investigation and adopting the safeguard measure, the Dominican Republic acted in a manner inconsistent with various provisions of WTO law, including: (a) the determination of the domestic industry entails arbitrary definitions of the products under investigation, the failure to consider relevant evidence and the unjustified exclusion of certain domestic producers; (b) there is no determination as to unforeseen developments and the effect of the obligations incurred under the GATT that are alleged to have resulted in increased imports causing serious injury to the domestic industry; (c) the increase in imports is not of the nature or magnitude required by the AS for the application of safeguard measures; (d) the determination of serious injury and causal link relate to a domestic industry of the Dominican Republic which is in a favourable position and suffers no damage on account of imports, but rather, if anything, on account of other factors relating to the domestic industry's own performance or economic conditions in the Dominican Republic; (e) the measures have not been applied on a most-favoured-nation basis, as required by Article 2.2 of the AS (which calls for safeguard measures to be applied to all imports under investigation, irrespective of their source), for which reason an argument was made for the exclusion of specific imports pursuant to Article 9.2 of the AS, without observing the requirement of parallelism.

II. FACTUAL BACKGROUND

4. Tubular fabric is described as a woven fabric of synthetic polypropylene yarn, which is produced from: (i) polypropylene resin; (ii) calcium carbonate; (iii) colouring agent; (iv) flexographic inks; and (v) solvents.[1] The yarn is wound on to bobbins and fed to circular looms in order to give the fabric a tubular form. The tubular fabric constitutes the raw material or main input for the manufacture of polypropylene bags.

[1] Initial technical report of the DEI, page 10.

5. Polypropylene bags are described as bags or sacks for packaging. They are produced from bobbins or rolls of tubular fabric, which in turn are produced from resin and other minor components.[2] Polypropylene bags are used for the packaging of food, agro-industrial and industrial products.[3]

III. THE MEASURES AT ISSUE

6. The provisional measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It was applied from l April 2010 until 17 October 2010 (a period of 200 days). The provisional measure was not applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, nor irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from and/or originating in Mexico, Panama, Colombia and Indonesia.[4] The provisional measure is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 26 March 2010.[5]

7. The definitive measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It came into effect on 1 April 2010, for a period of 18 months until 21 April 2012.[6] The definitive measure is not being applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, or irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from/or originating in Mexico, Panama, Colombia and Indonesia.[7] The definitive measure is applied as an alternative duty to the MFN tariff and is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 8 October 2011.[8]

IV. THE FRAMEWORK FOR THE PANEL'S REVIEW

8. The objective assessment by a panel must have certain characteristics. It must be a ***critical and in-depth examination*** of the explanations provided by the investigating authorities[9], in which it determines whether those explanations are ***reasoned and adequate***, as well as ***explicit***.[10] This assessment may not consist of finding "support for [the] conclusions [of the investigating authorities] by cobbling together disjointed references scattered throughout a competent authority's report".[11]

---

[2] *Ibid.*

[3] Public notice of provisional measure; public notice of definitive measure.

[4] Addendum to Resolution CDC-RD-SG-061-2010, dated 16 March 2010, deciding on the application of provisional measures, Exhibit CEGH-6, second article.

[5] G/SG/N/7/DOM/1, G/SG/N/8/DOM/1, G/SG/N/11/DOM/1, Exhibit CEGH-18.

[6] Public notice of definitive measure.

[7] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 (final resolution), fourth article. Exhibit CEGH-9.

[8] (G/SG/N/7/DOM/1/Suppl.1, G/SG/N/8/DOM/1/Suppl.1 (Exhibit CEGH-19); G/SG/N/7/DOM/1/Suppl.1/Corr.1, G/SG/N/8/DOM/1/Suppl.1/Corr.1 (Exhibit CEGH-20); G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (Exhibit CEGH-21).

[9] Appellate Body Report, *US – Lamb*, paragraph 106.

[10] *Ibid.*; see also Appellate Body Report, *US – Steel*, paragraphs 287 and 297.

[11] Appellate Body Report, *US – Steel*, paragraph 326.

9. The basis for the assessment by a panel must be the findings, conclusions and analysis contained in the public reports of the authority.[12] This assessment cannot be based on *ex post facto* explanations.

V. LEGAL CLAIMS

A. THE DEFINITION OF THE DOMESTIC INDUSTRY IS INCONSISTENT WITH ARTICLES 3.1, 4.1(c), 4.2(c) OF THE AS

1. The Commission failed to establish adequately and reasonably that the imported products were like or directly competitive products

10. The Regulatory Commission on Unfair Trade Practices and Safeguard Measures (the "Commission") held that the imported product under investigation was a single product jointly comprising tubular fabric and polypropylene bags. However, the Commission and its Investigations Department (DEI) made a number of basic errors in arriving at this definition:

- Despite the fact that the interested parties put forward a variety of questions and factual information concerning the definition of the imported product, neither the Commission nor the DEI gave an adequate and reasoned explanation in response to those objections. The questions concerned pointed to the fact that tubular fabric and polypropylene bags are distinct products and cannot be considered to be the same product.

- The only reason for considering tubular fabric and polypropylene bags as the same product was the classification based on Note 2 in Chapter 63 of the Dominican Republic's Customs Tariff.[13] What would appear to underlie the interpretation given to Note 2 by FERSAN, the DEI and the Commission (to the effect that heading 6305 covers tubular fabric) is the presumption that a tubular fabric is equivalent to an incomplete or unfinished bag. However, that presumption is not explained in any of the relevant reports or resolutions. Moreover, according to the Directorate of Customs of the Dominican Republic, this Note is inconsistent with the Harmonized System Convention.[14]

11. In the absence of reasoned findings and conclusions on the definition of the product under investigation, the Commission defined the product investigated inconsistently with Articles 3.1, last sentence, and 4.2(c) of the AS and, in consequence, defined the domestic industry inconsistently with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

12. In addition, the Commission failed to make a valid determination that the domestic products were directly competitive with the imported products under investigation. The Commission considered the production of tubular fabric and polypropylene bags as the same domestic industry, without having demonstrated that both products, as an input and as final goods, respectively, are

[12] *Ibid*., paragraph 299.

[13] According to Note 2, as described by the Commission in its preliminary resolution, "heading 6305 (corresponding to bags and sacks for packaging) also covers tubular fabric for bags, in accordance with interpretative rule 2(a), (preliminary resolution, paragraph 31).

[14] Communication from the Directorate-General of Customs (DGA) dated 25 November 2009, folio 000089 in the file, Exhibit CEGH-13.

directly competitive with each other. Further, the Commission failed to make a determination with regard to the directly competitive domestic product having the same scope as the imported product, since the Commission considered tubular fabric and polypropylene bags manufactured from resin (excluding bags manufactured from tubular fabric) as the domestic product and, at the same time, considered tubular fabric and polypropylene bags in general (regardless of whether the latter were produced from resin) as the imported product. Finally, the Commission determined the directly competitive products without following the order of analysis established by the Appellate Body for that purpose[15], inasmuch as the Commission first defined the status of FERSAN as that of the domestic industry, and subsequently defined the directly competitive products.[16]

13. The Commission could not have validly identified the domestic producers constituting the domestic industry, and this therefore entails a violation of Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

2. The Commission improperly excluded producers of directly competitive domestic products

14. The Commission considered that the domestic industry is the industry producing tubular fabric and polypropylene bags made from resin[17] and that that status fell to the applicant, FERSAN.[18] However, the Commission reached that conclusion despite making two fundamental errors:

- It excluded out of hand specific categories of producers of the directly competitive domestic product on the basis of an erroneous interpretation of the term "producers" in Article 4.1(c) of the AS. The requirement of being a "producer" of tubular fabric and polypropylene bags *made from resin* makes the status of producer conditional on a specific production process. The Commission's interpretation is contrary to the interpretation given to the term "producers" in the context of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.[19]

- Even under their own interpretation of the term "producers" based on production from resin, the DEI and the Commission excluded domestic producers producing the domestic product from resin, such as the companies FIDECA and TITAN.

15. For these reasons, the Commission failed to define the domestic industry in a manner consistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

[15] Appellate Body Report, *US – Lamb* paragraph 87.

[16] Initial resolution, page 4: preliminary resolution, paragraphs 13 and 14 and 26-36; definitive resolution, paragraphs 18-23.

[17] Preliminary resolution, paragraph 13; preliminary report, pages 55-58; final resolution, paragraph 18; final report, pages 43-46.

[18] *Ibid.*

[19] Panel Report, *US – Lamb*, paragraph 7.69. See also, with regard to countervailing measures, the Panel Report in *Mexico – Olive Oil*, paragraph 7.192; and with regard to anti-dumping measures, the Panel Report in *EU – Salmon*, paragraph 7.114.

B. THE ABSENCE OF DETERMINATIONS ON UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT IS INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 3.1, 4.2(c) AND 11.1(a) OF THE AS

1. The Commission failed to demonstrate that there were unforeseen developments

16. The Commission produced no reasoned finding or conclusion to demonstrate the existence of unforeseen developments, as well as the logical connection between those developments and the increased imports alleged to have caused serious injury to the domestic industry.

17. In the initial report, the DEI transcribed the arguments of FERSAN to the effect that there had been unforeseen developments caused by the obligations assumed in the DR-Central America Agreement for which the total reduction period was ascertained from 2004.[20]

18. In the preliminary report, the DEI stated that FERSAN added to its claim further unforeseen developments such as: (i) the international economic crisis of 2008 and its repercussions on the regional economy, and (ii) the introduction of goods produced under regimes allegedly incompatible with the DR-Central America Agreement, for which reason a bilateral violation of that agreement would qualify as unforeseen developments.[21] The DEI also mentioned FERSAN's argument that, with regard to the economic/financial crisis of 2008, the DEI simply confined itself to affirming that this "had a significant impact on the economy of the region which has not spared the Dominican industry". Moreover, the DEI itself disregarded the relevance of the alleged violation of the 1998 bilateral agreement as an event brought about by unforeseen developments.

19. Lastly, in the final report, the DEI added a new aspect relating to China's accession to the WTO.[22] Moreover, no opinion was given as to whether that fact was not foreseen by the Dominican Republic in its capacity as a WTO Member, at the time of entering into its obligations under the GATT (of 1994).

20. The descriptive and scattered references to unforeseen developments in the initial, preliminary and final determinations fail to satisfy the standard of factual demonstration required by Article XIX:1(a) of the GATT in relation to Articles 3.1, last sentence, and 4.2(c) of the AS. Consequently, the DEI and the Commission acted inconsistently with those provisions.

2. The Commission failed to explain how the GATT obligations caused the increased imports of tubular fabric and polypropylene bags

21. The DEI and the Commission recognized the obligation under Article XIX:1(a) of the GATT to demonstrate the unforeseen developments and the effect of the obligations incurred under the GATT which resulted in increased imports.[23] The Appellate Body has confirmed that, in order to demonstrate the *effect* of obligations assumed under the GATT, it is necessary to demonstrate that specific obligations have been assumed.[24]

[20] Initial report, page 15.
[21] Preliminary report, pages 70-71.
[22] Final report, page 66. We take it that the reference to "China's incursion into the multilateral trading system" refers to China's accession to the WTO.
[23] Preliminary report, page 69; final resolution, paragraph 27; final report, pages 63-65.
[24] Appellate Body Report, *Argentina – Footwear*, paragraph 91; Appellate Body Report, *Korea – Dairy*, paragraph 84.

22. There is no finding in the reports or resolutions that identifies the GATT obligations alleged to have caused the increased imports, or that indicates how those obligations would have resulted in an increase in the imports concerned. This is inconsistent with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

C. THE DETERMINATIONS REGARDING INCREASED IMPORTS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1 AND 4.2(c) AND 6 OF THE AS

1. The Commission failed to demonstrate an increase in imports in absolute terms that was "recent enough, sudden enough, sharp enough, and significant enough"

23. The Commission reached the conclusion that the imports increased in absolute terms, causing serious injury to the domestic industry[25], despite having found that there was a "marked decrease"[26] in imports in absolute terms towards the end of the period. Nor did the Commission provide an adequate and reasoned explanation as to why, despite the absolute decrease towards the end of the period, it still considered that there had been an increase in imports. It was not demonstrated, therefore, that there had been an increase in imports that was sufficiently sudden, recent, sharp and significant to support the contention of an absolute increase in imports, in line with the interpretation given by the Appellate Body in *Argentina – Footwear*.[27]

24. Likewise, neither the DEI nor the Commission complied with the obligation to examine the upward trend of imports during the period investigated, since they only referred to a comparison of the absolute levels at the beginning and end of the period of investigation.[28]

25. Consequently, the DEI and the Commission failed to establish a reasoned conclusion regarding the increased imports in a manner consistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

2. The Commission failed to demonstrate an increase in imports relative to domestic production

26. The Commission reached the conclusion that imports increased in relative terms, causing serious injury to the domestic industry.[29] However, the Commission reached this conclusion despite having found that the relative share of imports in relation to domestic production fell steadily and uninterruptedly for most of the period of investigation.

27. The Commission's final conclusion is not explained in the light of the factual findings of the DEI. From 2007, imports clearly showed a steady and uninterrupted downward trend in relation to domestic production.

28. Consequently, the Commission's determination that there had been an increase in imports in absolute terms was inconsistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last

[25] Preliminary resolution, first article; final resolution, paragraph 31 and first article.
[26] Preliminary report, page 68; final report, page 61.
[27] Appellate Body Report, *Argentina – Footwear*, paragraph 131.
[28] Appellate Body Report, *US – Steel*, paragraph 354.
[29] Preliminary resolution, first article; final resolution, paragraph 31 and first article.

sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

D. THE DETERMINATIONS REGARDING SERIOUS INJURY, AND THE DEMONSTRATION OF CRITICAL CIRCUMSTANCES (WITH REGARD TO THE PROVISIONAL MEASURE) ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, 4.1(a), 4.2(a), 4.2(c) AND 6 OF THE AS

29. In both the preliminary and the final determination, the Commission concluded that there was serious injury despite having committed numerous errors:

- It failed to carry out a disaggregated and complete analysis regarding the many segments of the domestic industry, as required by the Appellate Body.[30] Therefore, no separate analysis was provided regarding the production of tubular fabric and regarding the production of polypropylene bags.

- In the preliminary determination, the Commission failed to evaluate all relevant factors listed in Article 4.2(a) of the AS, since it omitted from its analysis the factor relating to the productivity of the domestic industry.

- In the preliminary and final determinations, the Commission concluded that there was serious injury despite the fact that the relevant indicators showed the contrary or were inadequately evaluated.

- Neither the DEI nor the Commission provided an adequate and reasoned explanation of the "critical" nature of the circumstances that allegedly justified the provisional measure in accordance with Article 6 of the AS.

30. The Commission's determination of serious injury to the domestic industry was therefore inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 5 of the AS, as well as with Article XIX:1(a) of the GATT.

E. THE CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, LAST SENTENCE, 4.2(a), 4.2(c) AND 6 OF THE AS

31. The Commission imposed the provisional and definitive measures on the basis of its conclusion that imports had increased, "causing" serious injury to the domestic industry of fabrics and bags.[31] In reaching this conclusion, the Commission was guilty of two serious omissions:

- It failed to demonstrate by means of a relevant analytical method the causal relationship between the alleged increase in imports and the alleged serious injury to the domestic industry. The Commission confined itself to making assertions with

[30] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 195, 213, 214; Appellate Body Report, *Mexico – Rice*, paragraphs 180-187.

[31] Preliminary resolution, first article; final resolution, first article.

regard to causation[32], but it failed to provide an adequate and reasoned explanation in this respect.

- It failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS. In violating this obligation, the Commission failed to show that the harmful effects caused by factors other than imports would not be attributed to the imports under investigation.

32. As a result, the Commission determined the causal link between the imports and the serious injury to the domestic industry inconsistently with Articles 2.1, 3.1, last sentence, 4.1(a), and 4.2 of the AS and Article XIX:1(a) of the GATT, as well as with Article 6 of the AS, with regard to the provisional measure.

F. THE MEASURES AT ISSUE VIOLATED THE REQUIREMENT OF PARALLELISM AND ARE INCONSISTENT WITH ARTICLES 2.1, 2.2, 3.1, 4.2, 6 AND 9.1 OF THE AS

33. In accordance with the requirement of parallelism, if a Member decides to exclude certain imports from the scope of a measure, the investigating authorities must satisfy themselves that those imports are also excluded from the evaluations relating to substantive aspects in which they were the subject of analysis.[33]

34. In the analysis of imports, the Commission considered all imports that entered the Dominican Republic between 2006 and 2009.[34] Thus, in the preliminary and final resolutions, the Commission decided to apply the provisional and final measures, respectively, to *all* imports of tubular fabric and polypropylene bags under headings 5407.20.20 and 6305.33.90 of the Dominican Republic's Customs Tariff.[35] Nevertheless, in the same resolutions, the Commission decided to exclude imports from Mexico, Panama, Colombia and Indonesia from the scope of both measures, on the ground that they collectively accounted for 1.21 per cent of the imports investigated.[36]

35. As a result, the Commission decided to apply the provisional and definitive measures inconsistently with Articles 2.1, 2.2, 3.1, last sentence, 4.2(a), 4.2(b), 4.2(c), 6 and 9.1[37] of the AS (the latter provision in relation to the provisional measure).

[32] Preliminary resolution, paragraph 47; preliminary report, page 88; final resolution, paragraphs 37 and 38.

[33] Appellate Body Report, *US – Steel*, paragraph 441. Appellate Body Report, *US – Tubular Goods*, paragraph 181, with citation from *US – Lamb*, paragraph 103.

[34] Preliminary report, Annexes I and II: final report, Annexes I and II.

[35] Preliminary resolution, second article, as amended by the amending preliminary resolution: final resolution, second article.

[36] Preliminary resolution, fourth article, as amended by the amending preliminary resolution; final resolution, fourth article.

[37] According to the statistics on imports, imports from Thailand amounted to 0.32 per cent of total imports during the period under investigation, and thus constituted less than 3 per cent of imports. It was therefore necessary to exclude imports from Thailand from the scope of the measures at issue, in accordance with Article 9.1 of the AS. However, the resolutions do not exclude Thailand from the scope of the measures at issue.

G. THE DOMINICAN REPUBLIC ACTED INCONSISTENTLY WITH ARTICLE XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

36. The Commission imposed the definitive measure without timely notification and without affording Members with a substantial interest in the products under investigation an opportunity for consultations as provided in Article 12.3 of the AS and Article XIX:2 of the GATT. Nor did the Commission provide an opportunity to obtain an adequate means of trade compensation in accordance with Article 8.1 of the AS and Article XIX:2 of the GATT.

VI. REASONS FOR REQUESTING SUGGESTIONS CONCERNING IMPLEMENTATION OF POSSIBLE RULINGS AND RECOMMENDATIONS BY THE PANEL

37. The complainants request the Panel, on the basis of Article XIX:1 of the DSU, to suggest that the Dominican Republic immediately put an end to the definitive measure. This request is also based on the previous practice followed by other panels.[38]

38. The magnitude and number of the errors committed by the DEI and the Commission in carrying out their investigation lead to a situation analogous to that obtained in the above-mentioned cases, so that the only way in which the Dominican Republic could properly apply the possible rulings and recommendations of the Panel would be through the immediate revocation of the definitive safeguard measure.

VII. REQUEST FOR RULINGS AND RECOMMENDATIONS

39. On the basis of the foregoing, the complainants request the Panel to issue the following findings and rulings: (i) the provisional measure and the definitive measure are inconsistent with Article XIX:I(a) of the GATT and Articles 2.1, 2.2, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the AS; and (ii) the Dominican Republic acted inconsistently with Article XIX:2 of the GATT and Articles 8.1 and 12.3 of the AS.

40. Pursuant to the provisions of the second sentence of Article 19.1 of the DSU, the complainants request the Panel to make suggestions for the application of its rulings and recommendations with regard to the definitive measure.

[38] Panel Report, *Argentina – Poultry*, paragraph 8.7; Panel Report, *Guatemala – Cement II*, paragraph 9.6; Panel Report, *Mexico – Steel Pipes and Tubes*, paragraph 8.12.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. This dispute concerns the Dominican Republic's imposition of a 38 per cent tariff on imports of polypropylene bags and tubular fabric by means of a provisional measure and, subsequently, a definitive measure. These measures are contested by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") in the light of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and various provisions in the Agreement on Safeguards ("AS").

2. As the course of action followed by the Dominican Republic did not, however, result in suspension of the obligations undertaken with respect to these products, or withdrawal or modification of concessions, neither Article XIX nor the AS are applicable to the measures contested by the complainants. Consequently, there are no grounds for this dispute and the present procedure before the Panel cannot continue.

3. If the Panel does decide that Article XIX of the GATT and the AS do apply to the measures contested, the Dominican Republic affirms, as a preliminary, that several claims are adequately identified in terms of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and are not covered by the Panel's terms of reference, or that the complainants have not been able to make a prima facie case for any violation. This is the case for the complaint based on the alleged omission of determinations of unforeseen developments and the effect of GATT obligations, an omission which, in the view of the complainants, resulted in inconsistency in the determinations of the increase in imports, serious injury and the causal link.

4. Likewise, the Panel's terms of reference do not include Article 4.1(a) of the AS as the legal basis for the complaint concerning the causal link, which was not included in the request for consultations. For the same reason, the complaint concerning the obligation to reach agreement on a means of trade compensation, based on Article 8.1 of the AS, does not fall within the Panel's terms of reference. Lastly, the complainants failed to elaborate on some complaints in their first written submission, and it is therefore the Dominican Republic's understanding that they have been withdrawn. This is the case for the complaints in points (h), (i), (l) and (m) of the request for the establishment of a panel submitted by the complainants.[1] The last three complaints (points (i), (l) and (m)) are not included in the Panel's terms of reference either.

5. If the Panel should decide to consider the measures at issue in the light of the GATT and the AS, the Dominican Republic affirms that, contrary to what is asserted by the complainants, the measures at issue fully comply with the GATT and the AS, particularly as regards the following:

- The definition of the domestic industry;
- determinations of the existence of unforeseen developments and the effect of the obligations incurred under the GATT;
- determinations of the increase in imports, the serious injury, the critical circumstances and the causal link;

[1] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.

- the parallelism requirement; and
- notice of the measure and the holding of consultations.

6. Contrary to the contention by the complainants, the definition of the domestic industry is based on valid determinations of the imported product under investigation and the directly competitive domestic product. As to the **imported product under investigatio**n, the complainants question the treatment of tubular fabric and polypropylene bags as a single product to be investigated. The previous reports on which the complainants base their case, however, provide little, if any, guidance. The paragraphs mentioned in the Appellate Body Report on *US – Lamb* refer to the inclusion of certain actors in the domestic industry, without dealing with determination of the imported product under investigation or the likeness of the lamb meat produced in the United States and that imported. The facts and the products under consideration are, moreover, very unlike each other.

7. The other Appellate Body Report mentioned, *Chile – Price Band System*, only mentions in this connection *US – Lamb* and, what is more, relates to a situation in which the Chilean authorities had only made an implicit affirmation of likeness or direct competition, simply providing an *ex post facto* explanation. This is in direct contrast to the present case, where there are many and detailed findings about the product under consideration and the directly competitive product in the initial report and resolution, the public notice of initiation, the preliminary report and resolution, as well as the final report and resolution of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic ("the Commission"). It is difficult to claim, therefore, that the considerations of the Appellate Body in that case are relevant to the present case. The reports and resolutions cited also show that, contrary to what is asserted by the complainants, the Commission and the Investigation Department (DEI) took into account comments by certain importers, exporters, and government authorities, even when they did not respond to them.

8. The complainants' analysis provides no conclusive legal grounds based on Article XIX of the GATT or on the AS to indicate that treating tubular fabric and polypropylene bags as a single product for the purposes of the investigation is inconsistent with the covered agreements. Prior Reports by Panels in *US – Softwood Lumber V, EC – Salmon (Norway)* or *Korea – Certain Paper* found that the Anti-Dumping Agreement did not provide any guidance on the way in which the product under consideration had to be determined, reasoning that also applies to the AS.

9. As regards the **determination of the directly competitive domestic product**, it is clear that it was based on what FERSAN, the petitioner in the procedure before the Commission, stated in its request for initiation of the investigation. It is necessary to emphasize, however, that the Commission's reports and resolutions show that numerous factors were evaluated affirming that the domestic product and the product under consideration were directly competitive. The complainants also contend that there must be symmetry between the definition of the product under consideration and the definition of the domestic product. This symmetry would be lacking as the product has been defined as "produced from resin". The technical reports and the resolutions show, however, that the criterion "produced from resin" was not a priori imposed when defining the directly competitive product, but is the logical result of the exclusion from the definition of the domestic industry of those manufacturers which import the product under consideration. Furthermore, the complainants do not indicate the legal basis from which the alleged obligation to respect symmetry in the definition of products that are in direct competition derives.

10. The complainants also put forward an order for the analysis which the Dominican authorities should have followed in their reports, based solely on a finding by the Appellate Body in its Report in *US – Lamb*, without indicating how such an obligation could be derived from Article 3.1, last sentence, or Article 4.2(c) of the AS. Even though the Dominican Republic questions the existence of such an obligation, it should be noted that the logical sequence of the preliminary and definitive reports that are an integral part of the respective resolutions are consistent with the order of analysis put forward by the complainants.

11. In definitive, the Dominican authorities defined the product under consideration as "polypropylene bags and tubular fabric" and the directly competitive domestic product as "polypropylene bags and tubular fabric"; the direct competition relationship is obvious and, furthermore, similar practices in anti-dumping investigations have been approved in a manner consistent with the Reports of the various Panels, as is the case for *US – Softwood Lumber V*, *Korea – Certain Paper* or *EC – Salmon (Norway)*. As the definitions of the product under consideration and the directly competitive domestic product are valid, they constitute an appropriate basis for the Dominican authorities' determination of the domestic industry.

12. With regard to the **determination of the domestic industry**, the Dominican authorities pointed out that three producers declared themselves to be interested parties, in two of which most of the output used imported tubular fabric, in other words, the product under consideration. Those manufacturers which import the product under consideration were excluded, in accordance with Law No.1-02, whose consistency with the AS was not questioned by the complainants, following an adequate and reasoned explanation. Consequently, there was no a priori exclusion of certain categories of producer, and the procedure was not based on an erroneous interpretation of the word "producers", there is no violation of Article 4.1(c) or other provisions of the AS in this sense, and the selection of FERSAN as the only component of the domestic industry is valid. Moreover, independently of the exclusion of certain manufacturers in the present case, the Dominican Republic points out that it reserves the right to require a minimum level of processing or value added before an economic actor can be deemed to be a "producer" within the meaning of Article 4.1(c) of the AS, so the idea that whoever cuts and sews tubular fabric is considered to be a "producer" of polypropylene bags is highly questionable.

13. With regard to unforeseen developments pursuant to Article XIX of the GATT, the Dominican Republic considers that their determination does not constitute a binding obligation as a prerequisite for the application of a safeguard measure. This understanding is based on the fact that the AS does not contain such an obligation and therefore derogates from Article XIX in this sense. This interpretation is corroborated by the intention of the States which negotiated the Uruguay Round, by the text, and the exhaustive nature of the AS, the legislation of other WTO Members, and by ambiguous declarations and the absence of clear guidelines in this respect on the part of the WTO's decision-making bodies. For these reasons, the Dominican Republic also expresses its disagreement with the prior Reports of the Appellate Body in *Argentina – Footwear* and *Korea – Dairy*, which require proof of the unforeseen developments that resulted in increased imports.

14. Despite the foregoing, if the Panel decides that proof of unforeseen developments constitutes a binding obligation, both the Preliminary Technical Report and the Final Technical Report contain detailed findings and conclusions in this regard, mentioning the tariff reduction process with the entry into force of the DR-CAFTA and the DR-Central America Treaty. Reference is also made to the form submitted by FERSAN, in which the rising cost of producing polypropylene bags and tubular fabric is addressed, as well as the increase in energy costs, which harmed its competitive position and opened the way to use of less costly imports. The Dominican authorities therefore provided a reasoned and

adequate explanation of the unforeseen developments whose effect was an increase in imports, complying with Article XIX.1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

15. Regarding the effect of GATT obligations, the Dominican Republic gave a 40 per cent tariff concession for products classified under subheadings 5407.20.20 and 6305.33.90, concerning polypropylene bags and tubular fabric. The Dominican Republic therefore complied with this requirement in Article XIX of the GATT to the effect that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations, including tariff concessions, in accordance with the words of the Appellate Body in its Report on *Argentina – Footwear*.

16. Concerning the increase in imports, the Commission's findings indicated a recent enough, sudden enough, sharp enough and significant enough increase, both in qualitative terms and qualitatively, to cause serious injury. Despite the existence of this increase, there was a 14.68 per cent drop recorded in the last year of the investigation period, whereas the increase was 50.06 per cent over the whole period investigated, also taking into account the aforementioned drop. According to the findings of the Dominican authorities, this decrease towards the end of the investigation period was more of an incidental and temporary nature as it was caused by the lower rate of economic growth in the Dominican Republic in 2009, which saw a decrease of 30.03 per cent in total imports, while during this period, imports of the product under consideration fell by a lesser amount. In addition, the Commission determined that there was a recovery in imports of tubular fabric and polypropylene bags in early 2010.

17. Moreover, contrary to what is asserted by the complainants, the Dominican Republic did not limit itself to comparing the end points in the investigation period but undertook a point-by-point analysis for each period separately, taking into account both the rate and the volume of the increase. It thus fully complied with the obligation to analyse the trend in imports, as specified by the Appellate Body in *Argentina – Footwear*. The Commission also conducted an analysis of the relative increase in imports, finding an increase in 2007 alone. Nevertheless, having previously proven the existence of an increase in absolute terms, it complied with Article 2.1 of the AS, which requires an increase in absolute terms or relative to domestic production, compliance with one of these requirements being sufficient. The claims by the complainants that there was no increase in imports or that its existence was not determined in accordance with Articles 3.1, last sentence, 4.2(c) and 11(a) of the AS should therefore be rejected.

18. With regard to the determination of serious injury, the claim that the Commission did not undertake a separate and comprehensive analysis of the numerous segments of the domestic industry should be rejected as there is no positive obligation in the AS requiring that serious injury be evaluated by segment or separately. It clearly emerges from the reports, moreover, that there was a joint analysis of the polypropylene bags and tubular fabric segments, and that the analysis was not limited to the production of bags alone, as contended by the complainants. Both the wording of the technical reports and the figures provided by the domestic industry (which are expressly mentioned in the reports) show that the investigating authority proceeded on the basis of aggregate data for polypropylene bags and tubular fabric.

19. Regarding the alleged failure to evaluate the "productivity" indicator in the preliminary determination, the Dominican Republic affirms that a finding by the Panel in this regard would clearly not be necessary in order to ensure a positive settlement of the dispute inasmuch as the measure is no longer in effect and has been replaced retroactively by the final determination, about which the complainants have not made the same claim. In addition, the trend in this indicator compares

production in volume and value terms with the number of employees, and both indicators are to be found in the preliminary report. When the complainants require that productivity be evaluated under a specific heading in the preliminary report, they are adopting a purely formalist approach, which is obviously inappropriate for a preliminary determination. In fact, Article 6 of the AS, concerning provisional measures, indicates that Article 4.2 of the AS applies to the investigation subsequent to the provisional measure and not to the preliminary determination, inasmuch as the obligation to evaluate all indicators of injury concerns the "subsequent investigation" after the adoption of a preliminary measure.

20. With regard to proof of serious injury, the Dominican authorities found conclusive indications of significant overall impairment, based on consistent and growing losses suffered by the domestic industry, the negative impact on increases in inventories, the relative contraction in the value of production, negative cash flow and the problems encountered by the domestic industry in gaining a larger market share despite its large investment and loss-making selling prices. In definitive, the investigating authority gave an adequate and reasoned explanation of the serious injury suffered by the domestic industry, so the Dominican Republic fully complied with Article XIX.1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the AS.

21. Concerning the alleged failure to prove the critical nature of the circumstances that justified the imposition of the provisional measure, the Dominican Republic sees no need to reach findings regarding the provisional measure, which has expired and been replaced by the definitive measure. Even so, the investigating authority proved the existence of injury difficult to repair in terms of Article 6 of the AS if no provisional measure was adopted. The investigating authority noted, among other indicators, a 206 per cent decline in financial performance and a 199 per cent increase in inventories.

22. Regarding the claims relating to the alleged failure to determine a causal link, many of the complainants' claims are biased. They mention that the domestic industry's share of domestic apparent consumption showed a sharp rise, whereas in fact it only exceeded its 2006 share in 2009, but remained below it in 2007 and 2008. The same applies to their interpretation of the share of imports, which only from 2009 onwards and by selling at a loss on the part of FERSAN, managed to fall below the 2006 levels. The same also applies to the alleged downward trend in imports, whereas they increased steadily from 2006 to 2008, with only an incidental and temporary drop in 2009.

23. The complainants also allege that the DEI and the Commission did not act consistently with the AS in attributing the financial losses to the imports, although it is shown in the preliminary and final reports that, if it had not been for the flow of imports, the domestic industry could have coped with the loans it contracted through economies of scale resulting from its investment without suffering financial losses. Likewise, the technical reports, by showing how imports replaced sales of domestic products, indicated how the increase in inventories is attributable to the increased imports. As regards cash flows, the decrease follows FERSAN's strategic decision to keep its prices low and its production levels high, precisely because of the pressure exercised by imports, so the negative trend in this factor as well has to be attributed to the imports, contrary to what is contended by the complainants.

24. The argument that injury caused by competition from the domestic producers excluded was wrongly attributed to the imports should be rejected as well. The reason why these producers were excluded was, precisely, because they imported the product under consideration, so the injury resulting from competition on their part was directly caused by the imports. It should, therefore, be found that the investigating authority conducted an appropriate analysis of the causal link between the increased imports and the serious injury to the domestic industry.

25. Regarding the parallelism requirement, the Dominican Republic points out that the final resolution provides for the application of a 38 per cent tariff, whereas the DEI had found that a tariff of 40 per cent was justified. Bearing in mind also that the imports not excluded from the investigation only represent 1.21 per cent of total imports, the Dominican Republic maintains that the findings in the technical reports did not vary, given this infinitesimal share.

26. Concerning the notice of the measure in accordance with Article XIX:2 of the GATT, this provision requires that the safeguard measure be notified to the Committee on Safeguards immediately after and not before its adoption, so the notice of the measure to the Committee only three days after the decision to impose it should be considered as immediate notice in conformity with Article XIX:2 of the GATT and Article 12 of the AS.

27. It also emerges clearly from the final report that the Dominican authorities gave adequate opportunity for consultations pursuant to Article 12.3 of the AS. The final technical report contains evidence of a large number of communications and notifications between the Commission and the complainants, as well as the holding of a public hearing on 12 May 2010. It cannot, therefore, be validly claimed that adequate opportunities for consultations were not given to Members having a substantial interest.

28. As regards the complainants' claim concerning Article 8.1 of the AS, which requires the maintenance of a substantially equivalent level of concessions and other obligations to that existing, it simply cannot be asserted that such a level was not maintained as, even after the imposition of the measure, the tariffs were lower than the bound tariffs, which set a ceiling of 40 per cent.

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX B-1

EXECUTIVE SUMMARY OF THE SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia is participating in this dispute because of its systemic interest in the application of Article XIX of the General Agreement on Tariffs and Trade (GATT 1994) and the Agreement on Safeguards (AS) and in the belief that safeguards are vital tools for the management of a country's trade policy and that, in practice, their use should not be prohibited but allowed, in conformity with Members' obligations under the aforementioned agreements.

2. In this statement, Colombia expresses its views on the six points set out below.

II. APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND OF THE AS TO THE PRESENT DISPUTE

3. In a request for a preliminary ruling the Dominican Republic asked the Panel to rule on the non-applicability of Article XIX of the GATT 1994 and of the AS with respect to the measures at issue in this dispute. The complainants responded to this request by rejecting the claims of the Dominican Republic. On 12 May 2011, the Panel sent the parties and third parties a communication stating that it considered it inappropriate to decide this point by means of a preliminary ruling and that it would pay special attention to the arguments of the third parties. In the light of the above and without prejudice to the decision already taken by the Panel concerning the timing of its ruling on the applicability of Article XIX of the GATT and the AS to the present dispute, Colombia is taking this opportunity to comment on certain aspects of the Dominican Republic's request for a preliminary ruling.

4. Specifically, the Dominican Republic suggests that Article XIX of the GATT 1994 and the AS are not applicable to the measures challenged by the complainants. Colombia believes that the main reason put forward by this Member is that the 38 per cent tariff surcharge does not exceed its bound tariff of 40 per cent for tariff headings 5407.20.20 and 6305.33.90, and that consequently there is no suspension, in whole or in part, of tariff concessions, as indicated in Article XIX of the GATT 1994.[1]

5. With respect to the possibility of pleading the non-applicability of certain provisions within the context of a preliminary ruling, the Dominican Republic argues that paragraph 15 of the Panel's working procedures in this case establishes the possibility of requesting preliminary rulings, at the latest, with the respondent's first written submission.[2] The Dominican Republic then connects this procedure with the provisions of Articles 7.1, 7.2 and 11 of the DSU.[3] The Dominican Republic develops its arguments on the basis of a panel's obligation to make an objective assessment of the facts of the case, the applicability of the covered agreements and the conformity of the former with the latter, and asserts that it would be more useful to settle this question of the applicability of

[1] Dominican Republic, Request for a preliminary ruling, Section 3.4, paragraphs 37-46.
[2] Paragraph 15 of the Panel's working procedures.
[3] Dominican Republic, Request for a preliminary ruling, Section 3.1.

Article XIX of the GATT 1994 and of the AS by means of a preliminary ruling, this being a preliminary and global matter.[4]

6. Colombia notes, in particular, two arguments made by the complainants in response to the request for a preliminary ruling: (i) Article XIX of the GATT 1994 and the AS are applicable to the measures in question, considering that the latter were the result of an investigation initiated, conducted and concluded under their provisions and those of the national safeguards legislation; moreover, the measures were notified in conformity with the procedures laid down for safeguard measures[5]; and (ii) preliminary rulings deal with procedural issues and not matters of substance.[6]

7. The parties to this dispute disagree about what issues can form the subject of a preliminary ruling. Colombia notes that preliminary rulings arose out of a practice among Members which has been endorsed by panels and the Appellate Body[7]; however, there is no provision in the DSU that regulates this practice. On the other hand, Articles 11, 12, 13, 14, 15 and 16 of the DSU contain specific provisions regarding panel reports. In this connection, Colombia notes that the general rule is to issue a panel report and exceptionally a preliminary ruling. Colombia also notes the relevance to the analysis of this case of certain rules identified by panels and the Appellate Body. In particular, it wishes to draw attention to the panel report in *Canada – Aircraft* in which, in relation to a discussion over jurisdiction, the panel declined to give an advance ruling, as requested by one of the parties (Canada), considering that there was no requirement in the DSU or any established practice that indicated an obligation to rule on a preliminary issue in advance of the panel report.[8] Moreover, neither does paragraph 15 of the Panel's working procedures specify when the Panel should rule on preliminary issues.

8. For Colombia, the rules that can be extracted from certain panel and Appellate Body reports show that it is incumbent on whoever raises the preliminary question to demonstrate that the issuing of a ruling in advance of the final report is justified.[9] In this connection, it should be borne in mind that the general rule is for rulings to be made in the final report.

9. In Colombia's opinion, if a Member has stated that it is implementing a procedure aimed at applying a safeguard measure and its actions throughout the investigation and notification process have been consistent with the application of a measure of this kind, then it would seem that to maintain, during the course of panel proceedings, that its measure was not really a safeguard measure would be inconsistent with its previous course of action. Within this context, it is relevant to consider the application of Article 3.10 of the DSU and in particular the reference to the spirit of good faith in which the parties should engage in the proceedings.

---

[4] Dominican Republic, Request for a preliminary ruling, Section 3.2.

[5] Objection of the complainants to the request for a preliminary ruling, Section III.B.3 and 4, paragraphs 90, 124, etc.

[6] Objection of the complainants to the request for a preliminary ruling, Section III.A.1 and 3, paragraphs 14 to 21, 24 to 34.

[7] The complainants acknowledge this in paragraph 14 of their written objection to the request for a preliminary ruling and the Dominican Republic does so in paragraphs 13 and 27 of its request for a preliminary ruling.

[8] Panel Report in *Canada – Aircraft*, paragraph 9.15.

[9] Considering that the argument used in this case is that of the usefulness of the preliminary ruling for settling the present dispute, it is clear that this usefulness must actually be specifically identified and demonstrated, not just mentioned. This conclusion is reinforced by the Appellate Body ruling in *EC – Hormones* (paragraph 152), where an objection raised by a party had to be sufficiently specific to enable the Panel to address it.

III. THE DETERMINATION OF THE PRODUCT BEING IMPORTED AND THE DOMESTIC PRODUCT IN THE AS

10. The complainant claims that the Dominican Republic: (i) failed to establish correctly that the products imported and the domestic products were like or directly competitive[10] and (ii) wrongly interpreted the term "producers" as used in the AS, with the result that domestic producers of directly competitive products were excluded.[11] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the AS was not properly established.

11. Colombia notes that the legal problem facing this Panel is specifically centred on determining whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the Dominican Republic's obligations under the AS, especially with respect to the concept of "domestic industry".

12. A fundamental element used in defining the domestic industry is the determination of the product under investigation, from the outset of the investigation, since the scope given to this term defines the context for determining where the "like or directly competitive products" are to be situated, while also forming the basis for identifying the domestic producers that make up the domestic industry and the data needed to analyse the injury. An incorrect identification of the products under analysis would necessarily lead to an inappropriate definition of the domestic industry. Furthermore, according to the findings of the Appellate Body in *US – Lamb*, the identification of the products which are like or directly competitive is the first step in determining the scope of the "domestic industry".[12]

13. Like the complainants, Colombia is of the opinion that this particular order of analysis established in cases of anti-dumping investigations[13] should be applied to safeguard cases *mutatis mutandis*, since it is the rational order for any safeguard investigation, insofar as both its main purpose and its scope revolve around the *product under investigation*.

14. Colombia agrees with the observations made by the Dominican Republic in paragraph 138 of its first written submission, where it points out that there are no previous determinations concerning how the product under investigation should be defined under the AS and that there are no express rules on this point. However, it does not agree with the Dominican Republic that this question is completely unregulated by the AS and that there are therefore no clear criteria for defining how this finding should be made.

15. Colombia suggests that a systemic interpretation of the AS under Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) would yield sufficient evidence to establish the meaning of "product under investigation" and how that product should be identified in a safeguard investigation. The second paragraph of the preamble to the AS expressly states that the Agreement clarifies and reinforces Article XIX of the GATT 1994 entitled "Emergency Action on

[10] First written submission of the complainants, paragraphs 77-80.
[11] First written submission of the complainants, paragraphs 160-163.
[12] Appellate Body Report in *US – Lamb*, paragraph 87.
[13] Footnote 89 of the first written submission of the complainants reads as follows:
"We note that in disputes concerning anti-dumping duties at least two panels have confirmed that the starting point in the analysis of likeness is the definition of the imported product under investigation, so that this product can be compared with the domestic product. See Panel Reports in *US – Softwood Lumber V*, paragraphs 7.152 and 7.153, and *EC – Salmon*, paragraph 7.51."

Imports of Particular Products" (emphasis added), which suggests that the product it is intended to investigate should be delimited and established using some sort of criterion. Likewise, Article 2.1 of the AS specifies that "a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities […]" (emphasis added). This Article is even more emphatic in stipulating that the scope of the product on which the safeguard measure is imposed (which should be taken to mean the product under investigation itself) is fairly limited, inasmuch as it uses the term *product* in the singular and not in the plural, as in other parts of the AS. If an exegetical interpretation of the ordinary meaning of the words is applied, in accordance with the rule envisaged in paragraph 1 of Article 31 of the Vienna Convention, Article 2.1 of the AS would appear to indicate that the product under investigation could only be a single product and could not comprise multiple products. However, Colombia considers that, in fact, the product under investigation can be made up of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the systemic interpretation of the AS.

16. Colombia considers that the rule in Article 4.1(c) of the AS also applies to the determination of the product under investigation because of the close relationship between the definition of the domestic industry and the product investigated. If it were not accepted that the products investigated ought to be, at least, like or directly competitive, it would not be possible to make this finding with respect to domestic products since it would be impossible to compare dissimilar categories of products. The present case involves precisely this situation: although it might perhaps be said that the imported tubular fabric competes with or is like the domestic product, the same cannot be said about the imported tubular fabric and domestic polypropylene bags.[14] Insofar as the standard of Article 4.1(c) requires the domestic and imported products to be like or directly competitive, if the "product investigated" contained products which in themselves were not, it would be impossible to prove the existence of such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry for the purposes of the investigation.

17. Colombia notes that the Dominican Republic has not specified any criterion for establishing how several products, i.e. tubular fabric and polypropylene bags, can be included in a single category. Apparently, this finding is based solely on considerations of a customs nature, as follows from Section 3 et seq. of the final report of the Investigations Directorate of the Dominican Republic's Regulatory Commission on Unfair Trade Practices and Safeguard Measures.[15] Acceptance of this interpretation would run contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[16], inasmuch as it would enable products of virtually any kind to be included as a single product in an investigation, whatever the relationship between them. Under this interpretation products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules that can be applied, a result that is manifestly absurd and contrary to the AS.

[14] As will be explained later, Colombia considers that the argument according to which inputs are part of a production chain is not sufficient to demonstrate a relationship of likeness or direct competitiveness.

[15] Final Technical Report of the DEI, dated 13 July 2010.

[16] In the following cases the Appellate Body referred to the application of the principle of effectiveness in the interpretation of treaties in the course of settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

18. In Colombia's opinion, the Panel should reject the Dominican Republic's argument according to which, for reasons of a customs nature, the two products should be treated as the same product investigated.[17]

19. Colombia concludes that the grouping together of tubular fabric and polypropylene bags in a single category of products under investigation, without making an analysis of likeness or direct competitiveness between the products in question, is inconsistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

IV. THE "UNFORESEEN DEVELOPMENTS AND EFFECT OF THE OBLIGATIONS" REQUIREMENT UNDER ARTICLE XIX:1(a) OF THE GATT 1994 AND THE AS

20. With respect to this point, according to the complainants, the Dominican Republic was unable to demonstrate the existence of unforeseen developments, insofar as it failed to give a reasoned explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis, and (iii) the entry of China into the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the Dominican authorities' explanations of why these events were unforeseen developments are inadequate.[18]

21. In Colombia's opinion, the Panel should take into account the fact that although there are certain requirements which any Member of the WTO must satisfy in order to prove this element, the standard cannot be construed in such a way as to preclude the application of the said developments de facto by establishing requirements that are difficult to satisfy in practice.

22. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to permit a clear and workable application of the concept, for the purpose of enabling the application of safeguard measures under the conditions envisaged in Article XIX of the GATT 1994 and the AS.

V. ASSESSMENT OF THE INCREASE IN IMPORTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AS

23. The complainants and the Dominican Republic are at one in accepting that the requirements that must be met in determining the nature of the increase in imports for the purposes of Articles XIX:1(a) of the GATT 1994 and 2.1 of the AS are those outlined by the Appellate Body in its report in *Argentina – Footwear*.[19] Moreover, they also agree that, as decided by the Appellate Body[20],

[17] See footnote 35.

[18] Paragraph 197 of the first written submission of the complainants reads as follows:
"The Commission recognized the obligation incurred under Article XIX:1(a) of the GATT to the effect that, in order to apply a safeguard measure, it is necessary to show that the unforeseen developments and the effect of the obligations incurred under the GATT are giving rise to increased imports which are causing serious injury to the domestic industry. However, the Commission did not establish any finding or well-founded conclusion that would demonstrate the existence of unforeseen developments, or a logical connection between those developments and the increased imports said to have caused serious injury to the domestic industry. This omission by the Commission is therefore incompatible with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS."

[19] First written submission of the complainants, paragraph 241, and first written submission of the Dominican Republic, paragraph 309.

in evaluating the increase the authorities should take the trend in imports during the period of investigation into account rather than concentrate on one or more points.[21]

24. Nevertheless, the complainants consider that the Dominican Republic's assessment of the behaviour of imports during the period of investigation does not satisfy the above-mentioned legal requirements and is therefore at odds with Articles XIX:1(a) of the GATT 1994 and 2.1, 3.1, 4.2(c) and 6 (solely with respect to the preliminary determination) of the AS.[22] For its part, the Dominican Republic claims to have made a proper assessment of the increase in imports, which showed that that increase was sudden, sharp, significant and recent.[23]

25. Colombia considers that certain additional elements could help to clarify how, in this specific case, the increased imports criteria should be taken into account. Colombia therefore wishes to draw attention to the following aspects mentioned in panel and Appellate Body reports: (i) the increase in imports should be assessed on a case-by-case basis[24]; (ii) the analysis of the increase in imports should be conducted with a view to establishing whether it is such as "to cause or threaten to cause serious injury to the domestic industry", that is to say, the increase in imports should be analysed in the light of all the actions of the investigating authority, in the same way as the determination of injury and the causal link between the increased imports and the said injury[25]; (iii) the increase should be assessed over a specific period of time and, rather than a comparison of the end points, should involve consideration of the trends in imports over the period investigated.[26] Moreover, special emphasis should be placed on analysing the data from the end of the period of investigation.[27]

26. Within this context, Colombia disagrees with the complainants' contention that there is a general rule according to which a decrease towards the end of the period of investigation indicates that there has not been an absolute increase in imports.[28] As the analysis should be made on a case-by-case basis, there could be a case in which a decline in imports towards the end of the period might not be significant and from a consideration of the whole of the increase during the period of investigation it might be concluded that there was in fact an absolute increase in imports, despite their decreasing towards the end of the period.[29]

27. Colombia considers that in examining whether the Dominican Republic made a proper and reasoned assessment of the increase in imports, the Panel should take into consideration the general assessment criteria described above.

---

[20] Appellate Body Report in *Argentina – Footwear*, paragraphs 129 and 130, and *US – Steel Safeguards*, paragraph 354.

[21] First written submission of the complainants, paragraph 243, and first written submission of the Dominican Republic, paragraph 326.

[22] First written submission of the complainants, paragraphs 27-284.

[23] First written submission of the Dominican Republic, paragraphs 302-343.

[24] Appellate Body Report in *US – Steel Safeguards*, paragraph 360.

[25] Appellate Body Report in *US – Steel Safeguards*, paragraphs 345 and 346.

[26] Appellate Body Reports in *Argentina – Footwear*, paragraph 129, and *US – Steel Safeguards*, paragraph 354.

[27] Appellate Body Reports in *US – Lamb*, footnote 88 to paragraph 138, and *US – Steel Safeguards*, paragraph 370.

[28] First written submission of the complainants, paragraph 247.

[29] This was the analysis made by the Panel in *US – Steel Safeguards* with respect to increased imports of rebar, paragraphs 10.224-10.225.

28. In addition, although in the light of the findings of an increase in imports and the reasons given by the Dominican Republic in the Final Technical Report it might be concluded that the Dominican Republic made a reasoned assessment of that increase[30], Colombia has doubts about whether the analysis was properly conducted, since following the determination of the product investigated, the Dominican Republic restricted its assessment to the cumulative increase in imports of tubular fabric and polypropylene bags.[31] That is to say, it did not specify which of the two products it was whose imports accounted for the increase revealed in the above-mentioned trends. Therefore, following the line of reasoning in Section III concerning the close relationship between the determination of the product under investigation and its treatment in the AS, the conclusion concerning the increase in imports and its causal link with the alleged injury is inadequate inasmuch as it is not made clear which imports increased: imports of tubular fabric or imports of polypropylene bags.

29. As this analysis is linked with that described in Section III, Colombia considers that if the Panel were to conclude that the conditions described in that section for two products to be grouped together in a single category and under the same safeguard investigation were satisfied, the conclusion with respect to this point should be consistent with that determination concerning the definition of the product investigated. In Colombia's opinion, the Panel could make the AS much clearer by taking the rule incorporated in Article 3.6 of the Anti-Dumping Agreement into account in the cumulative analysis.

VI. DEFINITION OF THE CONCEPT OF "CRITICAL CIRCUMSTANCES" IN ARTICLE 6 OF THE AS

30. The complainants consider that the Dominican Republic has failed to show the "critical" nature of the circumstances invoked in justification of the imposition of the provisional measure.[32] For its part, the Dominican Republic considers that a finding concerning this measure would not help to achieve a positive settlement of the dispute and that in any case it has explained the critical circumstances and assessments required to establish the need for the provisional measure.[33] Colombia considers that the debate between the parties affords a unique opportunity for the Panel to rule on a question which has not yet formed the subject of panel or Appellate Body rulings, namely: what should be understood by "critical circumstances" in Article 6 of the AS.

31. In Colombia's opinion, based on a systemic interpretation of Article 6 of the AS[34], the Panel could take into consideration as factors that make the damage "difficult to repair" aspects of the economic reality of the enterprise such as: its stocks, its sales, its profit margins and the price of like products, which should be compared with the most recent fluctuations (in the last six months) in imports, in order to determine whether, if no provisional measure were imposed, the damage would be difficult to repair.

---

[30] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, viewed at: http://www.cdc.gob.do/docweb/informes/Informe%20Tecnico%20Final%20-Publico-.%20Caso%20SG%20Tejido%20Tubular%20y%20Sacos%20de%20Polipropileno.pdf.

[31] First written submission of the Dominican Republic, paragraph 307.

[32] First written submission of the complainants, paragraphs 370-379.

[33] First written submission of the Dominican Republic, paragraph 409.

[34] That is to say, taking into account the fact that the purpose of safeguard measures is to counteract the serious injury or threat of serious injury that increased imports may cause to domestic producers of like or directly competitive products. Article XIX:1(a) of the GATT 1994.

VII. NOTIFICATION AND CONSULTATION REQUIREMENTS WITH RESPECT TO SAFEGUARD MEASURES IN THE AS

32. According to the complainants, the Dominican Republic imposed the definitive measure without making timely notification or providing Members having a substantial interest in the products investigated with an opportunity to hold the consultations mentioned in Article 12.3 of the AS and Article XIX:2 of the GATT 1994. Likewise according to the complainants, the Dominican Republic failed to afford an opportunity to obtain adequate means of trade compensation under Article 8.1 of the AS and the Article XIX:2 of the GATT 1994.[35]

33. Colombia considers that the failure of a Member to hold adequate prior consultations before imposing a safeguard measure is a violation of the procedure laid down in Article 12.3 of the AS. Moreover, the non-notification of a safeguard measure before it is imposed is contrary to Article XIX:2 of the GATT 1994.

VIII. CONCLUSION

34. Colombia considers that the present case raises important questions concerning the application of Article XIX of the GATT 1994 and the AS. Although not taking a final position on all aspects of the substance of the dispute, Colombia requests the Panel carefully to review the scope of the claims of the parties in the light of the observations made in this submission. Colombia reserves the right to make additional comments in the section of the first hearing with the parties and the Panel in which third parties are allowed to participate.

[35] First written submission of the complainants, paragraphs 46-460.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE UNITED STATES

I. THE COMPLAINANTS PROPOSE THE WRONG APPROACH FOR DETERMINING CAUSATION OF SERIOUS INJURY

1. Article 2.1 of the Safeguards Agreement states that a Member may apply a safeguard measure only if the Member finds that the product in question is being imported "in such increased quantities ... as to cause or threaten to cause serious injury to the domestic industry". In their first written submission, Costa Rica, El Salvador, Guatemala, and Honduras (collectively "complaining parties") argue that, under Article 2.1, the increase in imports of the product in question must be "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry.[1] The complaining parties rely upon the Appellate Body's report in *Argentina – Footwear (EC)* in support of their interpretation of Article 2.1.[2] As shown below, and contrary to the complaining parties' assertion, the Safeguards Agreement does not require such an approach to determine the causation of serious injury under Article 2.1.

2. In *United States – Steel Safeguards (AB)*, the Appellate Body referenced the same passage from *Argentina – Footwear (EC)* that the complaining parties rely upon in their first written submission. The Appellate Body clarified that the statement in question was about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement" and that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e. their consideration of serious injury/threat and causation)".[3]

3. Consequently, there is no basis for the complaining parties' assertion that Article 2.1 of the Safeguards Agreement requires the competent authorities to conduct a separate analysis of the volume of imports to determine whether it is "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry before proceeding to the rest of the analysis. It is sufficient to find that they have increased, and then address through the remainder of the analysis whether those increased imports cause serious injury or threat of serious injury.

II. THE METHOD OF PRODUCTION CAN BE RELEVANT FOR DETERMINING THE LIKE OR DIRECTLY COMPETITIVE PRODUCT

4. Article 4.1(c) of the Safeguards Agreement defines the "domestic industry" for purposes of the injury analysis as the "producers ... of the like or directly competitive products". The complaining parties argue that the Dominican Republic incorrectly defined the like or directly competitive product under Article 4.1(c) in the course of its investigation. They argue that the competent authority for the Dominican Republic, the Department of Investigations of the Regulatory Commission for Unfair

[1] Complaining Parties' First Written Submission, paragraphs 239-248.

[2] Complaining Parties' First Written Submission, paragraph 241.

[3] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted 10 December 2003, paragraph 346 ("*United States – Steel Safeguards (AB)*").

Trade Practices and Protection Measures of the Dominican Republic ("DEI"), defined the like or directly competitive product based, in part, on the production process used - i.e. tubular fabric and polypropylene sacks made *from virgin resin*.[4] According to the complaining parties, DEI did not treat polypropylene sacks made from a different production process (e.g. polypropylene sacks made from tubular fabric rather than virgin resin) as a like or directly competitive product. The complaining parties contend that the exclusion of producers who did not use virgin resin from the domestic industry is inconsistent with Article 4.1(c) of the Safeguards Agreement.

5. The United States takes no position regarding the adequacy of the Dominican Republic's approach to this issue in the challenged investigation, especially in light of the fact-intensive nature of the analysis. It is helpful, however, to consider certain observations regarding the determination of like or directly competitive products under the Safeguards Agreement.

6. In *United States – Lamb Meat (AB)*, the Appellate Body concluded that while the focus of the like or directly competitive product inquiry must be on the identification of *the product*, the production process may provide information on the like or directly competitive nature between products.[5] The Appellate Body further observed that "{w}e can ... envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products".[6]

7. Indeed, one can envisage a scenario in which the production process is highly relevant to the like or directly competitive nature between two products due to the qualities the process imparts on the product. For example, customers may demand items produced via a certain method because only that method guarantees the requisite level of quality or adherence to a given tolerance level. Under this scenario, products manufactured according to a different process may not be like or directly competitive.

III. THERE IS NO GENERAL RULE REGARDING THE IMPACT OF DECREASES IN IMPORTS TOWARD THE END OF THE PERIOD OF INVESTIGATION

8. Under Article 2.1 of the Safeguards Agreement, the competent authority must determine that there are increased quantities of imports, either absolute or relative to domestic production, in order to apply a safeguard measure. In paragraph 247 of their first written submission, the complaining parties argue that, as a general rule, a decrease toward the end of the period of investigation is an indication that there has been no absolute increase in imports.[7] According to the complaining parties, where the record shows a decline in imports toward the end of the period of investigation, only exceptional circumstances justify a finding by the competent authority of increased absolute imports under Article 2.1. The complaining parties purport to base their argument on the Appellate Body's report in *United States – Steel Safeguards (AB)*. But *United States – Steel Safeguards (AB)* does not support the complaining parties' proposed approach, and their position is otherwise unsupportable under the Safeguards Agreement.

[4] Complaining Parties' First Written Submission, paragraph 129.

[5] Report of the Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paragraph 94, footnote 55 ("*United States – Lamb Meat (AB)*").

[6] *United States – Lamb Meat* (AB), fn. 55.

[7] Complaining Parties' First Written Submission, paragraph 129.

9. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports, nor does it place special emphasis on the level of imports at the end of the period of investigation. Article 2.1 states that the competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production ... as to cause or threaten to cause serious injury to the domestic industry". Article 4.2(a), in turn, states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms." Neither article provides any reference to the period of time near the end of the period of investigation, nor otherwise indicates any special role for any particular period of time within the overall period of investigation. Accordingly, there is no textual basis in the Safeguards Agreement for the complaining parties' position.

10. Moreover, in *United States – Steel Safeguards (AB)*, the Appellate Body has explicitly rejected the argument on decreased imports toward the end of the period of investigation now made by the complaining parties. In that dispute, the Appellate Body stated that "Article 2.1 does *not* require that imports need to be increasing at the time of the determination" and that it did "*not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'".[8] Indeed, for a number of the products in question in *United States – Steel Safeguards (Panel)*, the Panel found that the investigating authority's determination of imports in such increased quantities was consistent with Article 2.1 notwithstanding a decline in imports toward the end of the period of investigation.[9]

11. In sum, the Appellate Body did not establish in *United States – Steel Safeguards (AB)* a general rule regarding decreases in imports toward the end of the period of investigation. The Appellate Body found, rather, that given the magnitude of the decrease in imports toward the end of the period of investigation for certain (but not all) products in that particular dispute, the competent authority had not provided a reasoned and adequate explanation of how the facts supported its determination that the product was "being imported in … such increased quantities".[10]

12. Accordingly, the complaining parties' assertion that there is a general rule regarding the impact of decreases in imports toward the end of the period of investigation is erroneous.

IV. IMPORTS EXEMPTED FROM APPLICATION OF THE SAFEGUARD MEASURE UNDER ARTICLE 9.1 ARE NOT EXEMPTED FROM THE INJURY AND CAUSATION DETERMINATIONS UNDER ARTICLE 2.1

13. In their first written submission. the complaining parties also allege that the Dominican Republic violated the requirements of "parallelism" under Articles 2.1 and 2.2 of the

[8] *United States – Steel Safeguards (AB)*, paragraph 367.

[9] Report of the Panel, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, paragraph 10.224 (rebar), paragraph 10.233 (welded pipe), and paragraph 10.253 (stainless steel bar) ("*United States – Steel Safeguards (Panel)*"). The Appellate Body did not review the section of the Panel's report regarding increased imports of rebar, welded pipe, and stainless steel bar.

[10] *United States – Steel Safeguards (AB)*, paragraph 368.

Safeguards Agreement.[11] The principle of parallelism derives from the use of the same text - "product ... being imported" - to describe both the investigation conducted by the competent authorities under Article 2.1 of the Safeguards Agreement and the authority to impose a safeguard measure under Article 2.2. The Appellate Body explained that "{i}n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in Articles 2.1 and 2.2."[12]

14. The complaining parties assert that (1) the DEI exempted imports from developing country Members (i.e. Mexico, Panama, Colombia, and Indonesia) from application of the safeguard measure under Article 9.1 of the Safeguards Agreement[13], but that (2) the DEI included imports from these countries in its analysis of injury and causation under Article 2.1.[14] According to the complaining parties, the fact that imports from these four countries were exempted from the application of the safeguard measure, but included in the injury and causation analysis, violates the requirements of parallelism between analysis of injury and application of the safeguard measure. The complaining parties' argument is fatally flawed, however, because it compares Article 2.1 of the Safeguards Agreement with Article 9.1, which is not included in the parallelism requirement.

15. Article 9.1 of the Safeguards Agreement states that "{s}afeguard measures *shall not be applied* against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned".[15] Thus, while Article 9.1 acts as an exception to the obligation under Article 2.2 of the Safeguards Agreement to apply safeguard measures to "a product being imported regardless of its source", it does not create an exception from the obligation under Article 2.1 to reach a determination with regard to all of the product. Assuming that the Dominican Republic found that each of the four countries accounts for less than 3 per cent of total imports and that it also found that the four countries collectively (and any other developing countries that individually account for less than 3 per cent of total imports) do not account for more than 9 per cent of total imports, there is no support in the text of the Safeguards Agreement for the complaining parties' argument that exemption from application of the safeguard measure for imports from developing countries under Article 9.1 also necessitates exclusion from the injury and causation analysis under Article 2.1.

16. Indeed, the Panel in *Argentina – Footwear (Panel)* affirmed that an exemption from application of the measure pursuant to Article 9.1 of the Safeguards Agreement does not mandate exclusion from the analysis under Article 2.1. The Panel observed that "Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures *where the injury and causation fully reflect the effects of those imports from developing countries*".[16] In deciding not to extend the exemption from application of the safeguard measure to the injury and causation analysis, the Panel reasoned "that where the

[11] Complaining Parties' First Written Submission, paragraph 449.

[12] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, paragraph 96 ("*United States – Wheat Gluten (AB)*").

[13] *See* Complaining Parties' First Written Submission, paragraph 54.

[14] Complaining Parties' First Written Submission, paragraph 446.

[15] Emphasis added.

[16] Report of the Panel, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121, paragraph 8.85 ("*Argentina – Footwear (Panel)*") (emphasis added).

Safeguards Agreement provides for an exception it does so in clear and explicit terms" and that no such exemption was provided for in Article 2.1.

17. Accordingly, there is no basis for the complaining parties' assertion that the requirements of parallelism under Articles 2.1 and 2.2 of the Safeguards Agreement apply to imports exempted from application of the safeguard measure by operation of Article 9.1.

ANNEX B-3

SUBMISSION OF NICARAGUA

I. INTRODUCTION

1. Nicaragua welcomes the opportunity to present its views in the proceedings initiated by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") with respect to the consistency of the provisional safeguard measure and the definitive safeguard measure imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20 and 6305.33.90 of the Dominican Republic Tariff, with the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards ("AS")*.

2. Nicaragua has decided to participate as a third party in this dispute because of its systemic interest in the correct interpretation of the provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")*.

3. As a general matter, Nicaragua is of the view that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as is made clear by the title of Article XIX of the GATT 1994. In the Appellate Body's words, "Article XIX is clearly, and in every way, an extraordinary remedy".[1] It should only be invoked when all of the strict requirements set out in WTO law have been fulfilled, in particular because reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters.

4. Nicaragua will limit its submission to the Dominican Republic's request for a preliminary ruling by the Panel ("Request") and to the issue of failure to comply with the requirement of parallelism of the measures at issue, and reserves its right to comment at the third party session on other issues of legal interpretation which it considers to be of particular interest.

II. REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING ON THE NON-APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

5. The Dominican Republic has requested the Panel to issue a preliminary ruling on the non-applicability of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards* ("AS") with respect to the measures at issue in this dispute.

[1] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, paragraph 86 ("*Korea – Dairy*"); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, paragraph 93 ("*Argentina – Footwear*").

6. In support of its Request, the Dominican Republic relies, *inter alia*, on the following claims and assertions:

Paragraphs 37 and 38, in which it claims that the legal provision in GATT Article XIX:

"is worded conditionally and consists of two parts: a first part establishing a series of conditions ("If ... any product is being imported ... in such increased quantities...") that must be met in order that a WTO Member may take the course of action described in the second part (the ... party shall be free ..."). The remainder of Article XIX sets forth a series of procedural requirements and disciplines that must be observed in the event that such a measure is adopted. In other words, if the conditions in the first part are satisfied, the WTO Member is authorized under the preceding provision to adopt the course of action outlined in the second part, provided that it complies with the disciplines and procedural requirements contained in the remainder of Article XIX. If the first part is not fulfilled, no such authorization will exist.

Conversely, if the course of action described in the second part of Article XIX:1(a) of the GATT is not adopted, there is no need to meet the conditions set out at the beginning of this provision or to comply with the disciplines and procedural requirements in the remainder of Article XIX. The course of action which may, or may not, be authorized is to suspend the obligation, in whole or in part, in respect of the product, or to withdraw or modify the concession."

Paragraphs 39 and 40, in which it asserts that:

"The course of action adopted by the Dominican Republic through the measures at issue clearly does not constitute any of the actions that may be authorized under Article XIX of the GATT, because neither of the two measures, preliminary or definitive, nor the underlying investigation involved a suspension, in whole or in part, of the obligations in respect of such product. Nor was there any modification or withdrawal of the concession."

"Given that the measures challenged by the complainants make no use of the authorization established in the last part of Article XIX:1(a), the conditions, disciplines and procedural requirements established in the Article do not apply to the measures in question."

Paragraph 46, in which it concludes with the assertion that:

"the Dominican Republic has not suspended an obligation, in whole or in part, nor has it modified or withdrawn a concession through the measures challenged by the complainants. Hence, Article XIX of the GATT does not apply to the measures challenged by the complainants."

Paragraphs 47 and 48, in which it claims and concludes that:

"As stated in Article I of the AS:

"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.

Given that the measures at issue did not consist of any of those envisaged in Article XIX of the GATT, as explained above in the light of the ordinary meaning of the terms of Article XIX and its object and purpose, the rules established in the AS do not apply."

7. In order to justify the above, the Dominican Republic applies the definitive measure as an alternative duty to the MFN tariff, and this is not a measure that would have been provided for in the country's Schedule of Concessions, presumably in order to circumvent its WTO obligations.

8. Nicaragua submits that the Request of the Dominican Republic does not find support in, and is rather contrary to, *Article XIX of the General Agreement on Tariffs and Trade 1994* and the *Agreement on Safeguards* and unduly impairs the rights conferred upon Members by the *WTO Agreement*. Accordingly, it respectfully requests that the Panel reject the Dominican Republic's request.

9. Moreover, we consider that the *sui generis* application of the definitive safeguard measure by the Dominican Republic undermines the security and predictability of the multilateral trading system and that these should be assured by the WTO dispute settlement system.

III. FAILURE TO COMPLY WITH THE REQUIREMENT OF PARALLELISM OF THE MEASURES AT ISSUE

10. Nicaragua agrees with the complainants that, although Mexico, Panama, Colombia and Indonesia are excluded from the scope of the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic, the investigating authority of the Dominican Republic, i.e. the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, failed to conduct a new analysis of increased imports, the alleged serious injury and causality. Neither the reports nor the preliminary and final resolutions gave any reasons as to why it was not necessary to observe parallelism between the scope of the provisional and definitive measures and the scope of the imports under investigation.

11. We consider that the Appellate Body's statement in *US – Line Pipe* applies in this regard: ... "establish[ing] explicitly" implies that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[1] "… To be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[2]

[1] Appellate Body Report, *US – Line Pipe* (WT/DS202/AB/R), paragraph 181.
[2] *Ibid*., paragraph 194.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SUBMISSION OF PANAMA

I. INTRODUCTION

1. Panama intervenes in this dispute because it considers that the definitive safeguard measure of the order of thirty-eight per cent (38%) *ad valorem* imposed by the Dominican Republic on imports of tubular fabric and polypropylene bags, classified under subheadings 5407.20.20 and 6305.33.90 of the Fourth Amendment to the Dominican Republic's Customs Tariff, is inconsistent with the Agreement on Safeguards (AS) of the World Trade Organization (WTO).

2. The Dominican Republic failed to consider important elements of procedure set forth in the AS; the obligation stipulated in Articles 12.3 of the AS and XIX:2 of the GATT to give timely notice and hold prior consultations with Members having a substantial interest in the measure was not fulfilled, nor were opportunities provided to obtain adequate means of trade compensation, as established in Articles 8.1 of the AS and XIX:2 of the GATT.

3. Panama also considers that there are flaws in the investigation conducted by the Investigating Authority of the Dominican Republic, particularly in the approaches to the following: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination of increased imports; (iv) determination of injury; and (v) causal link between the imports and injury, as will be discussed below.

II. NO OPPORTUNITIES WERE PROVIDED FOR PRIOR CONSULTATIONS AND REACHING AN UNDERSTANDING ON TRADE COMPENSATION

4. The Dominican Republic initiated a safeguards procedure, which was notified to the Committee on Safeguards pursuant to Article 12.1(a) of the AS[1], without any opportunity being provided for prior consultations, as stipulated in Article 12.3 of the AS, with a view to reaching an agreement on trade compensation as required by Article 8.1.

5. The Dominican Republic failed to meet the obligation to notify the definitive safeguard measure in a timely fashion so as to allow Members having a substantial interest in the matter to hold prior consultations, as provided for in Article 12.3 of the AS.

III. INCONSISTENCY IN THE DEFINITION OF DOMESTIC INDUSTRY

6. The Dominican Republic defined the product as both the input (tubular fabric) and the final product (polypropylene bag), indicating that both are of the same nature and that they should be considered as a single product. In so doing, the Investigating Authority failed to prove in its investigation that the input and the final product are directly competitive or like products, as established by the Appellate Body in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*. The Dominican Republic thus defined the domestic industry in a manner inconsistent with Articles 4.1(c) and 2.1 of the AS.

[1] G/SG/N/6/DOM/3 of 14 January 2010.

7. As regards the domestic industry, in defining producers the Investigating Authority of the Dominican Republic failed to consider the provisions of the AS inasmuch as it: (a) excluded from the domestic industry other producers that qualified at the same level as those assessed in the investigation; and (b) for the purposes of applying the safeguard measure, it included the producers of the inputs (tubular fabric) and the producers of the final product (polypropylene bags) without distinguishing between the two.

IV. FAILURE TO DEMONSTRATE UNFORESEEN DEVELOPMENTS RESULTING IN INCREASED IMPORTS SUCH AS TO CAUSE SERIOUS INJURY

8. There was no indication that the Investigating Authority of the Dominican Republic demonstrated conclusively and with sufficient evidence that unforeseen developments directly affecting the domestic industry had occurred, nor did it successfully demonstrate a logical connection between the conditions set forth in Article XIX of the GATT and those unforeseen developments.

V. LACK OF DEMONSTRATION OF A RECENT, SUDDEN, SHARP AND SIGNIFICANT INCREASE IN IMPORTS

9. There is no supporting determination in the investigation to show that the imports underwent a recent, sudden, sharp and significant increase.

10. There is no indication, in the conclusions reached by the Investigating Authority of the Dominican Republic at the end of the import investigation, of a demonstration that the increase in imports displayed the characteristics of being sudden, sharp, recent and significant, as required under the AS for the purposes of substantiation. Therefore the measures imposed are, in our view, inconsistent with Articles XIX of the GATT and 2.1, 4.2(c), 6 and 11.1(a) of the AS.

VI. LACK OF PREMISES FOR THE DETERMINATION OF SERIOUS INJURY

11. Panama considers that the Investigating Authority of the Dominican Republic did not carry out a detailed analysis for purposes of determining the serious injury sustained by the domestic industry, nor did it produce objective and positive evidence in support of its investigation or the application of the safeguard measures adopted.

12. The lack of substantiation by the Dominican Republic of the factors corroborating serious injury is inconsistent with Articles 4.2(a) and 2.1 of the AS.

VII. LACK OF JUSTIFICATION OF CAUSATION

13. The Investigating Authority of the Dominican Republic provided no justification for the determination of serious injury and causation in respect of a domestic industry that enjoys a favourable position; moreover, it provided no supporting evidence to show that the industry is currently being affected by the alleged increase in imports, nor did it identify other factors that might have affected the domestic industry and that bear no direct relation to the imports.

14. Panama considers that in the investigation conducted by the Investigating Authority of the Dominican Republic there were flaws in establishing the causal link between the allegedly unforeseen increase in imports and the alleged injury to the domestic industry, since it was not demonstrated that the imports were a sufficient and necessary cause for the alleged serious injury sustained by the

domestic industry, particularly with respect to the financial losses and alleged decline in production and consumption of the domestic product.

VIII. CONCLUSION

15. The Panel is requested to examine the actions of the Investigating Authority of the Dominican Republic as regards compliance with the procedures set forth in the AS and in particular the consultation procedure established in Article 12.3 in conjunction with Article 8.1 of the Agreement; and to review the Dominican Republic's failure to comply with the provisions of the GATT and the AS, as shown in this document.

ANNEX B-5

SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in the proceedings of the dispute. Turkey is participating in this case because of its systemic interest in the interpretation and implementation of the Agreement on Safeguards. Turkey would like to highlight the importance of imposing such measures in conformity with WTO obligations and its basic principles.

2. In this submission, Turkey is not in the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements. Turkey wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

3. Therefore, with this submission, Turkey aims to contribute to the Panel's analysis by interpreting the relationship between two provisions of the Agreement on Safeguards; Article 2.2 which determines the general rule as to how safeguard measures are to be applied and Article 9.1 which encloses special and differential rules to be applied to developing countries.

II. APPLICATION OF SAFEGUARD MEASURES TO DEVELOPING COUNTRIES

4. As is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source.

> "Article 2: Conditions
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source."

5. Article 2.2 sets forth an important obligation that a safeguard measure be imposed on the imported product "irrespective of its source". In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

6. On the other hand, Article 9.1 of the Agreement on Safeguards offers special and differential treatment to developing countries. Article 9.1 of the Agreement reads as follows:

> "Article 9: Developing Country Members
>
> 1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

7. According to the wording of Article 9.1 of the Agreement on Safeguards, safeguard measures shall not be applied to a developing country Member on the account that two conditions exist. These are (i) the share of imports of a certain product originating from the developing country shall not exceed 3 per cent among the imports of that product by the country applying the safeguards measure and (ii) the amount of imports from developing country Members which meet the first condition shall account for less than 9 per cent of the total amount of imports of that certain product by the country applying the safeguard measure.

8. On the basis of this interpretation, Article 9.1 provides a mandatory "special and differential treatment" in favour of developing countries. Turkey would like to emphasize that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply "special and differential treatment" to all developing countries that meet the conditions provided above. Therefore, Turkey believes that safeguard measure shall not be applied to all developing countries, whose total export to that country is below the threshold level of 3 per cent. In this respect, pursuant to the Article 9.1 of the WTO Safeguard Agreement; Turkey, as a developing country, shall be excluded from this measure.

III. CONCLUSION

9. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review the comments stated in this submission, in interpreting the Agreement on Safeguards.

ANNEX B-6

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. The Complainants appear to argue, among other things, that the *Agreement on Safeguards* applies with regard to any measures which are aimed at preventing or remedying injury caused by an increase in imports. For the reasons set out below, the European Union considers that this is indeed a necessary condition for the application of the *Agreement on Safeguards*, but not a sufficient condition in itself.

2. The Dominican Republic's request must be examined in the light of Article 1 of the *Agreement on Safeguards*. Article 1 makes it clear that the *Agreement on Safeguards* is concerned only with the application of measures of the type "provided for in Article XIX of GATT 1994", to the exclusion of any other safeguard measures.

3. In the European Union's view, the determination of whether a measure belongs to the category of safeguard measures "provided for in Article XIX of GATT 1994" is an objective determination, to be made having regard to each measure's structure and design. The subjective intent of the Member applying the measure may provide a useful indication, but can never be dispositive. Otherwise, the applicability of the *Agreement on Safeguards* would be left to the applying Member's own discretion.

4. The European Union considers that a safeguard measure is of the type "provided for in Article XIX of GATT 1994" where it has the following two characteristics: (1) it purports to remedy injury caused by an increase in imports; and (2) it involves the suspension of an obligation or the withdrawal or modification of a concession under the *GATT 1994*. By denying the relevance of the second of the above-mentioned characteristics, the Complainants fail to recognize the specific function of Article XIX within the *GATT 1994*, which, as made clear by the last part of Article XIX:1(a), is to authorise emergency action that would be otherwise prohibited by the *GATT 1994*.

5. Should the Complainants' views prevail in this dispute, any Member would ever consider in its interest to subject itself to the strictures of the *Agreement on Safeguards* in order to take measures which it could, in any event, adopt without the requirements of that agreement, simply by refraining from characterizing those measures as a response to an increase in injurious imports.

6. Furthermore, the European Union is concerned about the possible unintended consequences of the Complainants' interpretation. For example, the trade laws of many WTO Members, including the European Union, provide for the possibility of suspending the tariff preferences accorded under a Free Trade Area ("FTA") Agreement or unilaterally as part of a GSP scheme in response to injury caused by an increase in the preferential imports concerned. Those measures are often referred to as "safeguard measures" under the relevant FTA agreements or applicable domestic laws. But it is generally understood that they fall outside the scope of Article XIX of *GATT 1994* because they do not involve the suspension of any obligation or the withdrawal or modification of any concessions under the *GATT 1994*.

7. First, in addressing the Dominican Republican's request it is relevant to consider also Article 11.1(a) of the *Agreement on Safeguards*. The terms "shall not take or seek" indicate that the applicability of the obligations provided in the *Agreement on Safeguards* is not conditional upon a Member having effectively taken a safeguard measure of the type "provided for in Article XIX of GATT 1994". The *Agreement on Safeguards* governs the conduct of investigations opened with a view to the possible imposition of a safeguard measure of the type provided for in Article XIX of *GATT 1994*, even if no such measure is eventually imposed as a result of the investigation.

8. Second, the measures at issue do involve the suspension of certain GATT obligations of the Dominican Republic in so far as they do not apply with regard to all imports of like products originating in all WTO Members. The Dominican Republic has exempted from their application certain developing countries whose imports do not exceed the thresholds set out in Article 9.1 of the *Agreement on Safeguards*. This exemption involves a manifest "suspension" of the Dominican Republic's obligations under Article I:1 of the *GATT 1994*.

9. On the other hand, the European Union does not see merit in the Complainants' allegation that the measures at issue also amount to a suspension of the Dominican Republic's obligations under Article II:1(b) of the *GATT 1994*. Clearly, the intention of the Dominican authorities was to increase the rate of the applicable "ordinary customs duty", rather than applying "other charges or duties" on top of the ordinary customs duty. Contrary to what the Complainants appear to argue, the fact that the measures in dispute apply in place of the pre-existing MFN ordinary duty, rather than cumulatively with that duty, does not support, but rather undermines their claim under Article II:1(b); and the same is true of their argument based on the fact that the measures in dispute are applied in parallel with the pre-existing duty rate, which continues to be applicable to imports originating in developing countries excluded from the scope of the measures in dispute.

II. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

10. Whilst not entering into the reasons provided by the investigating authority to treat both the final product (i.e. polypropylene bags) and the input (i.e. tubular fabric) as one single product under investigation, the European Union considers that Article 4.1(c) of the *Agreement on Safeguards* does not require an assessment of likeness or direct competition when defining the product under investigation.

11. The *Agreement on Safeguards* does not contain a definition of product under investigation or product concerned. It addresses the application of safeguard measures to "a product" in general and "irrespective of its source". The absence of a definition indicates the intention of the negotiators to leave Members with a wide discretion when defining the product concerned.

12. The definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. In this respect, Article 4.1(c) requires that "domestic industry" is composed of producers of the like or directly competitive domestic products. The concept of likeness or direct competition is relevant to maintain the parallelism between the product under investigation and the like or directly competitive domestic products.

13. The European Union considers that in *US – Lamb* the Appellate Body did not conclude that there are limits in the definition of the product concerned. In that case the Appellate Body noted that, under Article 4.1(c) of the *Agreement on Safeguards*, input products can only be included in defining

the "domestic industry" if they are "like or directly competitive" with the end-products. In this respect, the European Union agrees that the parallelism between the product concerned and the like or directly competitive domestic products that conform to the domestic industry is broken if inputs are not like or in direct competition with the product concerned. However, in a case where the product concerned is composed of both inputs and the final product, the European Union does not see any obstacle in the *Agreement on Safeguards* to include both inputs and the final products as the like or directly competitive domestic products for the purpose of defining domestic industry.

14. Consequently, the European Union considers that insofar as the parallelism between the product under investigation (including both inputs and the final product) and the like or directly competitive domestic products (including both inputs and the final product) is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

15. In the present case it would appear that there was no parallelism if the domestic products were limited to tubular fabric and polypropylene bags made out of raw resin, whereas the product under investigation covered tubular fabric and polypropylene bags regardless of whether they were made out of raw resin. Indeed, if the final products are identical or directly competitive regardless of their production process, then producers of those products cannot be excluded from the definition of domestic industry.

16. Moreover, the European Union observes that several domestic producers were excluded from the definition of domestic industry because they were themselves importers of the product under investigation (i.e. the input, tubular fabric). It would appear that under Article 4.1(c) of the *Agreement on Safeguards*, in order to consider whether a company is a "producer" of the like or directly competitive product which should be included in the definition of domestic industry, the focus lies on the essential nature of the business activities of a given enterprise, as manufacturing an article or bringing a thing into existence. If the company concerned is merely an importer of the product under investigation, it would not qualify as a "producer" and then it can be excluded from the definition of domestic industry. In any event, in a situation where the company imports 100 per cent of the input covered by the definition of the product under investigation but then produces the final product covered by the same definition, it would appear difficult to conclude that such a company is *not* a producer of the like or directly competitive product.

III. UNFORESEEN DEVELOPMENTS

17. Contrary to the suggestions made by the Dominican Republic, the Appellate Body has spoken unambiguously on this issue. In both *Argentina – Footwear Safeguard* and *Korea – Dairy Safeguard* the Appellate Body reversed the panel's findings to the effect that the "unforeseen developments" clause in Article XIX:1(a) of the *GATT 1994* imposes no additional obligations upon Members. In *US – Lamb* the Appellate Body confirmed the above findings and went out to rule that that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.

18. The Appellate Body has clarified that, although its reports are not binding, except with respect to resolving the particular dispute between the parties, subsequent panels "are not free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB".

19. The Dominican Republic has not invoked any "cogent reason" why the Panel should depart from the legal interpretations made by the Appellate Body in the reports cited above. Rather, the Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on the allegation that the *Agreement on Safeguard* "constitutes an exhaustive agreement" and does not provide for such an obligation. In view of this, the European Union considers that the Panel need not engage in a detailed examination of this argument, which could be summarily dismissed by referring to the existing case law of the Appellate Body.

20. The European Union notes that one of the "unforeseen developments" now mentioned by the Dominican Republic is the increase in duty free imports under certain FTA agreements with other Central American and North American countries. However, even assuming that such an increase could be regarded as a genuine "unforeseeable development", it is plain that it would not be the "effect" of the obligations incurred by the Dominican Republic under the *GATT 1994*, as required by Article XIX:1(a). Rather, it would be the "effect" of obligations incurred by the Dominican Republic under the FTA agreements in question. Therefore, that development could not provide a basis for the imposition of safeguard measures under Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. Instead, that development should have been addressed by the imposition of bilateral safeguard measures withdrawing the preferential duty-free treatment in accordance with the relevant provisions of each FTA agreement concerned.

IV. CONCLUSIONS

21. While not taking a final position on the merits of the case, the European Union requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

1. The Dominican Republic argues that Article XIX of the GATT and the AS are not applicable to the measures at issue since they are applied at a level below the bound tariff for the tariff headings concerned.

2. The Dominican Republic's defence relates only to the provisional and definitive safeguard measures that were imposed. It does not touch on the investigation and the acts preceding application of the measure, nor does it affect the applicability of the AS and of Article XIX to the claims concerning notification, the conduct of consultations and the offer of means of trade compensation, as provided for in Articles 8 and 12 of the AS.

3. The Dominican Republic seeks to ignore the fact that it initiated and carried out an investigation procedure under the AS and Article XIX, as well as under its own domestic legislation on trade remedies, with a view to imposing safeguard measures within the meaning of Article XIX and the AS. This was affirmed by the Dominican Republic itself.[1]

4. The Dominican Republic justified the exclusion of certain imports from the scope of the measure on the basis of Article 9.1 of the AS; it notified the WTO Committee on Safeguards of the opening of the investigation, the adoption of the provisional measure and the adoption of the definitive measure and ordered notification of the first stage in the phasing out of the measure; it replied to Colombia that the investigation and the measures at issue were subject to the provisions of Article XIX and the AS; and lastly, by means of a press release it publicly explained that the investigation and the imposition of provisional and definitive measures were carried out on the basis of the AS and Article XIX, as well as domestic legislation on trade remedies.[2]

5. Although the measures at issue do not exceed the bound tariff of 40 per cent *ad valorem*, they consist of duties and charges other than ordinary customs duties and they are applied in a discriminatory manner on imports of certain Members. The safeguard measures therefore effectively suspend the Dominican Republic's obligations under Articles II:1(a) and II:1(b), second sentence, as well as under Article I:1 of the GATT regarding the MFN principle, respectively.[3]

6. Any measure that exceeds what is "necessary", in magnitude or time-scale, stands in violation of Articles 5.1 and 7.1 of the AS, even if the measures are not inconsistent with general obligations under the GATT or are higher or lower than the bound tariff. Otherwise, if this level of "proportionality" between serious injury and the trade remedy were not maintained, "legitimate" trade

[1] Initial report, pages 4 and 5; preliminary report, pages 5 and 6.
[2] Exhibits CEGH-17, 18, 32, RDO-1 and CEGH 24 and 25, respectively.
[3] Reply of Costa Rica, El Salvador, Guatemala and Honduras to the request for a preliminary ruling of the Dominican Republic, submitted on 3 May 2011, paragraphs 109-111.

would be affected and "competition in international markets" would be limited rather than enhanced, which is in all respects at variance with the object and purpose of the AS.[4]

7. The action taken by other panels and by the Appellate Body in two safeguard disputes, *Argentina – Footwear* and *Korea – Dairy*, implicitly confirms that the applicability of Article XIX and of the AS does not depend on whether the safeguards are higher or lower than the respective bound tariffs.

II. PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE

8. Set out below are our replies to the objections to the complaints relating to Articles I:1, II:1(a) and II:1(b) of the GATT. Our second written submission will give a detailed reply to the other preliminary objections.

(i) Alleged withdrawal of certain complaints

9. The Dominican Republic contends that the complaining parties have decided to withdraw various complaints, including those relating to Article I:1 of the GATT and Articles II:1(a) and II:1(b) of the GATT, since, in its opinion, these were not developed in the first submission of the complainants.[5]

10. The Dominican Republic's request is invalid since the complaints it challenges were set out in our first written submission and they were subsequently developed in greater detail in our reply to the Dominican Republic's request for a preliminary ruling. The Appellate Body has indicated that there is no obligation to set out all claims in the first written submission to the Panel.[6]

(ii) Objection concerning complaints not contained in the request for consultations

11. The Dominican Republic also argues that certain complaints contained in our request for the establishment of a Panel should remain outside the terms of reference of the Panel, being "new complaints" because they are not included in the request for consultations.[7]

12. The Appellate Body has firmly upheld the view that the legal basis for the request for consultations and the basis of the panel request should not necessarily be identical, provided that the latter can reasonably be inferred from the basis for the request for consultations.[8] The Panel in *China – Audiovisual Products* concluded that it is important to analyse the relationship between the obligations imposed by the provisions cited in the request for consultations and those cited in the panel request.[9]

---

[4] Preamble of the AS, third paragraph.

[5] First written submission of the Dominican Republic, paragraph 86.

[6] Appellate Body Report, *EC – Bananas*, paragraph 145; see also Panel Report, *China – Audiovisual Products*.

[7] First written submission of the Dominican Republic, paragraphs 87-89.

[8] Appellate Body Report, *Mexico – Rice*, paragraph 138; Appellate Body Report, *Brazil – Aircraft*, paragraph 132; Appellate Body Report, *US – Cotton*, paragraph 293; Panel Report, *China – Audiovisual Products*, paragraph 7.121; Panel Report, *US – Poultry*, paragraph 7.46; Panel Report, *EC – Fasteners*, paragraph 7.24.

[9] Panel Report, *China – Audiovisual Products*, paragraph 7.121.

13. In view of the possibility that the Dominican Republic might seek to argue in its defence that the measure is not a safeguard measure, the complainants made clear in their request for consultations their intention to reserve the right to raise other claims under the GATT. This emerges from the penultimate paragraph of the request for consultations.[10] It is appropriate to point out that, during the consultations, there was an exchange of information on the discriminatory exclusion of certain imports from the scope of application of the measures, as well as on the nature of the measures in the context of the legal system in force in the Dominican Republic.

14. The complaint relating to the most-favoured-nation obligation is based on Article I:1 of the GATT, which is closely linked to Article 2.2 of the AS inasmuch as both articles deal with the most-favoured-nation principle. Article 2.2 of the AS is expressly included in the request for consultations.[11] The complaints concerning the nature of the duties adopted as import charges are based on Articles II:1(a) and II:1(b) of the GATT, which are linked to Article XIX itself of the GATT. The tariff concessions referred to in Article XIX are subject "to the obligations contained in Article II of the GATT 1994".[12]

15. In addition, the precedent from *US – Poultry* is applicable[13], given that, inasmuch as the request for consultations contains a clear reservation regarding the right to raise other matters under the GATT 1994 and on the basis of the discussions held during the consultations, the complainants reworded their complaints and included in their panel request arguments under Articles I and II of the GATT.

16. By reason of the foregoing, this Panel should conclude that the complaints under Articles I:1, II:1(a) and II:1(b) of the GATT fall within the terms of reference of this dispute.

III. CLAIM RELATING TO UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT

17. The Dominican Republic failed to issue adequate or reasoned findings, conclusions or explanations to demonstrate unforeseen developments.[14] In response to this claim, the Dominican Republic questions the binding nature of Article XIX:1(a) with regard to unforeseen developments.

18. The obligation to consider unforeseen developments is an issue that was decided by the Appellate Body, in conclusive and unequivocal terms, in 1999 in the *Argentina – Footwear* and *Korea – Dairy* disputes. The Dominican Republic has presented no compelling reason to justify deviating from the Appellate Body's viewpoint.[15]

19. The Dominican Republic's investigating authority itself, in its technical reports, stated that it agreed with the Appellate Body's jurisprudence on this specific legal point.[16] More important is the recognition of the mandatory nature of the unforeseen developments criterion, which is set out in the Dominican Republic's legislation, and more specifically in Articles 239 and 247 of the Regulation to Law No. 1-02.

[10] Documents WT/DS415/1, WT/DS416/1, WT/DS417/1, WT/DS418/1.
[11] See paragraph "(g)" of the legal basis of the request for consultations.
[12] Appellate Body Report, *Argentina – Footwear*, paragraph 91.
[13] Panel Report, *US – Poultry*, paragraph 7.46.
[14] First written submission of the complainants, paragraphs 207 to 226.
[15] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 160.
[16] Final Report, page 65; Preliminary Report, page 69.

20. In its first written submission, the Dominican Republic cites various passages from the preliminary and final technical reports which allegedly contain the Commission's conclusions on unforeseen developments.[17] However, these passages merely constitute *references* to the arguments of FERSAN on events that *could* constitute unforeseen developments. They are not reasoned and adequate conclusions issued by the investigating authority. In addition, the explanations put forward by the Dominican Republic in its first written submission are clearly *ex post* explanations which cannot cure the lack of findings in the corresponding determinations or reports.[18]

IV. CLAIM RELATING TO THE DOMESTIC INDUSTRY

21. In its submission, the Dominican Republic confined itself to confirming that there were various questions concerning the consideration of fabric and bags as the same product, and that it even had doubts itself on that subject and addressed a letter to Customs, and the latter confirmed that they are two different products. However, it misrepresents our claim and argues that there is no substantive obligation governing the definition of the product under investigation.

22. What we have claimed in the context of the definition of the domestic industry is that no paragraph in the reports or resolutions reflects the adequate and reasoned findings and conclusions required under Articles 3.1 and 4.2(c) on a subject as fundamental, important and relevant as the definition of the product under investigation for purposes of defining the domestic industry, in the light of the various factual questions raised in the investigation, which were even taken up by the DEI and the Commission in the public reports.

23. The Dominican Republic arbitrarily defined like or directly competitive domestic products as products produced *from resin*, without giving an objective reason for so doing. However, the *product under investigation* included fabric and bags, irrespective of the way in which they were produced, whether from resin or from fabric or from some other phase of the production process. Nor is there any justification for excluding domestic producers of the like or directly competitive domestic product, such as the firms FIDECA and TITAN.

24. In short, the domestic industry was defined in a manner such as to be adapted solely and exclusively to the profile of the applicant, FERSAN, so that the latter is the only enterprise constituting the domestic industry. This was done through the use of arbitrary or inadequate definitions and criteria which do not conform to the requirements of Articles 2.1, 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

V. CLAIM RELATING TO THE ALLEGED INCREASE IN IMPORTS

25. The Dominican Republic acknowledges that there was no finding with regard to a relative increase in imports compared with domestic production, despite the fact that the final resolution determined that imports had increased "in absolute and relative terms".[19]

26. Regarding the absolute increase in imports, the complainants note that the Dominican Republic's defence, which seeks to play down the importance of the drop in imports towards the end of the period of investigation, applies only to the final determination, but not to the

[17] First written submission of the Dominican Republic, paragraphs 285-295.
[18] Panel Report, *Chile – Price Bands*, paragraph 7.147 and footnote 705. Appellate Body Report, *US – Lamb*, paragraph 72.
[19] Definitive resolution, first article.

preliminary determination. The Dominican Republic cannot, therefore, argue that this alleged increase was taken into consideration in order to justify the conclusion concerning increased imports in the preliminary determination.

27. As regards the final determination, the Dominican Republic claims that it explained that the decrease in imports towards the end of the period of investigation was transitory and incidental. The Dominican Republic acknowledges that the decrease towards the end of the period of investigation would have been due to the overall slowdown in the Dominican economy.[20] However, it does not follow from this assertion that the decrease in imports was characterized as transitory and incidental or that there was an explanation of the reasons for considering that the decrease in imports had those characteristics, as is now argued *ex post*.

28. Finally, the Dominican Republic acknowledges that the evaluation of the rate of increase in imports consisted of an "end to end" analysis of the period of investigation, and was based on figures showing the percentage variation of imports from year to year.[21] As can be seen from the determinations, there are no findings regarding the rate of imports. The "rate" is a specific requirement of Article 4.2(a) of the AS.

VI. CLAIM RELATING TO THE ALLEGED SERIOUS INJURY

29. The preliminary and final determinations of serious injury go beyond the definitions and basic criteria contained in Article XIX and the AS. Leaving aside the erroneous definition of the domestic industry, there are fundamental errors of methodology.

30. For example, the determinations are based on information about "the volumes of production of the product investigated, assuming it to be a single product, i.e. finished bags".[22] Despite the fact that the like or directly competitive product was defined as tubular fabric and polypropylene bags, the Dominican Republic evaluated only production performance for finished bags, and no analogous evaluation was carried out on production performance, in volume terms, in the other segment making up the domestic industry, i.e. the production of tubular fabric.

31. There are two different segments: production of tubular fabric and production of polypropylene bags. The evidence shows that not all tubular fabric production was destined for the production of finished bags. Although part of this production was "assumed" to be an input for finished bags, another part was destined for the commercial market (e.g. sales to FIDECA) and a further part went into increasing FERSAN's stocks. The production outcomes for one or the other product are not therefore necessarily the same.

32. The Dominican Republic presents evidence to establish that it conducted a joint analysis of the indicators relating to tubular fabric and polypropylene bags because it evaluated aggregate information from the *Bags Division* of FERSAN.[23] However, the information from the Bags Division includes the production of other products which are not like or directly competitive products (bags made of netting, rope or string), and which are destined for both the domestic and the international market.[24] Moreover, with regard to stocks, the information covers raw material and inputs which do

[20] First written submission of the Dominican Republic, paragraph 318.
[21] First written submission of the Dominican Republic, paragraph 328.
[22] Initial report, page 14.
[23] First written submission of the Dominican Republic, paragraph 358.
[24] Exhibits RDO-13, RDO-14, RDO-15.

not form part of the like or directly competitive product. This erroneous methodological basis invalidates the evaluation that was made of earnings and losses, stocks, cash flows and production value.

33. As regards the discrepancy between the factual findings relating to production and the conclusions of the DEI and the Commission, the Dominican Republic provides an *ex post* explanation of the way in which the fall in production is to be understood.

VI. CLAIM RELATING TO THE ALLEGED CAUSAL LINK

34. Causation: The complainants contend that the Commission determined the causal link between imports and serious injury to the domestic industry inconsistently with Article 4.2(b), among other provisions of the AS, and Article XIX:1(a) of the GATT.[25]

35. The replies provided by the Dominican Republic in its first written submission indicate, in summary, that the causation analysis is composed of two elements: (i) two paragraphs of the final resolution (more specifically, paragraphs 37 and 38)[26]; and (ii) the serious injury analyses contained in the preliminary and definitive technical reports.[27]

36. Regarding the first element, the two paragraphs of the final resolution are not sufficient to establish a causal relationship, since they consist of new assertions lacking analytical substantiation in the technical reports.[28] Regarding the second element, the existence of serious injury is only a necessary premise for the causation analysis, but it is not sufficient to establish a causal link.

37. Non-attribution: The complainants also contend that the Dominican Republic failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS, which consists in separating the harmful effects of factors other than increased inputs which are the cause of serious injury.[29]

38. In reply, the Dominican Republic puts forward *ex post* explanations and offers arguments regarding those factors other than increased imports which, in the complainants' opinion, should have been taken into account on examining the causes of financial losses, increased stocks and reduced cash flows, as well as the injury caused by domestic competitors. Even these *ex post* arguments are insufficient to justify the lack of a non-attribution analysis.

VII. CLAIM RELATING TO THE LACK OF PARALLELISM

39. The Dominican Republic failed to respect the requirement of parallelism since, despite having excluded imports from certain countries from the application of the measures, those imports were in fact included in the evaluation of increased imports, serious injury and causation.[30]

40. The Dominican Republic states that the exclusion of imports from Mexico, Panama, Colombia and Indonesia from the application of the measures was in conformity with Article 9.1 of the AS, which permits the exclusion of developing countries with less than 3 per cent import share.[31]

[25] First written submission of the complainants, paragraphs 380-404.
[26] First written submission of the Dominican Republic, paragraph 441.
[27] First written submission of the Dominican Republic, paragraphs 439 and 442 and footnote 341.
[28] First written submission of the complainants, paragraph 395.
[29] First written submission of the complainants, paragraphs 410-433.
[30] First written submission of the complainants, paragraphs 436-450.
[31] First written submission of the Dominican Republic, paragraphs 472-474.

The parallelism obligation is enforceable *irrespective* of the reasons why the Member applying the safeguard has decided to exclude such imports. The Dominican Republic also submits that "[e]ven if an investigation excluding imports from Mexico, Panama, Columbia and Indonesia were conducted, the conclusions concerning increased imports would not change, given the negligible share of 1.2 per cent [of those imports] during the period of investigation".[32] This line of argument has already been presented and rejected in *US – Steel*.[33]

VIII. INCONSISTENCY WITH ARTICLES XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

41. The Dominican Republic accepts that its notification was in fact made three days after the *adoption* of the measure[34] and seeks to justify this action by referring to the English and French versions of the GATT, which indicate that the notification must be made prior to the *application* of the measure, and not prior to its *adoption*, as stated in the Spanish version. We observe, however, that the explanatory note contained in paragraph 2(c)(i) of the GATT 1994 explicitly provides that "[t]he text of GATT 1994 shall be authentic in English, French and Spanish".

42. Even on the interpretation of the Dominican Republic regarding the obligation under Article XIX:2 of the GATT, the complainants submit that the Dominican Republic acted inconsistently with that provision, since the WTO Members were notified on 18 October 2010, i.e. on *the same day* as the entry into force of the measure. Moreover, the Dominican Republic claims to treat (i) the participation of the complaining countries as interested parties in the context of the safeguard investigation under the national jurisdiction of the Dominican Republic on the same basis as (ii) the conduct of multilateral consultations as provided for by Article 12.3 of the AS.

IX. CLAIMS UNDER THE GATT

43. In the event that it is determined that the provisional and definitive measures are not subject to Article XIX and to the AS, the Panel should find that the provisional and definitive measures are border measures subject to the basic disciplines of Articles I:1, II:1(a) and II:2(b) of the GATT, and that they are inconsistent with those provisions.

44. Claims under Article I:1 of the GATT: According to the most-favoured-nation clause, any measure that qualifies as an advantage, favour, privilege or immunity granted to imports of specific origin shall also be granted to imports of like products from the other WTO Members. In this case, the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of application of the measures constitutes an advantage, favour, privilege or immunity granted to imports of those origins.

45. The criterion for the granting of this advantage, favour, privilege or immunity is also discriminatory, even where there is compliance with the criterion that imports should not exceed 3 per cent, by individual origin, of total imports and nine per cent collectively of that total, in the

[32] First written submission of the Dominican Republic, paragraph 479.
[33] Panel report, *US – Steel*, paragraph 10.607.
[34] First written submission of the Dominican Republic, paragraphs 493 and 495.

period of investigation.[35] For example, that criterion was not applied for the purpose of excluding imports from Thailand, which are less than three per cent.[36]

46. Claims under Articles II:1(a) and II:1(b), second sentence, of the GATT: the provisional and definitive measures consist of duties or charges other than ordinary customs duties that are applied to imports of polypropylene fabric and bags.

47. Article II:1(b) prohibits the imposition of import duties and charges other than ordinary customs duties. Pursuant to the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, a surcharge other than an ordinary customs duty shall be inconsistent with Article II:1(b), second sentence, of the GATT unless that surcharge had been recorded by 15 April 1994 at the latest.

48. In the preliminary and final reports, the DEI undertook an evaluation of the most effective alternatives for the imposition of the measure at issue, in which the DEI explicitly affirmed that the purpose was to establish a "second tariff" in addition to the applicable tariff.[37] This intention to establish a duty different and distinguishable from the ordinary customs duty was confirmed at the time of establishment of the measures and their time-frame. In the final resolution, the Commission stated that, for those countries subject to "an MFN tariff higher than the percentage of the definitive safeguard measure … the said MFN tariff shall apply". The MFN tariff in the Dominican Republic is the ordinary customs duty applicable to imports that do not benefit from tariff preferences[38], while under the final resolution, the surcharge constitutes an alternative duty to the MFN tariff, and either the surcharge or the ordinary customs duty is applied, whichever is higher. As can be seen from the Customs Tariff of the Dominican Republic, that country does not maintain an ordinary customs duty possessing the modal quality of an alternative duty. It follows from this that the provisional and definitive measures impose a duty of a nature distinct from the ordinary customs duty applicable in the Dominican Republic.[39]

49. Pursuant to Articles 5, 6 and 7 of Tariff Reform Law No. 146-00 (which governs the application of tariffs in the Dominican Republic), ordinary customs duties or tariffs can only be modified by a legislative act, but not by administrative means.[40] Inasmuch as the provisional and definitive measures were not imposed in accordance with the procedure provided for in Dominican legislation for the imposition of ordinary customs duties, the provisional and definitive measures do not qualify as ordinary customs duties.

50. For all of the above reasons, the provisional and definitive measures qualify as other duties or charges within the meaning of Article II:1(b), second sentence, of the GATT. It should be mentioned additionally that the Dominican Republic did not record in its Schedule of Concessions the possibility of applying measures of this nature. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and, by implication, with Article II:1(a) of the GATT.

[35] Preliminary Resolution, paragraphs 50 and 51; Final Resolution, paragraphs 42 and 43.
[36] Preliminary Report, Annex I; Final Report, Annex I.
[37] Final Technical Report, page 97.
[38] Customs Tariff of the Dominican Republic, Exhibit CEGH-27.
[39] Preliminary Report, page 93; Final Report, page 97.
[40] Tariff Reform Law No. 146-00, Exhibit CEGH-22.

X. CONCLUSIONS AND REQUEST FOR RECOMMENDATIONS AND SUGGESTIONS

51. In addition to the request for findings and rulings contained in our first written submission[41], the complainants request the Panel to issue the following findings and rulings:

- The application of the provisional and definitive measures excluding imports from specific origins is inconsistent with Article I:1 of the GATT.

- The provisional and definitive measures constitute other duties and charges distinct from ordinary customs duties within the meaning of Article II:1(b), second sentence, of the GATT and grant less favourable treatment than that provided for in the Dominican Republic's Schedule of Concessions within the meaning of Article II:1(a) of the GATT, for which reason both measures are inconsistent with the provisions of the GATT.

52. Despite the fact that the complaints concerning Articles I and II of the GATT have been submitted as alternatives, the applicants request the Panel to rule on them even if it concludes that the measures at issue *are* safeguard measures. This is important given the possibility of an appeal for which the Appellate Body would need to have factual findings for the purpose of completing the legal analysis relevant to the case.

[41] First written submission of the complainants, paragraph 477.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the AS, in other words, all the rules duly cited by the complainants in the request to hold consultations[1], in the request for the establishment of a panel[2] and in their first written submission, do not apply to the measures at issue. This makes it impossible to evaluate the consistency of the measures contested with the disciplines cited.

2. The Dominican Republic wishes to reaffirm the reasons why the rules cited by the complainants do not apply on the basis of five arguments. Firstly, the applicability of Article XIX of the GATT and the AS depends on objective criteria that cannot be replaced by statements made by the Dominican authorities. Secondly, the measures at issue are not covered by the objective applicability criteria in Article XIX of the GATT and the AS. Thirdly, Article 11.1(a) of the AS does not cover action prior to the adoption of the measures contested. Fourthly, the measures at issue did not lead to suspension of Article 1:1. Fifthly, the measures at issue do not constitute suspension of the second sentence of Article II:1(b) of the GATT.

1. The applicability of Article XIX of the GATT and the AS is not defined on the basis of statements by Members

3. A large part of the arguments put forward by the complainants concerning the applicability of Article XIX of the GATT and the AS consisted of indicating that the measures at issue are the result of an investigation initiated, conducted and concluded by the Dominican Republic on the basis of Law No. 1-02[3] with the Dominican authorities having cited Article XIX of the GATT and several provisions of the AS.[4] The complaining parties also attach considerable weight to notifications to the WTO Committee on Safeguards.[5]

4. Nevertheless, as stated by the Appellate Body, an examination of applicability is an objective analysis of the content of the measures at issue, rather than on the basis of nominal aspects such as the statements made by the Dominican authorities.[6] If it is considered that the classification of a measure in national law or the intention of the authorities are decisive for the purposes of classifying a measure, as underlined by the European Union, this would mean that WTO Members could impose measures that comply with their obligations by describing them in a particular way.[7]

5. The legal basis for the measures at issue, Law No.1-02, provides in Article 73 that safeguard measures may consist of an increase in tariffs, in tariff quotas or maximum rates[8], making

[1] WT/DS415/1, WT/DS416/1, WT/DS417/1 and WT/DS418/1.
[2] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.
[3] Exhibit RDO-11.
[4] *Idem*. paragraphs 43-74.
[5] *Idem*. paragraphs 75-82.
[6] Appellate Body Report, *US – Shrimp (Thailand)*, paragraph 241; Appellate Body Report, *US – Softwood Lumber IV*, paragraph 65; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87 to paragraph 87.
[7] See paragraph 10 of the Third Party Written Submission of the European Union.
[8] Above, note 23.

no reference to a suspension of obligations or the withdrawal or modification of concessions, which are the objective criteria for application of Article XIX of the GATT and the AS. Consequently, a safeguard adopted under Law No. 1-02 does not necessarily constitute a safeguard in terms of the GATT or the AS.

6. In the present case, as the Dominican Republic granted a tariff concession of 40 per cent for the products in question, it is free to impose a lower tariff, pursuant to Article II:1(a) of the GATT, as confirmed by the Appellate Body.[9] By adopting a safeguard measure pursuant to Law No. 1-02 that increased the tariff to 38 per cent, in GATT terms the measure consisted of an increase in the MFN tariff to below the bound level, a measure which the Dominican Republic was free to adopt. In definitive, the fact that the Dominican Republic's authorities adapted their conduct to the AS and to Article XIX of the GATT does not imply that the complainants can call the measures at issue into question in the light of those provisions.

7. Essentially, the Dominican Republic complied with a more onerous procedure than that imposed by the GATT. The complainants were aware of the nature of the measures and expressed doubts about the applicability of Article XIX of the GATT prior to the adoption of the provisional measure.[10] Nevertheless, they insisted on questioning the measures in the light of Article XIX of the GATT and the AS.

2. The measures issue do not fall within the scope of Article XIX of the GATT and the AS

8. The scope of the AS is defined in Article 1 thereof, which provides that 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 …".[11] The material scope of Article XIX of the GATT is set out in paragraph 1(a) thereof.[12] The form of this paragraph is conditional, the first part describing a series of conditions that must be verified to enable the WTO Member in question to make use of the authorization defined in the last part of the paragraph, which provides that the Member *"shall be free, …, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession"*. If the course of action defined in the last part of Article XIX:1 of the GATT is not followed, there is no need to meet the conditions set out at the beginning of this provision, or to comply with the disciplines and procedural requirements in the remainder of Article XIX of the GATT.[13]

9. Article XIX:1(a) of the GATT may authorize the total or partial suspension of an obligation undertaken or the withdrawal or modification of a concession. The measures contested are based on Law No. 1-02 and consist of an increase in the MFN tariff up to a level lower than that bound. In other words, there was no suspension of any obligation or withdrawal or modification of any concession, so Article XIX of the GATT and the AS do not apply.

10. The context of Article XIX confirms the statement above. The Dominican Republic was entitled to adopt the measures at issue pursuant to Article II:1(a) of the GATT, so no obligation was suspended and there was no withdrawal or modification of any concession. If it is found that there

[9] Appellate Body Report, *Argentina – Textiles and Apparel*, paragraph 46.
[10] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, page 85. Exhibit RDO-9.
[11] AS, Article 1.
[12] Request by the Dominican Republic for a preliminary ruling, paragraph 37.
[13] *Idem*. paragraph 38.

must be compliance with the provisions in Article XIX of the GATT and the AS even if no concession is withdrawn or modified, and no obligation is suspended, Article XIX of the GATT and the AS would be distinct from the series of rights and disciplines laid down in the WTO Agreement, contrary to the criteria determined by the Appellate Body.[14] Considering a tariff increase up to a level that does not exceed the bound level to be a safeguard measure would make the GATT provisions that serve as basis meaningless.

11. Another relevant provision in this regard, Article 11.1(c) of the AS, provides that the Agreement does not apply to measures which a Member seeks to adopt, adopts or maintains in accordance with other provisions in the GATT 1994, other than Article XIX, and the multilateral trade agreements contained in Annex 1A, other than the AS, or in conformity with protocols, agreements or conventions concluded within the framework of the GATT 1994. This provision reaffirms the non-applicability of Article XIX of the GATT and the AS to the measures at issue, which are in accordance with Article II:1(a) of the GATT.

12. Moreover, Article 8.1 of the AS provides the following:

> *"A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure [...] to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 […]. To achieve this objective, the Members concerned may agree on adequate means of trade compensation ...".*

13. If no agreement is reached, Article 8.2 of the AS allows the exporting Members affected to suspend the application of concessions or other equivalent obligations under the GATT to the trade of the Member applying the safeguard. This once again confirms that only a measure that involves withdrawal, modification or suspension of an obligation or concession must comply with the disciplines imposed by Article XIX of the GATT and the AS. If this is not the case, WTO Members may have the right to compensation for action that may be freely adopted.

14. The object and purpose of Article XIX of the GATT and the AS, which have been described by the Appellate Body as "to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members"[15], also confirm this interpretation. The object and purpose have been confirmed by the history of the Uruguay Round negotiations, where the function of safeguard clauses was described as "*offering certain possibilities for easing contracted obligations, they encourage importing countries to enter into commitments which would otherwise be of unconditional rigidity*".[16]

15. The history of negotiations reaffirms the interpretation described. For illustrative purposes, statements such as the following can be taken into account: "*GATT safeguard clauses permit the application […] of measures not otherwise permitted under the rules*"[17] or "*the scope of the issue to be negotiated in the Negotiating Group on Safeguards […] should be confined to the rules and disciplines applicable for the withdrawal of GATT concessions*" and "*Since safeguard measures*

[14] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 81.
[15] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 94.
[16] Submission by Switzerland to the Negotiating Group on Safeguards, 14 July 1988, MTN/GNG/NG9/W/20.
[17] Note by the Secretariat of the Negotiating Group on Safeguards, 7 April 1987, MTN/GNG/NG9/W/1.

invariably imply the withdrawal of GATT concessions ...".[18] Moreover, the Secretariat, when explaining the history behind the drafting of Article XIX and its role in the GATT, indicated that "*Article XIX is one of a number of safeguard provisions in the General Agreement which permit contracting parties, subject to specific conditions, to re-impose trade barriers otherwise prohibited by the Agreement. It permits the imposition of tariffs and quantitative restrictions otherwise prohibited by the provisions of Articles II and XI …*".[19]

16. In the light of the above, the Dominican Republic also expresses its disagreement with the complainants' argument that the use of the word "*podrá*" in the Spanish text of Article XIX:1(a) of the GATT ("shall be free" in the English text) implies that in the terms of the GATT or the AS a safeguard measure may consist of a measure that does not suspend a concession or obligation.[20] In addition to contradicting the context, object and purpose and the history of the negotiations and drafting of Article XIX of the GATT and the AS, it also relies on an incorrect reading of the text, ignoring the conditional structure of Article XIX:1(a) of the GATT, making the disciplines and conditions set out therein subject to the adoption of a measure consisting of a suspension, modification or withdrawal of an obligation or concession.

17. This can be confirmed in the light of the Panel Report in *Chile – Price Band System*. The measures at issue were specific duties which, depending on the circumstances, exceeded Chile's bound tariff. Chile claimed that, as the price band system exceeded the bound tariff, it constituted a safeguard. Consequently, the duty applied was considered to be a safeguard in the terms of Article XIX of the GATT solely to the extent that it exceeded the bound rate.[21]

3. The applicability of Article XIX of the GATT and the AS to the investigation prior to the adoption of the measures at issue

18. According to the complainants, the formula "*tratar de adoptar medidas*" in the Spanish text of Article 11.1(a) of the AS ("seek any … action" in the English text) includes the intention or the steps taken towards the specific act of adopting measures such as those in Article XIX of the GATT. The investigation prior to the adoption of the provisional and definitive measures would constitute such an act and therefore Article XIX of the GATT and the AS would be applicable.[22]

19. The complainants propose applying the AS to an investigation, even when the ensuing measures do not fall within the scope of these provisions, without making this possibility subject to any criterion. A more logical interpretation would be to limit the time-frame for application of Article 11.1(a) and not to apply it when it is clear that the Member concerned did not adopt or seek to adopt a safeguard measure in accordance with Article XIX of the GATT. In fact, although it might be considered that in the first stages of the investigation the Dominican Republic *sought* to adopt a safeguard measure in accordance with the provisions in Article XIX of the GATT, such a statement is no longer possible after the adoption of the definitive measure in October 2010.

[18] Communication by the Nordic Countries to the Negotiating Group on Safeguards, 30 May 1988, MTN/GNG/NG9/W/16.

[19] Background note by the Secretariat of the Negotiating Group on Safeguards, 16 September 1987, MTN/GNG/NG9/W/17.

[20] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 95.

[21] Panel Report, *Chile – Price Band System*, paragraph 7.109.

[22] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraphs 86-91.

20. Furthermore, Article 11.1(a) of the AS has to be read in conjunction with Article 11.1(c), whose relevant text provides that: "*This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX* …". The use of the conjunction "or" means the AS does not apply to measures adopted pursuant to another provision of the GATT, namely, Article II:1(a).

21. If the line of reasoning put forward by the complainants is followed, the only plausible interpretation in order to avoid the contradictions that arise from removing from the investigation the measures adopted as a result of it, would be to identify the obligations in the AS which specifically apply to the investigation. The complainants, however, have not indicated what these obligations are, which they cite with reference to the stage of the investigation, and have simply indicated that they "also question the way in which the notification and consultation procedure were conducted …".[23]

4. The alleged suspension of Article II:1(b) of the GATT

22. The complainants contend that the measures suspend the second sentence of Article II:1(b) of the GATT as the tariff constitutes a duty other than ordinary customs duty. The measures would therefore result in a safeguard measure within the meaning of Article XIX of the GATT.[24] According to Dominican legislation, however, a safeguard may be in the form of three possible measures: an increase in tariffs, tariff quotas, or maximum rates.[25] By providing for an *increase* in already-existing tariffs, the measure constitutes an increase in ordinary customs duty and not a separate duty.

23. Furthermore, the measures at issue replace the MFN tariff normally applicable. If the duty was distinct from ordinary customs duty, there would be no such replacement but, as is the case for anti-dumping duties or countervailing measures, it would be applied in addition to the duty normally applicable. The following statement by the Appellate Body in *India – Additional Import Duties* is relevant: "*Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates*".[26] (emphasis added)

5. The alleged suspension of Article I:1 of the GATT

24. The complainants stated that the exclusion of Mexico, Panama, Colombia and Indonesia from the measures at issue represents suspension of Article I:1 of the GATT, which the Dominican Republic justified by citing Article 9:1 of the AS.[27] This would mean that the measures at issue constitute safeguards in terms of Article XIX of the GATT and the AS.

25. This argument has two flaws. Firstly, safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT. This can be confirmed by Article 2.2 of the AS. The history of negotiations contradicts the interpretation that a safeguard measure may

[23] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 91.
[24] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 111.
[25] Law No. 1-02 on Unfair Trade Practices and Safeguard Measures, Article 73.
[26] Appellate Body Report, *India – Additional Import Duties*, paragraph 159.
[27] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 110.

consist of the suspension of Article I:1 of the GATT. During the Uruguay Round, it was decided to incorporate Article 2.2 in order to prevent the selective application of safeguards.[28]

26. Secondly, Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure as an exception to Article 2.2 of the AS. An exception to Article 2:2 of the AS can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists, which is not the case.

[28] See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991, section M, paragraphs 5 and 9.

ANNEX C-3

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Members of the Panel, members of the Secretariat, representatives of the Dominican Republic:

1. Our closing statement will be very brief. Our complaints and arguments are clear, and we merely wish to make four very specific comments on subjects that were addressed during the last two days of our discussions.

2. Firstly, on the issue of the interpretation of the "obligations" in Article XIX:1(a) of the GATT, it is important to note that the last phrase draws a distinction between "to suspend the obligation in whole or in part" in respect of such product, and "to withdraw or modify the concession". The term "obligation" clearly means something different from "concession", and consequently, the Dominican Republic's argument that the "obligation" involves only that relating to "tariff concessions" is without foundation. In fact, the Dominican Republic's interpretation would render the term "obligation" as it appears in the last phrase of Article XIX:1(a) of the GATT redundant and meaningless. Our understanding, which is shared by some of the third parties to this dispute, is that the scope of the term obligation goes beyond the concept of "concession". Furthermore, the Dominican Republic's interpretation is contrary to the principle of effectiveness in the interpretation of treaties.

3. Secondly, the complainants would also like to make it clear that they are not claiming violation of any regional trade agreement. As indicated in our request for the establishment of a panel, our complaints concern only violations of covered agreements.

4. As we have stated since the beginning of this dispute and as understood by the Dominican Republic up until it submitted its statement of preliminary objections, our position has been, and continues to be, that the measures at issue are safeguard measures within the meaning of Article XIX of the GATT and the AS.

5. Thirdly, the Dominican Republic stated yesterday that the measures at issue were simply a "tariff increase". It also stated that its authorities had taken the more difficult path in adopting the alleged tariff increase, since they could have done so without conducting an investigation. The truth, as we see it, is that the only reasonable explanation why the Dominican Republic decided, at the time, to apply safeguard measures under Article XIX of the GATT and the AS rather than a simple tariff increase, was that a simple tariff increase would not have enabled it to exclude the Central American countries from the scope of application of those measures in view of the existence of bilateral preferential obligations. We trust that this clarification will dispel any doubt with respect to the Dominican Republic.

6. Although the Dominican Republic could have adopted a tariff increase without conducting a safeguard investigation, the fact remains that this is not the option that it chose. Instead, it took the decision to initiate an investigation and adopt safeguard measures. The Dominican Republic cannot rid itself of the general obligations laid down in the AS and Article XIX while at the same time using Article 9.1 of the AS to justify the discriminatory application of those safeguards.

7. Indeed, if the Dominican Republic had opted for a simple tariff increase that did not exceed the WTO bound rate, we would not be here today in these WTO dispute settlement proceedings. As

we have repeatedly argued, the Dominican Republic is denying the obvious: that it conducted a safeguard investigation, following which it imposed a safeguard measure. To accept that a Member can impose safeguard measures and then describe them as something different for the purposes of a dispute settlement procedure would have serious systemic implications for the WTO. This is yet another reason why the Dominican Republic cannot be allowed at this point to deny its obligations under Article XIX and the AS.

8. Finally, we would like to note that in paragraph 47 of its First Oral Statement, the Dominican Republic confirmed that the safeguard measure was a measure other than ordinary customs duties: "as long as the increased tariff is in force, the MFN tariff *normally applied* is not in force" (emphasis added). To quote a legal proverb, "Where the party confesses, no proof is needed".

Thank you.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chair, members of the Panel:

1. The Dominican Republic welcomes your efforts and questions yesterday and today at this first substantive meeting, in the hope that they will lead to a positive settlement of this dispute.

2. The Dominican Republic wishes to take the opportunity of this meeting to clarify certain aspects of the safeguard measures adopted on the basis of Law No. 1-02, as a consequence of previous exchanges of views.

3. The Dominican Republic's tariffs are defined in Law No. 146-00, which specifies that tariffs may only be determined through legislative channels. The measures that are the subject of this dispute were adopted on the basis of Law No. 1-02 on Unfair Trade Practices and Safeguard Measures.[1] In Title IV on "Safeguard measures", this Law defines safeguard measures in Article 57 as "those intended to regulate imports temporarily … [with] the objective of preventing or remedying serious injury to a domestic industry and facilitating adjustment for domestic producers". Pursuant to Article 73, the measures in question may consist of a temporary increase in tariffs.

4. From the foregoing statement, it follows that, on the one hand, tariffs must have a legal basis in a law, in this particular case Law No. 146-00. On the other hand, Law No. 1-02 allows a temporary increase in the tariffs determined therein subject to the adoption of a safeguard measure, as defined in the Law.

5. In Dominican law, therefore, the same rules apply to any tariff increase resulting from a procedure conducted pursuant to Law No. 1-02. In other words, there is no distinction between the way in which a domestic safeguard measure that does not lower the bound tariff is adopted and the adoption of a measure that exceeds this tariff and can be considered a safeguard in terms of Article XIX of the GATT and the Agreement on Safeguards.

6. The fact of following the procedure defined in Law No. 1-02 and citing the provisions of the Agreement on Safeguards in no way implies any intention on the Dominican Republic's part to make measures that do not lower the bound tariff subject to Article XIX of the GATT and the Agreement on Safeguards. In fact, it would be unnecessarily complicated to follow different procedures depending on the type of safeguard in question.

7. The measures at issue consist of the adoption of a safeguard pursuant to Law No. 1-02. As this measure does not consist of an increase above the Dominican Republic's bound tariff in the WTO however, as has been shown, the measure does not suspend any obligation, or modify or withdraw any concession in terms of Article XIX. Certainly, according to WTO law, the Dominican Republic could have adopted the measures at issue without complying with the onerous obligations imposed by the Agreement on Safeguards. But by adopting the measures at issue pursuant to Law No. 1-02 and as this domestic Law reflects the Agreement on Safeguards, the adoption procedure followed the Agreement on Safeguards. As the Dominican Republic has already stated, this does not imply that

[1] Exhibit RDO-11.

the domestic safeguard measures are subject to the disciplines of Article XIX of the GATT and the Agreement on Safeguards.

8. To summarize, the complainants contend that, solely for the reason that the measures at issue have the title "safeguard" and that the procedure in Law No. 1-02 was followed, they can question these safeguard measures before the WTO Dispute Settlement Body.

9. This position is not acceptable. The Dominican Republic notes that many free trade agreements have ad hoc safeguard mechanisms. The complainants' position would mean that any bilateral safeguard would be subject to examination by the WTO Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards.

10. To give just one example, the second paragraph of Article 8.02(2) of the Dominican Republic-Central America Free Trade Agreement provides that:

> *For the application of bilateral safeguard measures, the competent authorities shall conform to the provisions in this chapter and, supplementarily, to Article XIX of the GATT 1994, the Agreement on Safeguards of the World Trade Organization and the respective domestic legislation.*

11. How can it be found, in the light of this provision, that any bilateral safeguard adopted pursuant to the Dominican Republic-Central America Free Trade Agreement would be subject to examination by the Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards? A reply in the affirmative would be absurd. Nevertheless, this is the conclusion reached using the logic put forward by the complainants in their response to the request by the Dominican Republic for a preliminary ruling and in their oral statement made at this first substantive meeting.

12. The complainants have indicated that adopting a safeguard measure under Law No. 1-02 when such a measure does not lower the tariff in the WTO schedule of bindings would be contrary to the principle of good faith and could have harmful systemic implications.

13. The Dominican Republic does not understand why the complainants consider it reprehensible to increase a tariff temporarily under a safeguard procedure in its domestic law when the same increase could be effected under a simpler procedure and with fewer guarantees for the parties involved. The guarantees afforded are obvious from the broad participation of the complainants in the procedure prior to the adoption of the measure, when they were informed in detail of all aspects of the proposed measure, including the fact that it did not exceed the bound tariff. It cannot, therefore, be considered that the Dominican Republic's conduct was unexpected or inconsistent with the principle of good faith.

14. The Dominican Republic thinks it relevant to refer to the record of the hearing held at the headquarters of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures on 12 May 2010. At this hearing, the representative of the Government of Honduras took the floor to indicate that:

> *"[T]he amount of the provisional measure adopted is 38.5 per cent ad valorem, while the Dominican Republic's bound rate for the products in question is 40 per cent*

> *ad valorem, so it cannot be claimed that there is any reason to turn to a safeguard measure …"*[2] (emphasis added)

15. This observation was preceded by other comments prior to the adoption of the provisional measure.[3] In other words, not only were the complainants informed that the measure would not exceed the bound tariff, but the complainants themselves in their statements expressed serious doubts about the applicability of Article XIX of the GATT. Today, however, the complainants insist on a point of view that is contrary to these statements made throughout the procedure for adoption of the measures which they are now questioning in the light of rules which they themselves declared to be irrelevant.

16. With regard to the question of whether a safeguard measure in terms of Article XIX of the GATT may consist of suspension of Article I:1 of the GATT, the Dominican Republic would like to refer to paragraphs 51 and 52 of its oral statement at the beginning of this first substantive meeting.

> *"51. … [T]he safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT can be confirmed by Article 2.2 of the Agreement on Safeguards, which provides: 'Safeguard measures shall be applied to a product being imported irrespective of its source.'.*
>
> *52. … Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure. More accurately, it constitutes an exception to Article 2.2 of the Agreement on Safeguards. An exception to Article 2.2 of the Agreement on Safeguards can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists …"*

17. Mr Chair, members of the Panel, before concluding this oral statement, the Dominican Republic would like to refer to one aspect that has arisen during this substantive meeting. Article 72 of Law No. 1-02 provides for the exemption of developing countries from safeguard measures adopted pursuant to the Law, thereby reflecting the provision in Article 9.1 of the Agreement on Safeguards. As has become apparent during this meeting, however, the definition in Article XIX of the GATT does not correspond to the possible forms which a safeguard measure may take in the light of Article 73 of Law No. 1-02. It is thus possible that situations may arise in which certain WTO Members are exempt from a safeguard measure adopted pursuant to Law No. 1-02, even though such exemption may not be based on Article 9.1 of the Agreement on Safeguards because the safeguard measure is not one of the measures covered by Article XIX of the GATT. The Dominican Republic is aware that exempting developing countries from a domestic safeguard measure may be problematic in specific cases in which the measure adopted does not constitute a safeguard measure in the terms of Article XIX of the GATT.

[2] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, Exhibit RDO-10, page 179.

[3] See, for example, Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, Exhibit RDO-9, page 85.

18. In this connection, it might be desirable to do away with the granting of an exemption when the domestic safeguard measure is not covered by Article XIX of the GATT. This is not a question that can be resolved in the present dispute, however, inasmuch as Article I:1 of the GATT is not part of the Panel's terms of reference.

19. Mr Chair, members of the Panel, I thus conclude my oral statement. The Dominican Republic remains at your disposal to respond to any questions that might arise.

ANNEX D

ORAL STATEMENTS OF THE THIRD PARTIES AT THE SPECIAL SESSION OF THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF COLOMBIA

I. THE DETERMINATION OF THE IMPORTED PRODUCT AND THE DOMESTIC PRODUCT IN THE AGREEMENT ON SAFEGUARDS

1. The present case has given rise to a discussion of the rules that should be applied in determining the product investigated in a safeguard process, taking into account the relevance of that determination to the national authority's analysis, under the Agreement on Safeguards, of the similarity between the imported product and the like or directly competitive product manufactured by the domestic industry.

2. In its first written submission, the complainant argues that the Dominican Republic: (i) failed to determine correctly that the imported products and the domestic products were like or directly competitive[1]; and (ii) wrongly interpreted the concept of "producers" in the Agreement on Safeguards, leading to the exclusion of domestic producers of directly competitive products.[2] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the Agreement on Safeguards was not properly established.

3. Colombia proposes to comment on the discussion concerning whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the obligations of the Dominican Republic under the Agreement on Safeguards, especially with respect to the concept of "domestic industry" and the means of identifying it.

4. Colombia agrees with the statement by the Dominican Republic that there are no precedents in panel or Appellate Body proceedings concerning how the product under investigation in a safeguards investigation should be defined and that there are no express rules relating to this matter. However, it does not agree that this is a question unrelated to the provisions of the Agreement on Safeguards and that, consequently, there are no clear criteria for determining how this finding should be made.

5. The determination of the product under consideration or investigation is a fundamental part of the process of properly identifying the domestic industry in a safeguards investigation. This decision establishes the context for determining where the "like or directly competitive products" are to be situated, while forming the basis of the analysis for identifying the domestic producers that make up the domestic industry and the data that will be needed for the analysis of injury.

6. Colombia proposes that, despite the term "product investigated" not being used in the Agreement on Safeguards, a systematic interpretation of the Agreement under Article 31 of the Vienna Convention yields sufficient evidence to establish what product under investigation should be taken to mean and how that product should be identified in a safeguards investigation.

7. In this respect, an exegetical reading of the second paragraph of the preamble and Article 2.1 of the Agreement on Safeguards, consistent with Article 31 of the Vienna Convention, would suggest

[1] First written submission of the complainants, paragraphs 77-80.
[2] First written submission of the complainants, paragraphs 160-163.

that an investigation can only be conducted into "a product" and not several. However, Colombia believes that it can be argued that the product under investigation may be composed of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the provisions of Article 4.1(c) of the Agreement on Safeguards.

8. Article 4.1(c) of the Agreement on Safeguards, which defines domestic industry, reads as follows:

> "[…] a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". (emphasis added)

9. Although the Article in question relates to the determination of the domestic industry and to how the imported products should be compared *vis-à-vis* the domestic products, for Colombia this rule also applies to the determination of the product under investigation, because of the close relationship between the definition of domestic industry and the product investigated. If it is not accepted that the products investigated should be, at least, like or directly competitive, this finding could not be made with respect to domestic products, since it would be impossible to compare dissimilar categories of products.

10. Insofar as the standard of Article 4.1(c) of the Agreement on Safeguards requires that the domestic and imported products be like or directly competitive, if the "product investigated" contained products which in themselves were not, or was composed of several individual products which needed to be considered individually, it would be impossible to prove that there was a parameter for defining such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry within the investigation.

11. A similar argument was upheld in an analogous situation by the Panel in *United States – Steel Safeguards*, when the relationship between a suitable definition of the imported products and the causal link envisaged in Article 4.2(b) of the Agreement on Safeguards was analysed. In this connection, the panel stated that:

> "In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken."[3]

12. Colombia considers that this reasoning is also applicable to Article 4.1(c) of the Agreement on Safeguards inasmuch as the definition of the product investigated could prevent the proper identification of the domestic industry, a situation which would necessarily lead to a violation of the above-mentioned Article.

13. For this reason, the criterion for establishing whether two different products can be regarded as a single product investigated means that there must, at least, be a relationship of likeness or direct

[3] Panel Report in *United States – Steel Safeguards*, paragraph 10.416.

competitiveness between them. Otherwise it would be impossible to comply with the requirement for the determination of the domestic industry in Article 4.1(c) of the Agreement on Safeguards.

14. Colombia notes that the Dominican Republic does not mention any criterion for establishing how several products, in this case tubular fabric and polypropylene bags, could be included in a single category. Apparently, this finding was based solely on considerations of a customs nature, which, in Colombia's opinion, is not a reasonable and sufficient basis for making such a determination. In the words of the last sentence of Article 3.1 of the Agreement on Safeguards, the identification of the product investigated by the Dominican Republic would not be a finding or reasoned conclusion.

15. To accept that products investigated can be grouped together without any justification of their likeness or competitiveness would be contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[4], insofar as it would allow virtually any kind of products to be included as a single whole in a safeguard investigation, regardless of the relationship between them. Under this interpretation, products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules applicable to this situation, a conclusion that is manifestly absurd and contrary to the Agreement on Safeguards.

16. Colombia therefore concludes that the grouping of tubular fabric and polypropylene bags in a single category of products under investigation is inconsistent with the obligations under Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

II. THE REQUIREMENT OF "UNFORESEEN DEVELOPMENTS" UNDER ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

17. On this point, the complainants allege that the Dominican Republic has not demonstrated the existence of unforeseen developments insofar as it has not given a reasonable explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis and (iii) China's accession to the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the reasons given by the Dominican Republic's authorities for treating these events as unforeseen developments are inadequate.

18. In Colombia's opinion, the Panel should take into account the fact that, although there are certain requirements that every Member of the WTO must meet to prove this element, the standard cannot be construed in such a way as to make it de facto impossible to recognize these developments, by laying down requirements that are difficult to meet in practice.

19. Colombia agrees with the statement by the Dominican Republic to the effect that the rule for the application of the concept of "unforeseeability" is not clear and, on the contrary, makes it difficult for any Member of the WTO to use the safeguard measures for which the Agreement on Safeguards provides. In *Argentina – Footwear*, the Appellate Body defined the concept of unforeseen developments as "unexpected" or "unforeseeable".[5] Likewise, the Panel in *Argentina – Preserved Peaches* stated that: "*The text of Article XIX:1(a) cannot support an interpretation that would equate*

[4] In the following cases the Appellate Body has referred to the application of the principle of effectiveness in the interpretation of treaties in settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

[5] Appellate Body Report in *Argentina – Footwear*, paragraph 91.

increased quantities of imports with unforeseen developments."[6] However, later in its report the same Panel considered that "*a statement that the increase in imports, or the way in which they were being imported, was unforeseen does not constitute a demonstration as a matter of fact of the existence of unforeseen developments*".[7]

20. In recent years, the Appellate Body has ruled on several occasions on how the standard relating to the existence of unforeseen developments should be met. Both these decisions and those already mentioned have created some uncertainty as to how States should demonstrate the existence of this situation.

21. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to enable it to be applied clearly and effectively, with a view to allowing the application of safeguard measures under the conditions envisaged in Article XIX of the GATT and the Agreement on Safeguards. In Colombia's view, as long as this standard on unforeseen developments perpetuates the uncertainty with regard to its application, it will be very difficult to show that situations such as those submitted by the Dominican Republic can be regarded as meeting the aforementioned requirement.

22. In Colombia's opinion, given the lack of clarity in this respect, the Panel's examination cannot be *de novo* or involve a judgment that goes beyond the elements reasonably available to the Member at the time the disputed measure was applied. Colombia takes the view that there is simply no support in either the Agreement on Safeguards or Article XIX of the GATT for the opposite course of action which, moreover, could potentially infringe essential legal principles of due process and substantive justice.

23. These comments are without prejudice to Colombia's arguments as set out in its submission to the Panel.

[6] Appellate Body Report in *Argentina – Preserved Peaches*, paragraph 7.18.
[7] *Ibid*., paragraph 7.24.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES

1. Mr Chairman and members of the Panel, it is a pleasure to appear before you today to present the views of the United States as a third party in these proceedings. The written submission of the United States addressed the submissions of the complaining parties, and we will not repeat those points here. Today, the United States will address the Dominican Republic's written submissions, including its request for a preliminary ruling as to whether the *Agreement on Safeguards* ("Safeguards Agreement") and Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") apply to the measures at issue in this proceeding.

Whether the Safeguards Agreement Is Applicable

2. The first issue we would like to discuss today is the applicability of the Safeguards Agreement to the measures at issue.

3. Specifically, the Dominican Republic argues that the Safeguards Agreement does not apply because the increased tariff rates associated with the measures do not exceed the relevant tariff bindings of the Dominican Republic for the product or products in question – i.e. polypropylene bags and tubular fabric.[1]

4. Although the United States takes no position on the consistency of the measures at issue with the WTO, it may be relevant to the question of the applicability of the Safeguards Agreement that the Dominican Republic apparently considered that the measures were safeguards when it imposed them, including notifying them as safeguard measures to the Committee on Safeguards.[2] It would also appear as a general matter that it would be relevant as to exactly what the measures at issue entail. For example, the Dominican Republic represented that it relied on at least one of the provisions of the Safeguards Agreement in structuring its measures - it relied on Article 9.1 of the Safeguards Agreement as a basis for not applying the increased duties to certain Members.

5. As a result, the Dominican Republic apparently relied on the measures as safeguards to justify not applying its duties on the products at issue in a most-favoured-nation manner pursuant to Article I:1 of the GATT 1994 when it exempted imports from certain developing countries (i.e. Mexico, Panama, Colombia, and Indonesia) from the application of the measures. As a result, imports of polypropylene bags and tubular fabric from these countries are treated more favourably than imports from other Members.

6. Accordingly, the question of whether the Dominican Republic needed to suspend its tariff concessions on the products at issue in order to impose the measures at issue is only part of the relevant legal analysis.

Definition of "Producers" Under Article 4.1(c) of the Safeguards Agreement

7. In addition, the United States would like to address the Dominican Republic's "reservation" of the "right" to apply a minimum transformation or value-added test (at paragraph 251) to define

[1] Dominican Republic's request for a preliminary ruling (18 April 2011).
[2] G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (18 October 2010).

producers for purposes of Article 4.1(c) of the Safeguards Agreement. According to the Dominican Republic, it reserves the right to exclude entities, such as downstream companies that provide low value-added finishing services, from the universe of producers of like or directly competitive products and, therefore, from the domestic industry.

8. It does not appear that the Dominican Republic applied a minimum transformation or value-added test in determining producers for purposes of the measures at issue in this proceeding. As a legal matter, the Panel should not reach hypothetical issues that do not arise from the actual determination of the competent authority that is at issue in a dispute. Such issues would not form part of the "matter" the Dispute Settlement Body has charged the Panel with examining and would therefore be outside the Panel's terms of reference under Article 7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

9. In any event, the United States notes that there is nothing in the Safeguards Agreement that prohibits the application of a minimum transformation or value-added test for purposes of defining producers under Article 4.1(c) of the Safeguards Agreement.

Conclusion

10. This concludes our statement. Thank you again for this opportunity to express our views.

ANNEX D-3

ORAL STATEMENT OF PANAMA

Mr Chairman, members of the Panel:

1. As a third party, Panama welcomes this opportunity to give the reasons why it considers the safeguard measures adopted by the Dominican Republic, which are the subject of these proceedings, to be inconsistent with GATT Article XIX and the WTO Agreement on Safeguards (AS).

2. Panama is of the view that this Panel will reach the same conclusion when it analyses the Dominican Republic's actions within the context of the national investigation procedure and the multilateral notification and consultation procedures established in Articles 8.1, 12.1 and 12.3 of the AS.

3. Panama believes that the investigation underlying the measures adopted by the Dominican Republic's Investigating Authority was flawed in its determinations with regard to: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination regarding the increase in imports; (iv) determination of injury; and (v) the causal link between imports and injury. These determinations are not based on adequate and reasoned findings or on a detailed analysis of the case, in accordance with Articles 3.1 and 4.2(c) and the substantive rules of the AS.

4. The lack of substantiation for these elements, which are vital for an action under the AS, has been argued extensively in these proceedings by the complaining parties and now by at least one of the third parties. We recall, for instance, the arguments put forward by the complainants in their first written submission (*see paragraphs 73 et seq.*). Therefore, as you requested, Mr Chairman, and to save time, we will refer to only three points concerning the Dominican Republic's violations within the framework of the AS and GATT Article XIX.

5. First, Panama reiterates its view that the Dominican Republic did not give timely notice or hold prior consultations with those Members having a substantial interest in the measure, as provided for in Article 12.3 of the AS and Article XIX:2 of the GATT; nor did it provide opportunities to obtain an adequate means of trade compensation for those Members, as established in Article 8.1 of the AS and Article XIX:2 of the GATT. We elaborate on this point in our first written submission, but feel it is important to reiterate it orally (see *First Submission of Panama, paragraph 14*).

6. Second, the Dominican Republic claims that GATT Article XIX and the AS are not applicable to the provisional and definitive measures adopted (see *First written submission of the Dominican Republic, paragraph 90*). In Panama's view, it is clear that the Investigating Authority of the Dominican Republic conducted the investigation and adopted the measures at issue under Article XIX of the GATT and the AS. This is shown by the fact that, when it excluded imports from Panama from the scope of the measure, the Dominican Republic cited Article 9.1 of the AS (see *Preliminary Resolution, fourth article, as amended by Preliminary Amending Resolution; Final Resolution, fourth article; CEGH-5 and 6*). Panama agrees with the Dominican Republic that Article 9.1 of the AS provides justification under WTO law for having excluded imports from Panama from the application of this measure.

7. Moreover, the Dominican Republic notified the investigation and the provisional and definitive measures to the WTO under Article 12 of the AS. It is therefore Panama's understanding that GATT Article XIX and the AS do indeed apply to the present proceedings, as affirmed by the Dominican Republic in its own statements in support of its action (*see notifications of the measure by the Dominican Republic, CEGH-18 to 21*).

8. Third, and lastly, Panama disagrees with the Dominican Republic's preliminary objection to this Panel's terms of reference. We understand that the Dominican Republic objects to the complainants having questioned the provisional and definitive measures in the light of GATT Article XIX, the AS, GATT Articles I:1 and II:1(a) and the second sentence of GATT Article II:1(b), and other issues relating to the investigation, notification and consultations in respect of the case (*First Written Submission of the Dominican Republic, paragraphs 86 and 87*). Panama participated as an associated third party in the consultation meeting and, while safeguarding the confidentiality of these consultations, believes that all the measures or complaints set forth in the requests for the establishment of the Panel reasonably reflect the requests for consultations and the developments that took place at the consultation meeting.

9. Panama understands that the Members of this Organization have the right to adopt measures to safeguard their domestic industry. These measures must, however, adhere to the legal principles and processes embodied in the agreements signed by the Members, as in the case of the AS, which is our current focus. Panama is concerned that the safeguard measure adopted by the Dominican Republic is inconsistent with the provisions and procedures established in the AS and the GATT. We trust that the Panel will reach the same conclusion, and that it will recommend that the Dominican Republic withdraw the measures immediately.

ANNEX D-4

ORAL STATEMENT OF TURKEY

Mr Chairman and members of the Panel:

1. Turkey welcomes this opportunity to present its views in this proceeding. I will summarize Turkey's position on the subject, to the extent possible, by refraining from repeating details presented in our written submission.

2. Although the dispute covers many issues, Turkey would like to focus on some major subjects and it is not the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements.

3. Turkey hereby wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

4. As it is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a Member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source. In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

5. On the other hand, Article 9.1 of the Agreement on Safeguards sets forth that the safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. Turkey's "developing country status" has been recognized by Member States, including the Dominican Republic, and export products from Turkey have been excluded from measures in safeguard investigations.

6. Turkey considers that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply the special and differential treatment to all developing countries that meet the conditions.

7. In Turkey's view, in the case where a developing country's export of the product at issue to the country applying the measure is 0 per cent, the applicatory country carries the obligation to include that developing country in the list of countries exempt from the scope of the safeguard measure. In this context, having in mind the fact that Turkey has no share in the Dominican Republic's imports in question; the list of the developing countries, which are exempted from the imposition of the safeguard measure in this case, should include Turkey, as well.

8. Turkey wishes to thank the Panel for this opportunity to submit its views during this hearing. Turkey looks forward to answering any questions that Panel may have.

Thank you, Mr Chairman.

ANNEX D-5

ORAL STATEMENT OF THE EUROPEAN UNION

Mr Chairman, distinguished members of the Panel:

I. INTRODUCTION

1. The EU makes this third party oral statement because of its systemic interest in the correct interpretation of Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. The EU respectfully requests this Panel to take into account the observations already made in our Third Party Written Submission when making findings in this case. Today, while not repeating those observations, the EU will recall some of them and will make some additional remarks in view of the comments made by other third parties.

II. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

2. The first issue the EU would like to recall is the applicability of the *Agreement on Safeguards* in the present case.

3. In the EU's view, Article 1 of the *Agreement on Safeguards* defines its scope by reference to the measures "provided for in Article XIX of the GATT 1994". Article XIX of the *GATT 1994* authorizes WTO Members to suspend the obligations incurred under that agreement provided that certain conditions are met. In this respect, it appears that the nature of a safeguard measure under Article XIX of the *GATT 1994* is of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it will not be considered as a safeguard measure pursuant to Article XIX of the *GATT 1994* and, consequently, will not fall under the *Agreement on Safeguards*.

4. Indeed, the EU observes that several provisions of the *Agreement on Safeguards*[1] make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

5. In any event, as noted in our written submission, this does not necessarily imply that the tariff measure at issue in this dispute falls entirely outside the scope of the *Agreement on Safeguards*. Such a measure also comprises a set of *actions* taken by the Dominican Republic which can be examined in view of the obligations contained in the *Agreement on Safeguards*. In the EU's view, actions when initiating and conducting the investigation are governed by the *Agreement on Safeguards* even if the investigation is terminated and no such measure is eventually imposed as a result of the investigation. Thus, *a fortiori* in cases where the investigation shows that "the extent necessary to prevent or remedy serious injury and … facilitate adjustment"[2] does not require going beyond the tariff binding, the EU

[1] *Agreement on Safeguards*, Articles 7.2, 8.1 and 12.3.
[2] *Agreement on Safeguards*, Article 5.1.

considers that the set of actions taken by the investigating authority should still comply with the *Agreement on Safeguards*.[3]

III. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

6. The EU would also like to address some of the comments raised by Third Parties as regards the need for an assessment of likeness or direct competition when defining the product under investigation.[4] As explained in our written submission, Article 4.1(c) of the *Agreement on Safeguards* does not require such an assessment. Thus, WTO Members are not limited when determining the product under investigation.

7. However, several obligations follow from that determination. In particular, the definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. Insofar as the parallelism between the product under investigation and the like or directly competitive domestic products is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

8. Furthermore, the EU notes that in *US – Lamb* the Appellate Body did not impose the requirement to *only* include like or directly competitive products in the definition of product under investigation. And certainly it did not say that inputs can *only* be included as part of the same product under investigation if they are like or directly competitive with the finished product. This issue was simply not addressed by the Appellate Body. Rather, in that case the Appellate Body questioned the definition of the domestic industry which included inputs (i.e. live lambs) and the final product (i.e. lamb meat) while the product under investigation was *only* the final product (i.e. lamb meat). In other words, the Appellate Body questioned the lack of parallelism between the product concerned and the like or directly competitive domestic products.

IV. UNFORESEEN DEVELOPMENTS

9. The EU also recalls its position that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.[5] This has been confirmed by the Appellate Body on numerous occasions. The Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on arguments that have been explicitly rejected by the Appellate Body. Thus, the Panel should follow previously adopted Appellate Body reports addressing the same issues.[6] This does not mean that the Panel can disagree with previously adopted Appellate Body reports and state so in its report. However, in order to ensure security and predictability of the system[7], it should not depart from the Appellate Body's consistent interpretation

[3] Colombia's Third Participant Written Submission, paragraphs 18-22; Nicaragua's Third Party Written Submission, paragraphs 5-9.
[4] Colombia's Third Participant Written Submission, paragraphs 25-37.
[5] Colombia's Third Participant Written Submission, paragraphs 47-50.
[6] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 161.
[7] *DSU*, Article 3.7.

of the covered agreements, and thus leave the dissenting WTO Member the possibility of invoking "cogent reasons" before the Appellate Body.[8]

V. PARALLELISM AND ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

10. Finally, the EU would like to add that the exclusion of certain developing countries from the scope of application of the safeguard measure pursuant to the application of Article 9.1 of the *Agreement on Safeguards* does not affect the parallelism under Articles 2.1 and 2.2.[9] Unlike other situations, such as the inclusion of members of a free-trade area[10], the exception of developing countries whose import share collectively does not exceed 9 per cent of the total imports of the product concerned is explicitly provided for in the *Agreement on Safeguards.* Absent any cross-reference to Article 2 or any clarification in Article 9 that those imports should also be excluded for the relevant analysis under Article 2.1, the logical conclusion is that the negotiators did not intend to require parallelism also with respect to an explicit exception to Article 2.2.

VI. CONCLUSIONS

11. To conclude, while not taking a final position on the merits of the case, the EU requests the Panel to carefully review the scope of the claims in light of these observations.

Mr Chairman, distinguished Members of the Panel, thank you for your kind attention.

---

[8] Panel Report, *US – Stainless Steel (Mexico)*, paragraph 7.105 as reversed by the Appellate Body in *US – Stainless Steel (Mexico)*, paragraph 162; and Panel Report, *US – Continued Zeroing*, paragraphs 7.181 and 7.182 ("As discussed above, we share a number of concerns raised by the Panel in *US – Stainless Steel (Mexico)*, particularly with regard to the US mathematical equivalence argument. We recognize, however, that the Appellate Body in its report reversed the Panel's findings and this report gained legal effect through adoption by the DSB. We note that this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments. Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case").

[9] US Third Participant Written Submission, paragraphs 14-17; Nicaragua's Third Party Written Submission, paragraphs 10-11.

[10] Appellate Body Report, *US – Line Pipes*, paragraph 197; Appellate Body Report, *US – Wheat Gluten*, paragraph 96; and Appellate Body Report, *US – Steel Safeguards*, paragraph 441.

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. In this second written submission, Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") will refute the arguments put forward by the Dominican Republic in the request for a preliminary ruling contained in its first written submission, as well as in its oral statements and its replies to the Panel's questions.

II. THE APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

2. First of all, as is clear from the design, structure and architecture of the provisional and definitive measures[1], the latter impose "other duties or charges" within the meaning of Article II:1(b), second sentence, of the GATT, given the following attributes of an objective nature, which distinguish them from ordinary customs duties: (a) the process of formulation of the measures (administrative process compared with the legislative process which characterizes ordinary customs duties)[2]; (b) the intention of the authority which gave rise to the measure ("second tariff")[3]; (c) its actual wording (alternative duty to the ordinary customs duty)[4]; (d) its actual administration (treatment different from ordinary customs duties)[5]; and (e) the express admission by the Dominican Republic that the measure *replaces* the ordinary customs duty ("as long as the increased tariff applies, the ordinary MFN tariff shall not apply").[6]

3. Secondly, the Dominican Republic argues that Article XIX:1(a) excludes the possibility of imposing safeguard measures that imply a suspension of Article I:1 of the GATT, suggesting that it is not legally feasible to suspend the obligation under this provision in the context of a safeguard action. For that purpose, it cites various views of individuals or relevant historical background concerning Article XIX.[7] However, the underlying issue is the fact that the text of Article XIX:1(a) does not make the distinction referred to by the Dominican Republic. The term "obligation" is not subject to any qualification. As mentioned by the EU, a note to the analogous provision to Article XIX in the Havana Charter (the predecessor to the GATT 1947) imposed the obligation of non-discrimination against imports from any member country. However, that note was deleted and does not appear in the text of the GATT.[8] The negotiating history plays a secondary role in the interpretation of an

[1] Replies of the complainants to questions 26 and 27.
[2] Exhibit CEGH-23. Reply of the Dominican Republic to questions 31 and 32. Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraphs 143 and 144.
[3] Exhibits CEGH-7 (page 93) and CEGH-10 (page 97). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 121.
[4] Exhibit CEGH-9 (pages 8 and 9 - second article). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 142.
[5] Exhibits CEGH-30 and CDGH-31. Reply of the complainants to question 26.
[6] Opening statement of the Dominican Republic, paragraph 47.
[7] Reply of the Dominican Republic to question 60 from the Panel.
[8] Reply of the EU to question 2 from the Panel.

international agreement. The complainants' view that the term "obligation" covers all obligations under the GATT is shared by the United States[9] and the EU.[10]

4. Thirdly, the Dominican Republic argues that the AS covers only measures that involve a suspension of obligations, but no other actions relating to a safeguard investigation, because Article 1 of the AS requires that the AS shall apply only to measures provided for in Article XIX of the GATT. Conversely, if a measure other than one of those provided for in Article XIX of the GATT is taken, it is not applicable.[11] The complainants contend that the measures at issue imply a suspension of obligations under Articles I:1, I:2(a) and II:1(b) of the GATT, for which reason, even under the Dominican Republic's interpretation, these measures are safeguard measures. Notwithstanding, even if it is considered that the measures do not imply a suspension of obligations within the meaning of Article XIX of the GATT, the complainants contend that the measures and all aspects of the investigation are covered by the AS and by Article XIX.

5. In the complainants' view, the reference to "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS does not mean that any safeguard measure necessarily implies the suspension of obligations or the withdrawal or modification of concessions. If that were the case, Article 11.1(a) of the AS would be deprived of any meaning. The approach suggested by the Dominican Republic would imply that a safeguard investigation, including the determination of the right to apply safeguard measures, could not be challenged until the adoption of a measure had been verified.

6. Through its interpretation, the Dominican Republic would appear to be suggesting the introduction of a rule analogous to Article 17.4 of the Anti-Dumping Agreement with regard to the scope of safeguard measures, via the interpretation of the Panel. Article 17.4 of the Anti-Dumping Agreement establishes an effective limit on the right to submit an anti-dumping dispute to a panel, unless an anti-dumping measure at least exists. However, in the matter of safeguards, there is no provision analogous to Article 17.4 of the Anti-Dumping Agreement that could be contained in the AS. Nor is it foreseen in Appendix 2 of the DSU that safeguard disputes should be subject to special or additional provisions as indeed provided for under Article 17.4 in respect of anti-dumping disputes.

7. Accordingly, the complainants consider that the "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS refers to any type of measure available to an importing Member that has established the right to apply a safeguard measure in accordance with the first part of Article XIX:1(a) and the AS; that is to say, a measure responding to the serious injury caused by increased imports as a result of unforeseen developments and the effect of the obligations incurred under the GATT, including tariff concessions.

8. The term "shall be free" in the last part of Article XIX:1(a) of the GATT means that, prior to verification of the circumstances and conditions provided for in the first part of Article XIX:1(a), a Member is entitled to suspend an obligation, or to withdraw or modify concessions. However, this entitlement does not mean that the action taken by the Member in response to the serious injury *should* necessarily involve a suspension of obligations or the withdrawal/modification of a concession. The purpose of the AS and of Article XIX of the GATT is to provide a mechanism to prevent or remedy serious injury to the domestic industry caused by increased imports as a result of unforeseen developments and the effect of obligations under the GATT, and to facilitate adjustment.

[9] Reply of the United States to question 2 from the Panel.
[10] Reply of the EU to question 2 from the Panel.
[11] Reply of the Dominican Republic to questions 62 and 77 from the Panel.

Articles 5 and 7 of the AS require that a safeguard measure be applied solely and exclusively to the extent and during the period "necessary" to prevent or remedy serious injury and to facilitate adjustment. Any measure that goes beyond what is "necessary" either in magnitude or time-scale is in violation of these provisions of the AS, even if the measures fall within the scope of bound measures or are not inconsistent with general GATT obligations.

9. The Dominican Republic's interpretation could lead to a circumvention of other trade policy instruments such as anti-dumping duties and countervailing duties. Under that interpretation, if a Member that initiates and carries forward an anti-dumping investigation (in accordance with Article VI of the GATT and with the Anti-Dumping Agreement) observes flaws in the investigation, that Member could evade questions under those instruments by terminating the investigation in question without applying an anti-dumping duty, and subsequently increase the tariff up to the level that would have corresponded to the anti-dumping duty, but below the bound level in order to be able to affirm that no anti-dumping measure has been imposed and that, at the same time, there is no violation of the bound tariff. Clearly, this interpretation would be contrary to the spirit of the WTO Agreement. The complainants trust that this Panel will not set a precedent that renders inoperative these trade policy instruments which are of fundamental importance in multilateral trade relations.

III. THE PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE OF THE PANEL

10. The Dominican Republic argues that the alleged inconsistency between the request for consultations and the panel request has changed the essence of the complaints.[12] The complainants note that the change in the essence of a complaint is a criterion that has been used in objections to the inclusion of additional *measures* but not in objections to the inclusion of additional *legal bases*[13], which are the kind of objections raised by the Dominican Republic in this dispute. In addition, the essence of the complaints has not changed inasmuch as the measures, the products at issue and the covered agreements relied upon have always been the same.

11. As part of another preliminary objection, the Dominican Republic also states that the complaints under Articles I and II of the GATT are new complaints since they were not included in the request for consultations[14] and "bear no relationship whatsoever to the submissions contained in the request for consultations".[15] As was explained above, these claims come within the Panel's terms of reference by virtue of the express reservation contained in the request for consultations.[16] Contrary to the contention of the Dominican Republic, the reservation in question cannot be characterized as "very full" since it refers only to the right of the complainants to raise additional matters *in accordance with the AS and the GATT 1994*, and in the context of concerns relating to provisional and definitive measures, as well as the related proceedings.

[12] First written submission of the Dominican Republic, paragraphs 67, 82, 84 and 89. Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, pages 62-65.

[13] Panel Report, *EC – IT Products*, paragraph 7.182; Panel Report, *Dominican Republic – Cigarettes*, paragraph 7.19; Appellate Body Report, *US – Zeroing (EC) (21.5)*, paragraph 383; Appellate Body Report, *Brazil – Aircraft*, paragraph 132.

[14] First written submission of the Dominican Republic, paragraph 89.

[15] Replies of the Dominican Republic to the questions from the Panel, page 64.

[16] Initial oral statement of the complainants at the first substantive meeting, paragraphs 34-45; replies of the complainants to the questions from the Panel at the first substantive meeting, paragraphs 152-160.

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

12. The claim concerning the domestic industry is a compound claim which subsumes various related complaints. The complaint relating to the definition of the imported product under investigation refers to the lack of "adequate and reasoned explanations" in the light of the requirements of Articles 3.1, last sentence, and 4.2(c) of the AS.[17] The complainants observe that in section 4.2.4, the Dominican Republic bases its argument on the mistaken idea that the claims concerning the imported product under investigation refer to the alleged existence of guidelines for their definition; this is not the case, as is clear from the first written submission, the opening statement at the first meeting with the Panel, the replies to the Panel's questions and this second written submission.[18]

13. It is clear that the Dominican Republic failed to demonstrate that its investigating authority had given an adequate and reasoned explanation concerning the various questions and factual information provided by the numerous interested parties which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had provided an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

14. Regarding the Dominican Republic's argument that "there are no Panel or Appellate Body determinations which explicitly interpret the terms "like product" or "directly competitive product" in the context of determinations covered by the AS"[19] the complainants fail to see the significance of that argument and observe that the Dominican Republic ignores the recent settled case law of the Appellate Body in the *EC – Civil Aircraft* case. The absence of determinations explicitly interpreting the terms "like product" and "directly competitive product" does not exempt the investigating authorities from making explicit findings and providing adequate and reasoned explanations in respect of both definitions. Nor does it exempt the investigating authorities from following a mandatory order of analysis in order to define the domestic industry.

15. Consequently, there are no grounds for rejecting the arguments relating to the inconsistency of the determination regarding the imported product under investigation. In particular, it is clear that the Dominican Republic failed to demonstrate that its investigating authority had provided an adequate and reasoned explanation concerning the various questions and factual information submitted by the numerous interested parties, which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had given an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

[17] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65.

[18] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65. Second written submission of the complainants, paragraph 85.

[19] First written submission of the Dominican Republic, paragraph 191.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

16. The Dominican Republic has explained that the following events were considered as unforeseen developments: (i) China's accession to the WTO; and (ii) the tariff cuts resulting from free trade agreements.[20]

17. As a factual matter, from the beginning of the process of China's accession to the WTO and at the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987. Hence, China's accession to the WTO in 2001 does not constitute a development that was unforeseen or unexpected for the Dominican Republic when the WTO Agreement entered into force in 1995. On the contrary, in 1995 it was foreseen that at some point in the future China would join the WTO once negotiations with the various Members of this Organization were completed.

18. The Dominican Republic also makes the *ex post* argument that the tariff cuts under the Central America-DR Agreement and DR-CAFTA constitute unforeseen developments.[21] The initial provisions of these free trade agreements indicate that both were entered into pursuant to Article XXIV of the GATT, which, following the establishment of the GATT 1947, stipulated the possibility for Members of the GATT/WTO system to form free trade areas or customs unions.[22] Upon joining the WTO, the Dominican Republic assumed the rights and obligations contained in the WTO Agreement, including the provisions of Article XXIV of the GATT.[23] This implies that, for the Dominican Republic as a WTO Member, the possibility of signing free trade agreements under Article XXIV of the GATT was not an *unforeseen* event.

19. Even assuming, *quod non*, that China's accession and the tariff cuts pursuant to the above-mentioned agreements had constituted unforeseen developments for the Dominican Republic and that the latter had made the relevant adequate and reasoned finding in its technical reports (or resolutions), it is clear that no logical connection whatsoever was established between these events and the alleged increase in imports of polypropylene bags and tubular fabric.

VI. THE ALLEGED INCREASE IN IMPORTS

20. In response to question 96, the Dominican Republic acknowledges that the treatment of tubular fabric and polypropylene bags as a single product affected the determination of increased imports, since the data relating to imports of both products were analysed in conjunction.[24] Given this explicit acknowledgement, the complainants consider that, if the Panel finds that there were

[20] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[21] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[22] Central America-DR Agreement, Article 1.01 ("The Parties establish a free trade area in accordance with the provisions of Article XXIV of the General Agreement on Tariffs and Trade 1994 and Article V of the General Agreement on Trade in Services (GATS) of the WTO Agreement"), Exhibit CEGH-37; DR-CAFTA, Article 1.01 ("The Parties to this Agreement, pursuant to the provisions of Article XXIV of the *General Agreement on Tariffs and Trade 1994* and Article V of the *General Agreement on Trade in Services*, establish a free trade area"), Exhibit CEGH-38.

[23] The Enabling Clause is another instrument that provides for the possibility of regional trade arrangements.

[24] Reply of the Dominican Republic to question 96 from the Panel.

no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation, which is not supported by the provisions of the AS. In other words, an element that is inconsistent with the provisions of the AS (in this case the definition of the imported product subject to investigation under Articles 3.1, last sentence, and 4.2(c)) and which is used as a basis for another analysis required by the AS, such as the determination of the increase in imports, cannot lead to an evaluation of that increase that is consistent with the AS. For this reason alone, the determination of increased imports should be declared inconsistent with Article XIX:1(a) and Articles 2.1, 3.1, last sentence, and 4.2(c) of the AS.

21. With regard to the final determination, specifically, the Dominican Republic uses information from outside the period of investigation in an attempt to explain the decrease in imports up to the end of the period of investigation. As this information lies outside the period of investigation, it is not appropriate to take it into consideration.

VII. THE ALLEGED SERIOUS INJURY

22. The Dominican Republic asserts that there was no need to carry out a separate analysis of certain sectors because it evaluated fabric and polypropylene bags as a whole and did not conduct an analysis by sector or segment.[25] The problem with this assertion is that, in actual fact, the Dominican Republic did conduct an analysis by sector with regard to production by volume - that of finished bags - as was acknowledged by its own investigating authority, since that was the only information which was available on that aspect.[26]

23. Thus, the investigating authority assumed that the finished bags sector comprised the total output of tubular fabric and polypropylene bags. However, the information from the Dominican Republic's own reports also shows that there was production of tubular fabric, beyond that used captively by FERSAN, which was destined for the commercial market (sales of tubular fabric to FIDECA), which could not therefore be considered as being included within the volume production of finished bags.

24. With regard to the market share of imports as a percentage of consumption, the Dominican Republic again puts forward an *ex post* explanation which has no basis in its determinations. This explanation should also be rejected. Nevertheless, even if it were taken into consideration, what the Dominican Republic is asserting is that, on account of the investments undertaken, FERSAN deserved to have a greater share of the market than that which it obtained at the end of the period.[27] The Dominican Republic leaves aside the objective figures which show precisely the opposite: that FERSAN was gaining market share at the expense of imports. Not even on an *ex post* basis does the Dominican Republic provide an explanation as to how investments in technology by FERSAN could justify an "adjustment" of market share beyond the objective figures found in the DEI reports.

25. Concerning the assessment in respect of stocks, the Dominican Republic admits that it made an end-to-end assessment without considering the trends in this indicator.[28] It is clear, therefore, that the evaluation required by Articles 4.2(a), 3.1 and 4.2(c) of the AS was not carried out. This point is

[25] Reply of the Dominican Republic to question 127 from the Panel.
[26] Initial report page 14.
[27] Reply of the Dominican Republic to question 127 from the Panel.
[28] Reply of the Dominican Republic to question 141 from the Panel.

supplementary to the other objections raised with regard to the valuation of inventories, which we have mentioned in our previous written submissions.[29]

26. Regarding the injury evaluation criterion in relation to the preliminary determination, the Dominican Republic presents an interpretation which would have the effect of lowering the standard of proof, by even eliminating the evaluation of the indicators referred to in Article 4.2(a) of the AS for this type of determination. The complainants strongly disagree with this approach. As the complainants mentioned in their reply to question 146, there is no reason to consider that the concept of serious injury or threat of serious injury is different in Articles 4 and 6 of the AS, especially since Article 4.1 defines both concepts "for the purposes" of the AS.

VIII. THE ALLEGED CAUSAL LINK

27. We note that the Dominican Republic has offered no defence arguments in addition to those put forward in its first written submission in connection with our complaints concerning causation and non-attribution. The complainants have already responded to the Dominican Republic's defence concerning these two complaints, as set out in our initial oral statement at the first substantive meeting.[30]

IX. PARALLELISM BETWEEN THE SCOPE OF APPLICATION OF THE MEASURE AND THE SCOPE OF THE INVESTIGATION

28. As was noted previously by the complainants, the obligation with regard to parallelism is enforceable irrespective of the reasons why a Member decides to exclude imports from certain origins from the application of the measure.[31] The complainants do not agree with the Dominican Republic's interpretation to the effect that Article 9.1 of the AS constitutes an exception to the parallelism requirement since: (i) the AS contains no textual basis for such an interpretation; (ii) the parallelism obligation has been defined in general terms by the Appellate Body, without providing for exceptions to its fulfilment.

29. Nor is the parallelism obligation limited to situations of exclusion of imports from countries that are trading partners under an FTA. Although the Appellate Body defined the parallelism obligation when examining safeguard measures that excluded imports from free trade areas, this does not imply that the obligation itself is limited to that context.

X. NOTIFICATION, LACK OF CONSULTATIONS AND OF MEANS OF TRADE COMPENSATION

30. The complainants reiterate their view that the proceedings and hearings carried out in the safeguard investigation under the jurisdiction of the Dominican Republic cannot be treated as equivalent to consultations at *multilateral level* as prescribed by Article 12.3 of the AS. The conduct of an investigation which provides adequate opportunity for the interested parties to put forward their arguments constitutes compliance with the obligation set out in Article 3.1, but no reference is made to the prior consultations provided for in Article 12.3. Accordingly, the Dominican Republic's interpretation would make Article 12.3 redundant, since it would mean that the conduct of the

[29] First written submission of the complainants, paragraphs 218-223; opening statement, paragraphs 89-90.
[30] Initial oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[31] Initial oral statement of the complainants at the first substantive meeting, paragraph 118.

investigation required by Article 3.1 would automatically imply compliance with Article 12.3. This proposition should be rejected as it would be contrary to the principle of effectiveness in the interpretation of treaties.[32]

XI. THE VIOLATIONS OF ARTICLES I:1, II:1(A), AND II:1(B) OF THE GATT

A. COMPLAINTS UNDER ARTICLE I:1 OF THE GATT

31. Both the provisional measure and the definitive measure are inconsistent with Article I:1 of the GATT, inasmuch as the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of those measures constitutes an advantage, favour, privilege or immunity granted to imports from those origins and is not granted "immediately and unconditionally" to any "like product" originating in the territories of all the other WTO Members.

32. Furthermore, the criterion for the granting of such an advantage, favour, privilege or immunity is discriminatory even where there is compliance with the principle that imports should not individually, by origin, exceed 3 per cent of total imports, or collectively account for more than 9 per cent of that total during the period under investigation.[33] For example, that criterion was not applied to exclude imports from Thailand, which are less than 3 per cent.[34]

33. The complainants note that the Dominican Republic shares this view. In its reply to question 2 from the complainants, the Dominican Republic stated that it "understands, as indicated in its final statement at the first substantive meeting of the Panel, that the exclusion of certain countries under this provision raises problems in situations where the safeguard measures adopted in accordance with this law do not constitute safeguard measures under the terms of Article XIX of the GATT and the Agreement on Safeguards".[35]

B. COMPLAINTS UNDER ARTICLE II:1(a) AND II:1(b) OF THE GATT

34. Article II:1(b) prohibits the application of import duties and charges other than ordinary customs duties. By way of exception to this prohibition, a Member may maintain a duty or charge of this nature which existed at "the date" of the GATT [1994] or which was enforceable under mandatory legislation in the territory of the Member before that date. Another exception is where other import duties and charges distinct from ordinary customs duties have been recorded in the Schedule of Concessions of the Member concerned. Both the provisional and the definitive measure imposed by the Dominican Republic are "tariff surcharges" or, in general terms, import charges or duties other than "ordinary customs duties", which are applied to imports of polypropylene fabrics and bags. The Dominican Republic's regulations do not describe them in this way. However, the complainants chose the term "tariff surcharges" because they represent rates different from the "normally applicable MFN tariff"[36]; different, that is, from an ordinary customs duty under Dominican legislation.[37]

---

[32] Appellate Body Report, *US – Gasoline*, page 25: see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81-82.

[33] Preliminary resolution, paragraphs 50 and 51; final resolution, paragraphs 42 and 43.

[34] Preliminary report, Annex I; final report, Annex I.

[35] Reply of the Dominican Republic to question 2 from the complainants; final statement of the Dominican Republic at the meeting with the Panel, paragraph 17.

[36] Opening statement of the Dominican Republic, paragraph 47.

[37] Exhibit CEGH-27.

35. It is important to emphasize that the tariff surcharge was designed by the investigating authority of the Dominican Republic as a "second tariff"[38] and that the definitive measure operates as an alternative to the MFN tariff, so that either the surcharge or the ordinary customs duty is applied, whichever is higher.[39] Moreover, in accordance with Tariff Reform Law No. 146-00 of 11 December 2000, ordinary customs duties or tariffs can only be amended by a legislative act.[40]

36. It should also be mentioned that the Dominican Republic failed to record in its Schedule of Concessions the possibility of applying other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of the GATT 1994.[41] This excludes the possibility of justifying the measures at issue under Article II:1(a) of the GATT.

37. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and by implication, with Article II:2(a) of the GATT.

[38] Exhibit CEGH-7, page 93. Exhibit CEGH-10, page 97.
[39] Exhibit CEGH-9, pages 8 and 9, second article.
[40] Articles 5, 6 and 7 of Tariff Reform Law No. 146-00, Exhibit CEGH-22.
[41] See Exhibit CEGH-27.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the Agreement on Safeguards ("AS") do not apply to the measures at issue. This makes it impossible to evaluate the consistency of these measures with the disciplines cited. In addition, the Dominican Republic affirms that, even if these provisions were applicable, the measures at issue are fully consistent with them.

1. ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS DO NOT APPLY TO THE PRESENT DISPUTE

2. The applicability of these provisions depends on objective criteria (namely, the fact that the measures imply the suspension of an obligation or the withdrawal or modification of a concession), without decisive subjective criteria such as statements by the national authorities.

1.1 Even if it is considered that the measures at issue constitute suspension of Article I:1 of the GATT, they do not fall within the scope of Article XIX of the GATT and the Agreement on Safeguards

3. Article I:1 of the GATT is not one of the "obligations" that may be suspended according to Article XIX:1(a). Consequently, even if it is concluded that the measures at issue suspend Article I:1, this does not mean that they constitute safeguards. There are five reasons for this.

4. Firstly, safeguards must be applied without discrimination (according to Article 2.2 of the AS), with Article 9.1 of the AS being an exception to this non-discriminatory application. To consider that Article XIX of the GATT allows the suspension of Article I:1 would amount to a contradiction between the WTO Agreements. Secondly, this is confirmed by the history of the Uruguay Round negotiations, which led to the inclusion of Article 2.2 of the AS. Thirdly, Article I:1 of the GATT is not the obligation whose effect is increased imports that cause serious injury in the terms of the first sentence of Article XIX:1(a) of the GATT and, hence, is not the obligation that can be suspended in the terms of the second sentence of Article XIX:1(a). Fourthly, Article 9.1 of the AS requires the previous existence of a safeguard measure in order to apply, so it is illogical to claim that reference to Article 9.1 of the AS is in itself indicative of the existence of a safeguard in the terms of Article XIX of the GATT. Fifthly, and finally, the Dominican Republic draws attention to the illogical interpretation put forward by the complainants: imposing a safeguard measure (*erga omnes*, as required by Article 2.2 of the AS) consisting of the suspension of Article I:1 of the GATT, which could only result from the exemption provided in Article 9.1 of the AS, would mean that the only content of the safeguard measure would be the exemption of certain countries from its scope; it would be a safeguard measure that would only provide for its non-application.

1.2 The measures at issue do not suspend Article II:1(b) of the Agreement on Safeguards as they cannot be classified as "other duties or charges"

5. The complainants contend that the objective of the measures was to create a "second tariff" to be applied in addition to the common tariff applicable (MFN). These measures, however, in fact replace this tariff, as recognized by the complainants, contradicting themselves, so they constitute

"ordinary customs duties"; if they were other tariffs, they could not replace the tariff previously applicable but only be added to it.

6. Mere modification of the tariff rate is not equivalent to the imposition of "other duties and charges", and this cannot be concluded either from the fact that the tariff was adopted as the result of an investigation initiated at the request of the domestic industry (as the Appellate Body indicated in *Chile – Price Band System*). As the measures did not affect the tariff in any other way, they cannot be termed "other duties or charges", and consequently the tariff resulting from the measures, as indicated in *India – Additional Import Duties*, naturally constitutes an ordinary customs duty.

7. The complainants also contend that, as Law No. 146-00 provides that existing customs duties can only be modified by means of a legislative act, the measures at issue are not ordinary customs duties but "other duties or charges" because they were established by means of an administrative act. This statement overlooks Law No. 1-02, which allows a temporary increase in the tariff determined by means of an administrative act, and also that the type of act created by the Members in the dispute is irrelevant from the point of view of WTO law.

8. Lastly, the fact that the duties applied by a Member do not appear in its schedule does not prevent such duties from being ordinary customs duties. As the measures at issue are not "other duties and charges", they come under the category of "ordinary customs duties" and as they apply at a rate lower than the pre-existing ordinary MFN tariff, they are consistent with the first sentence of Article II:1(b) and do not constitute safeguards.

1.3 The Agreement on Safeguards does not apply to the investigation prior to the adoption of the measures at issue

9. The complainants contend that Article XIX of the GATT and the AS apply to the investigation that preceded the adoption of the measures at issue, even though these do not constitute safeguard measures. The Dominican Republic considers that dissociating the investigation from the measures is an artificial distinction and is meaningless.

10. This is shown by the relevant provisions of the AS. Firstly, according to Article 1, the applicability of AS rules presupposes the application of a safeguard measure. Secondly, Article 3.1 does not impose any investigation obligation prior to the adoption of measures that are not safeguards. Lastly, this is confirmed by Article 11.1(a) because it is when the investigation is concluded that it becomes certain whether or not a safeguard measure is to be adopted, so it makes no sense to subject investigations that do not result in the adoption of such a measure to the disciplines in Article XIX. The contrary interpretation of this Article put forward by the complainants is contradicted by Article 11.1(c), which specifically excludes the application of the AS to measures, such as the measures at issue, that are consistent with the GATT.

11. The Dominican Republic affirms that it is not a question of "seek to adopt" a safeguard measure in the terms of Article 11.1(a) of the AS, as confirmed by the facts: at a very early stage in the investigation it became clear that the measure would not be an increase above the ceiling bound rate, as the complainants themselves mentioned prior to the adoption of the provisional measure. In any event, the investigation is exempt according to Article 11.1(c).

12. Be that as it may, the Panel should abstain from reaching findings regarding the claims concerning the investigation stage, as this is not required in order to ensure a positive settlement of this dispute, in conformity with Article 3.7 of the DSU.

13. The Dominican Republic also notes that the complainants request a recommendation on abstention from applying safeguard measures, whereas such a solution is not a possibility afforded by the WTO dispute settlement mechanism.

2. THE MEASURES AT ISSUE IN THE LIGHT OF ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS

2.1 The definition of the domestic industry is fully consistent with the requirements in the Agreement on Safeguards

14. In the first place, the determination of the product under investigation was clear and unequivocal, sufficient and reasoned, consistent with the AS, contrary to what is asserted by the complainants. As the parties agreed that there was no need to prove likeness or a competitive relationship between the articles comprising the product under investigation (as the complainants did not claim this) and having taken into account the questions posed by certain participants, the complainants' assertions regarding this determination do not stand up.

15. Secondly, the determination of the like and directly competitive domestic product was reached by the Commission after extensive consideration, even bearing in mind that it is obvious that the product under investigation and the like domestic product are directly competitive inasmuch as they are identical.

16. Contrary to the complainants' interpretation, the production process was not a decisive factor in defining the like domestic product, but was one of the criteria used to identify the domestic industry.

17. The Dominican Republic emphasizes that the like domestic product does not include flat tubular fabric, contrary to what the complainants appear to contend.[1]

18. Thirdly, in order to determine the domestic industry, it was not necessary to make a determination of likeness or direct competition between the input and the finished product, contrary to what is asserted by the complainants, because the determination of the domestic product used a basis for determining the domestic industry is identical to the product under investigation.

19. Article 4.1 itself of the AS specifically envisages the possibility that the domestic industry does not cover all producers of the like product, as confirmed by WTO case law.[2] In order to define the domestic industry, the Commission considered all the producers mentioned by FERSAN in its domestic producer form[3] and then excluded, by means of reasoned arguments, those producers that showed no interest in taking part in the procedure, those that were not producers (according to Article 4.1(c) of the AS and WTO case law[4]) and Textiles Titán.

20. Textiles Titán was excluded because production of the product under consideration represented only a very small percentage of its activities compared to import and conversion. The

[1] Replies by the complainants to questions by the Panel after the first substantive meeting, paragraphs 222 and 223.

[2] Panel Report, *US – Wheat Gluten*, paragraph 8.54, and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paragraph 7.341.

[3] Final Technical Report, pages 49-52. Exhibit RDO-10.

[4] Panel Report, *EC – Salmon (Norway)*, paragraph 7.115, footnote 289.

omission of such an exclusion possibility in Article 4.1(c) of the AS, unlike the Anti-Dumping Agreement, should not be seen in a dispositive sense. This is reaffirmed by Article 4.2(a) and (b) of the AS, which require an evaluation of injury and causal link based on reliable data that cannot be obtained from the aggregate data for enterprises which both produce and import the product under consideration.

2.2 The Dominican Republic correctly evaluated the increase in imports and made reasoned determinations in this respect

21. Contrary to what is asserted by the complainants, the Dominican Republic made a reasoned and adequate determination of the increase in imports based on data for the investigation period (2006-2009). The decrease in imports in 2009 did not prevent a finding of an increase in imports because it was incidental and cyclical, as stated by the Commission, in accordance with Article 2.1 of the AS.

22. The Commission encountered further support for this position in the data for 2010, but did not base itself on these, contrary to what is claimed by the complainants; this position had already been reached at the preliminary stage when the data for 2010 were not yet available. This quest for further confirmation of the findings using the most recent data is supported by WTO case law.[5]

23. The aforementioned findings sufficed for compliance with Article 2.1 of the AS, contrary to what is claimed by the complainants, not having been substantiated by *ex post* explanations (the 2010 data, according to the complainants); on the one hand, the reference to the 2010 data was included in the final determination (*ex ante*) and, on the other, these data were not used for substantiation purposes but for confirmation.

2.3 The determination of serious injury is consistent with the Dominican Republic's obligations under Article XIX of the GATT and the Agreement on Safeguards

24. Firstly, the complainants' assertion that the Commission based itself solely on the "bags" segment when evaluating the indicators of injury is not substantiated; the evaluation was made in respect of the like domestic product as a whole.[6] Moreover, the Commission was neither obliged to make separate evaluations for each segment of the industry[7], nor to include only identical or similar products in the definition of the product under investigation.[8]

25. Secondly, the Dominican Republic was entitled to base its determination of serious injury on the data concerning the "bags division" in its entirety, which it did because it was the smallest group of products for which there was audited information, and includes the domestic like product. This method is consistent with Article 4.2(a) of the AS, which requires that the factors evaluated be objective and quantifiable, and is envisaged in Article 3.6 of the Anti-Dumping Agreement.

[5] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160, confirmed by the Appellate Body, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 7.64.

[6] Final Technical Report, page 69. Exhibit RDO-10.

[7] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 190 and 204; first written submission of the Dominican Republic, paragraphs 350 to 354.

[8] Panel Report, *US – Softwood Lumber V*, paragraph 7.157; see also Panel Report, *EC – Salmon (Norway)*, paragraphs 7.45 and 7.68.

26. Contrary to what is asserted by the complainants, not only is there no obligation to restrict the evaluation solely to the product intended for the domestic market, excluding the exported product, but such an exclusion is not even permitted.[9]

27. Thirdly, and finally, the depreciation costs were correctly included in the production cost used to evaluate profitability. Although the complainants assert that costs should be ascribed *pro rata*, in accounting (and according to WTO case law[10]) the costs used to evaluate profitability are all those associated with the production and sale of the product in question, not only those of direct benefit. The "bags division's" audited profit and loss statements, on which the Commission based itself when evaluating profitability[11], show that the depreciation costs were correctly ascribed.

2.4 The "parallelism" theory does not apply when imports from developing country Members are excluded, in accordance with Article 9.1 of the Agreement on Safeguards

28. The scope of the "parallelism" theory is limited to the context of customs unions and does not apply in general, as has been attested by WTO case law.[12] Unlike what occurred in previous disputes, the exclusion of imports from application of the safeguard measure is based on Article 9.1 of the AS, an explicit exemption from the scope of *application* of a safeguard measure (Article 2.2 of the AS) but not from the scope of the safeguards *investigation* (Article 2.1 of the AS). Accordingly, the reference to the "product … imported" in Article 2.2 of the AS includes all imports, except those covered by Article 9.1, whereas the "product … imported" in Article 2.1 of the AS does not include exemptions; when the exemption in Article 9.1 of the AS is applied, the requirements concerning the investigation (and all the evaluations and determinations it involves) must be fulfilled for all imports, irrespective of whether or not some of them are subsequently excluded from application of the measure in accordance with Article 9.1 of the AS.

29. This position does not lead to unjustified results, prevented by the *de minimis* thresholds imposed by Article 9.1 of the AS, which require that the impact of the imports exempted may not be significant or distort the determinations of the increase in imports and serious injury.

30. Concerning the non-attribution requirement, which requires that the correct attribution of injury take into account the effects of the increase in imports and not "other factors", the Dominican Republic points out that imports from developing countries are not factors "other than the imports", on the basis of Article 2.1 of the AS, notwithstanding their subsequent exemption from application of the measure.

3. CONCLUSION

31. Based on the foregoing, the Dominican Republic requests the Panel to find that the measures at issue are not covered by the scope of Article XIX of the GATT and the Agreement on Safeguards or, alternatively, that they are consistent with these provisions, and to reject all the claims made by the complainants.

---

[9] Appellate Body Report, *US – Hot-Rolled Steel*, paragraph 190.
[10] Panel Report, *EC – Salmon (Norway)*, paragraph 7.483.
[11] Exhibits RDO-13, RDO-14 and RDO-15.
[12] Appellate Body Report, *US – Wheat Gluten*, paragraph 96, and *Argentina – Footwear (EC)*, paragraph 114.

ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OR EXECUTIVE SUMMARIES THEREOF

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

I. PRELIMINARY OBJECTIONS TO THE CLAIMS RELATING TO THE NEED FOR THE MEASURES, ARTICLE I.1 OF THE GATT AND ARTICLE II.1 OF THE GATT

1. The Dominican Republic notes that among the claims not covered by the Panel's terms of reference because they were not the subject of consultations are those contained in subparagraphs (i), (l) and (m) of the request for the establishment of a panel.

2. With regard to these claims, the complainants contend that the Dominican Republic did not prove that its right of defence was affected.[1] The Dominican Republic points out that the effect on this right is a criterion followed when it is considered that a request for the establishment of a panel may be insufficient, in the light of Article 6.2 of the Dispute Settlement Understanding[2], and that it did not claim that the request for the establishment of a panel was *insufficient* but rather that no consultations on these claims were held pursuant to Article 4 of the Dispute Settlement Understanding. The failure to hold consultations excludes these claims from the Panel's terms of reference, irrespective of whether or not the Dominican Republic's right of defence is affected.[3]

3. Secondly, the complainants assert that the criterion of a change in the essence would not apply to this dispute as it has been used for objections to the inclusion of additional *measures* in the request for the establishment of a panel, but not for objections to the inclusion of additional *legal bases*.[4] Their arguments, however, disregard Appellate Body case law in *Mexico – Anti-Dumping Measures on Rice*[5] and the Panel in *China – Publications and Audiovisual Products*.[6]

4. Thirdly, the claimants contend that, even if the *test* of a change in the essence did apply, it was not used because the claims concerning Articles I.1, II.1(a) and II.1(b) of the GATT and Article 5.2 of the Agreement on Safeguards reasonably arose from the legal bases of the request for the holding of consultations.

5. As to the claim concerning the most-favoured-nation obligation based on Article I.1 of the GATT, the complainants contend that it arises from their claim concerning Article 2.2 of the Agreement on Safeguards, as set out in the claim in subparagraph (g) of the request for consultations.[7] This claim was, however, included solely in case the measures at issue did not constitute safeguard measures according to the terms of Article XIX of the GATT.[8] In fact, the aforementioned

[1] Second written submission of the complainants, paragraphs 47-50, 64 and 68.
[2] *Ibid*., see footnotes 32 and 33.
[3] First written submission of the Dominican Republic, paragraphs 51-58.
[4] Second written submission of the complainants, paragraph 52.
[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138. The Panel Report on *EC – Fasteners (China)*, paragraphs 7.507 and 7.508, applied this criterion of a change in the essence when considering that Article 6.9 of the Anti-Dumping Agreement was not included in the Panel's terms of reference as it had not been the subject of consultations.
[6] Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.
[7] Replies of the complainants to the questions from the Panel, paragraph 158.
[8] Oral statement of Costa Rica, El Salvador, Guatemala and Honduras at the first substantive meeting of the Panel, paragraph 37.

subparagraph (g) in no way relates to the claim concerning Article I.1 of the GATT in the request for the establishment of a panel but only refers to the non-exemption of certain developing countries pursuant to Article 9.1 of the Agreement on Safeguards.

6. The complainants also argue that the claim relating to Article II.1(a) and II.1(b) of the GATT is based on Article XIX of the GATT because the increase in imports must be a result of the effect of the tariff concessions subject to Article II of the GATT.[9] They do not, however, specifically indicate to which claim in the request for consultations they are referring.[10] Moreover, the complainants have not indicated how this legal basis could arise from Article XIX as the specific legal basis for any claim contained in the request for consultations.

7. It is obvious that the claim concerning the alleged omission of findings and conclusions on the need for measures was not the subject of consultations pursuant to Article 4.4 of the Dispute Settlement Understanding and does not stem from any legal basis contained in the request for consultations. Although Article 5.1 of the Agreement on Safeguards is indeed cited in subparagraph (g) of the request for consultations, the claim only refers to the alleged failure to comply with the "parallelism" requirement.

8. The complainants indicate that the claims concerning Articles I and II of the GATT are based on the reservation clause in the request for consultations.[11] Nevertheless, the fact that the measures at issue do not constitute safeguard measures under Article XIX of the GATT is not information obtained during the consultations, as required by WTO case law[12] and the reservation clause mentioned by the complainants because the latter were already well aware of the nature of the measures in question before the consultations.[13]

9. In the light of the foregoing, the Dominican Republic argues that the claims included in subparagraphs (i), (l) and (m) of the request for the establishment of a panel are not included within the Panel's terms of reference.

II. ADDITIONAL REASONS WHY A SAFEGUARD MEASURE MAY NOT CONSIST OF THE SUSPENSION OF ARTICLE I.1 OF THE GATT

10. In the complainants' view, a safeguard measure could imply the suspension of Article I.1 of the GATT.[14] This statement is not supported by Article 2.2 of the Agreement on Safeguards or any other provision.

11. In addition to the reasons already explained[15], it is relevant to quote the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which provides the following: "*It is understood that any suspension, withdrawal or modification*

[9] *Ibid*., paragraph 159.
[10] *Ibid*., footnote 89.
[11] Second written submission of the complainants, paragraph 58.
[12] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138; Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.
[13] Oral statement of the Dominican Republic at the first substantive meeting of the Panel, 15 June 2011, paragraph 17; closing statement of the Dominican Republic at the first substantive meeting of the Panel, 16 June 2011, paragraph 16; replies of the Dominican Republic to questions from the Panel, question 51.
[14] Reply of the complainants to the questions from the Panel, paragraph 77.
[15] Second written submission of the Dominican Republic, paragraphs 8-14.

under paragraphs 1 (a), 1(b) and 3(b) must not discriminate against imports from any Member country …".[16]

12. The foregoing logic has applied to Article XIX of the GATT since the very first days it came into force. When addressing Japan's request for accession, the Ad Hoc Committee on Agenda and Intersessional Business rejected the possible extension of this Article to constitute suspension of Article I.1.[17]

13. This was also supported by John H. Jackson already in 1969: "*Although nowhere expressly mentioned in the language, the preparatory work and subsequent GATT practice make it clear that the withdrawal or suspension shall be on a non-discriminatory MFN basis.*"[18]

14. Consequently, Article XIX of the GATT never envisaged the possibility of suspension of Article I.1 of the GATT.

III. THE ALLEGED NATURE OF "OTHER IMPORT DUTIES AND CHARGES" IN THE MEASURES AT ISSUE

15. The complainants use four arguments to claim that the measures at issue are inconsistent with Article II.1(a) and II.1(b) of the GATT as they constitute "other duties and charges" within the meaning of Article II.1(b), second sentence, of the GATT and the Dominican Republic had not included them in the relevant column in its Schedule of Tariff Concessions.

16. First of all, the complainants contend that, as they constitute a tax other than ordinary customs duty, the measures in question are "other duties and charges". This premise does not, however, mean that these are "other duties or charges". Quite the contrary, it indicates that the increased tariff is an ordinary customs duty because it replaces the tariff normally applicable: the only duty paid currently on imports of polypropylene bags and tubular fabric is the 28 per cent duty, in other words, the MFN tariff increased on the basis of the measures at issue.

17. Secondly, the complainants state that the fact that the duty imposed on the basis of the measures at issue applies as an alternative shows that the measures resulted in the application of other duties or charges. On the contrary, as underlined by the European Union in its written submission, the fact that the measures apply *in place of* and not *cumulatively with* the MFN tariff normally applicable is proof that these are not "other duties and charges".[19]

18. Thirdly, the complainants cite the Tariff Reform Law No.146-00, which provides that tariffs can only be amended by means of a legislative act, and from this infer that, as the measures at issue were established through an administrative act, they are "other duties and charges". The complainants disregard Article 73 of Law No.1-02, which allows temporary increases in the tariff established by the law through application of a safeguard measure.[20]

---

[16] United Nations Conference on Trade and Employment, held in Havana, Cuba, Final Act and related documents, page 113. http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[17] Ad Hoc Committee on Agenda and Intersessional Business, Report on the Accession of Japan, 13 February 1953, L/76, Exhibit RDO-27, paragraphs 6 and 7.

[18] John H. Jackson, *World Trade and the Law of GATT*, The Michie Company Law Publishers, Charlottesville, Virginia, 1969, page 564. Exhibit RDO-28.

[19] Third party submission by the European Union, 16 May 2011, paragraph 16.

[20] Exhibit RDO-11.

19. Lastly, the complainants cite some communications from which they infer that these are "other duties and charges".[21] These communications do not, however, lead to the conclusion that these are "other duties and charges", and the complainants have not indicated how they reached such a conclusion.

20. It would appear that the complainants are equating the safeguard measures with trade remedies (anti-dumping and countervailing measures). In fact, such a comparison is wrong because safeguard measures suspend obligations and do not lead to the imposition of other additional duties - as is the case for anti-dumping duties or countervailing measures. This emerges clearly from a comparison of Articles VI.2 and XIX.1(a) of the GATT. It is also the reason why safeguards are not listed in Article II.2(b) of the GATT together with anti-dumping and countervailing duties.

IV. CLAIMS RELATING TO THE DEFINITION OF THE DOMESTIC INDUSTRY

21. First of all, the complainants question the explanation of the definition of the product subject to investigation. They do not, however, make any claim regarding the determination of the imported product subject to investigation[22]; that is to say, the determination would be valid but not its explanation. The Dominican Republic would also like to clarify that neither in case law nor in the Agreement on Safeguards are there any grounds supporting the complainants' statement[23] that the Panel should only base itself on the published reports on the case.[24]

22. The Dominican Republic argues that the explanations given by the Commission on determination of the product subject to investigation are sufficient and comply with Articles 3.1 and 4.2(c) of the Agreement on Safeguards, that there are no legal grounds for requiring an "adequate and reasoned explanation of the reasons for the tariff classification"[25], and that the complainants have not explained how such an obligation arises from the aforementioned Articles. Likewise, it is not clear why Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards would require that the proposal by the participating parties not to deal with tubular fabric and polypropylene bags as a single product would have to be addressed.

23. The complainants quote the Appellate Body report in *EC – Civil Aircraft* to claim that the Panel was obliged to review the definition of the product subject to investigation. This finding is not relevant, however, as the Appellate Body differentiated between definitions under Part III of the Agreement on Subsidies and Countervailing Measures and the definition of the product investigated in accordance with Part V of the same Agreement and the Anti-Dumping Agreement. In other words, the case law does not relate to the definition of a product subject to investigation in a national safeguards procedure.[26]

24. Secondly, the complainants allege that determination of the likeness relationship between the domestic product and the imported product subject to investigation was composed of an implicit assertion of such a relationship. The Dominican Republic draws attention to paragraphs 163 to 181 of its first written submission and to the Commission's Preliminary Technical Report, page 58, where the

[21] Second written submission of the complainants, paragraphs 303 and 304.
[22] *Ibid*., paragraphs 85 and 106.
[23] Replies of the complainants to questions from the Panel, paragraph 18.
[24] See the Panel Reports in *US – Wheat Gluten*, paragraphs 8.19 and 8.21; and *Argentina – Preserved Peaches*, paragraph 7.6.
[25] *Ibid*., paragraph 85.
[26] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paragraph 1133.

determination of the like domestic product is reached, *inter alia*, on the basis of physical and chemical characteristics, tariff headings, and the production process.

25. It should be pointed out that the fact that the domestic product was defined as tubular fabric and polypropylene bags manufactured from resin only indicates a physical characteristic that also applies to the product subject to investigation. Although the production process plays an important role in the definition of the domestic industry, it was not preponderant when determining the like domestic product, where it was one of several criteria examined. The fact that the Commission, when defining the domestic industry, based itself on a series of producers that included Textiles Titán S.A., Filamentos del Caribe S.A., Agro-arrocera S.A. and Fibras Dominicanas CxA.[27], shows that the definition of the like domestic product includes bags obtained from tubular fabric.

26. Given the identical scope of the definitions of the product subject to investigation and the like domestic product (tubular fabric and polypropylene bags), the Dominican Republic considers that the fact that they are like products, and so are directly competitive, is obvious.

27. Thirdly, the complainants contend that the Commission failed to follow a logical order of analysis when determining the domestic industry, disregarding Appellate Body case law by claiming that the Agreement on Safeguards does not require any particular order when examining reports.[28] What the Appellate Body stated[29], however, only clarified the logical path to be followed when examining an issue before one, without seeking to stipulate that there is a mandatory order for analysis by national investigating authorities. Furthermore, there is a logical order in the Commission's analysis when defining the product subject to investigation, the like product and the domestic industry.[30]

28. The complainants also question the fact that the Commission considered tubular fabric and polypropylene bags to be part of the same domestic industry without proving that they were effectively competitors[31], basing themselves on the aforementioned Appellate Body Report. Nevertheless, in this Report the Appellate Body did not contend that it had to be proven that the products composing the domestic industry are like products.[32]

29. Fourthly, the complainants claim that certain categories of producers of the directly competitive domestic product were a priori excluded, based on an erroneous interpretation of the word "producers" in Article 4.1(c) of the Agreement on Safeguards.[33] The Dominican Republic recalls that Agroarrocera and Fibras Dominicanas did not take part in the procedure, that FIDECA *did not produce* the like domestic product (given that it only transformed imported or locally purchased tubular fabric bags)[34] and that Textiles Titán mostly transformed imported tubular fabric. It should be pointed out that Textiles Titán was excluded from the definition of the domestic industry using the provision in Article 26 of Law No. 1-02.

[27] Preliminary Technical Report, page 68. Exhibit RDO-9.
[28] Second written submission of the complainants, paragraph 159.
[29] Appellate Body Report, *US – Lamb*, paragraph 87. See also the reply by the Dominican Republic to question 102 from the Panel.
[30] First written submission of the Dominican Republic, paragraph 210.
[31] Second written submission of the complainants, paragraph 98.
[32] Appellate Body Report, *US – Lamb*, paragraphs 87 and 88.
[33] Second written submission of the complainants, paragraph 85.
[34] Final Technical Report, pages 51 and 52. Exhibit RDO-10.

30. The exclusion of Textiles Titán is justified according to the current meaning of the provisions in Article 4.1(c) of the Agreement on Safeguards and the context and case law in the WTO, which confirm that it is consistent with the Agreement on Safeguards to consider as "domestic industry" a major proportion thereof.[35] Moreover, Article 4.2(a) and (b) provide that investigating authorities must base themselves on reliable data. Where the main activity of an enterprise included in the definition of the domestic industry is to import and resell the product subject to investigation, the investigating authority may find it impossible to separate the data relating to the products produced from those imported when evaluating the indicators of injury or making the determination of the causal link.[36]

V. CLAIMS RELATING TO THE DETERMINATION OF THE INCREASE IN IMPORTS

31. The complainants consider that the Dominican Republic did not prove that there was an increase in imports, as required by Article XIX.1(a) of the GATT and Articles 2.1 and 4.2(c) of the Agreement on Safeguards because "if … there were no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation".[37] The complainants did not, however, claim that the determination of the product subject to investigation was inconsistent *per se* and the Dominican Republic considers that it constitutes valid grounds for determining the increase in imports.

32. The statement that the Dominican Republic "failed to demonstrate that there were adequate and reasoned explanations for an increase in imports in absolute terms that was recent, sudden, sharp, and significant"[38] is also wrong inasmuch as the Commission:

- Determined that, despite a 14.6 per cent decrease in 2009, overall during the investigation period imports increased by 50.06 per cent.[39]

- Indicated that the decline in imports in 2009 was explained by the reduced growth in the economy, which led to a 30.3 per cent decrease in imports in comparison with 2008.[40]

- Without extending the investigation period, confirmed the temporary nature of the decline in 2009 in the light of the figures for 2010 in the final report, showing that

[35] Panel Report, *US – Wheat Gluten*, paragraphs 8.54-8.56.
[36] See the reply by the Dominican Republic to question 91 from the Panel.
[37] Second written submission of the complainants, paragraph 203.
[38] *Ibid*., paragraph 210.
[39] Preliminary Technical Report, page 74, Exhibit RDO-9; Final Technical Report, page 58, Exhibit RDO-10.
[40] Preliminary Technical Report, page 80; Final Technical Report, page 68. Also: Central Bank of the Dominican Republic, *Resultados Preliminares de la Economía Dominicana*, January-September 2009, page 12. Exhibit RDO-12.

imports were increasing once again. It should be noted that the use of data not included in the investigation period has been confirmed by case law.[41]

33. The complainants' statement that the Dominican Republic failed to make findings regarding the rate of imports is also wrong as the percentage ratio of growth for each year and for the investigation period can be found in the Preliminary and Final Technical Reports.[42]

[41] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 167. Also: second written submission of the Dominican Republic, paragraph 88 to 90.

[42] Preliminary Technical Report, page 74 and Final Technical Report, page 58.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. INTRODUCTION

1. The central tenet of the Dominican Republic's defence is its claim that the provisional and definitive measures are not safeguard measures inasmuch as the 40 per cent tariff was not raised. To us, the reasons why the Dominican Republic adopted these measures and is today following a complex line of argument are quite obvious: the Dominican Republic sought to protect a particular company by means of measures intended to give the appearance of being consistent with (i) its regional free trade agreements (FTAs); and (ii) the WTO disciplines.

2. The only option was to apply a WTO safeguard measure, which is permitted both by the WTO disciplines and the regional agreements.

3. The problem arose when the Dominican Republic decided to state in this dispute that the measures are not safeguard measures but a straightforward tariff increase within the limits bound in the WTO. By closing the door to our complaints under the AS, the Dominican Republic opened up another door with equally serious legal implications. Basically, the statement that the measures contested are not safeguards immediately involves violation of Articles I and II of the GATT. Likewise, if the measures are considered not to be safeguards consistent with the WTO, the Dominican Republic would have to explain on what regional legal basis it applies an alleged 38 per cent tariff *ad valorem* on imports that should be subject to zero tariff under the regional agreements. We are explaining this as background and as evidence of the existence of safeguard measures in the WTO context. As we have explained, this procedure concerns neither violations of FTAs nor safeguards of a regional nature.

II. THE APPLICABILITY OF THE AS AND ARTICLE XIX

4. We do not think that the opinions expressed by the Dominican Republic solely for the purposes of this procedure are supported by the various objective elements indicating that the provisional and definitive measures are safeguard measures such as those provided by Article XIX and the AS: (a) these opinions of the Dominican Republic disregard *the design, structure and architecture of the measures*[1]; (b) they are not consistent either with the prior *actions* of the Dominican Republic; and (c) the Dominican Republic is trying to sidestep the fact that, even according to its restrictive interpretation based on an individualistic reading of Article XIX.1(a), the provisional and definitive measures imply the suspension of obligations under Articles I.1, II.1(a) and II.1(b).

A. SUSPENSION OF ARTICLE I.1 OF THE GATT

5. The Dominican Republic firstly indicates that the suspension itself which constitutes the safeguard measure, and is referred to in Article XIX.1(a) of the GATT, cannot refer to Article I.1 of the GATT.[2] The Dominican Republic does not, however, explain why, if this is the case,

[1] Second written submission of the complainants, paragraphs 14-22.
[2] Second written submission of the Dominican Republic, paragraph 9.

Article XIX.1(a) itself uses the generic term "obligations" and "obligation" and does not explicitly exclude Article I.1 of the GATT from its application. The Dominican Republic's reference to Articles 2.2 and 9.1 of the AS in connection with this discussion is not very clear and does not enable it to be determined what it is claiming.[3] The word "obligation" in Article XIX.1(a) is not qualified by the words *unless otherwise provided in Article I.1 of the GATT*, as the Dominican Republic suggests. To paraphrase the Appellate Body, this interpretation would imply "read[ing] into the text words which are simply not there", which has been prohibited by the Appellate Body.[4] Like the complainants, the European Union[5] and the United States[6] consider that the word "obligation" in Article XIX.1(a) includes the obligation in Article I.1 of the GATT.

6. Secondly, the Dominican Republic's argument is based on semantics when it indicates that the discussion on the possibility of applying a selective safeguard has been concluded.[7] The application of a safeguard measure that excludes imports from particular trading partners is a selective way of applying safeguard measures - the measure is applied to certain origins and not to others. Nevertheless, Members have not been prohibited from making such exemptions, and even the Appellate Body itself has recognized that the possibility of excluding specific imports from the application of a safeguard measure is open so there is no need to issue a ruling.[8]

7. Thirdly, the Dominican Republic argues that the words "obligations" and "obligation" in the first and second part of Article XIX.1(a) refer to the same thing and therefore "this term cannot refer to the most-favoured-nation principle in Article I.1 of the GATT, and cannot be the cause of an increase in imports".[9] The Dominican Republic does not, however, explain why the increase in MFN trade could not involve an increase in imports within the meaning of Article XIX.1(a) of the GATT and Article 2.1 of the AS.

8. Fourthly, the Dominican Republic states that Article 9.1 implies an obligatory exclusion of imports only after a measure has been qualified a safeguard measure. Consequently, in its opinion, a safeguard measure consisting of the suspension of obligations under Article I.1 of the GATT could not exist. It is clear that the obligation to exempt imports from developing countries pursuant to Article 9.1 of the AS does not imply that the word "obligation" in Article XIX of the GATT has to be read in the narrow sense, excluding Article I.1 of the GATT. It appears rather that the Dominican Republic is contradicting its argument that the measures in question are not safeguard measures.

9. Fifthly, the Dominican Republic indicates that suspension of Article I.1, together with application of Article 2.2 and the exemption mandate in Article 9.1, would imply that the only content of a safeguard measure would be the exemption of certain countries from its scope.[10] The obligation in Article 2.2 implies that there can be no discrimination when applying a safeguard measure with regard to all the imports subject to investigation. This provision does not, however, mention the possibility that a safeguard measure allows the exemption of certain imports. The Appellate Body has also deliberately been silent in this regard. Consequently, the Dominican Republic's argument that

[3] *Idem.*
[4] Appellate Body Report, *India – Quantitative Restrictions*, paragraph 94.
[5] Reply by the EU to question 2 from the Panel, paragraphs 9 and 10.
[6] Reply to the United States to question 2 from the Panel, paragraphs 7 to 9.
[7] Second written submission of the Dominican Republic, paragraph 10.
[8] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 114.
[9] Second written submission of the Dominican Republic, paragraph 11.
[10] *Ibid*., paragraph 12.

Article 2.2 would cease to apply to any safeguard that implies suspension of Article I.1 lacks substance.

B. SUSPENSION OF ARTICLE II.1(a) AND II.1(b), SECOND SENTENCE, OF THE GATT

10. The Dominican Republic now indicates that the provisional and definitive measures replace the pre-existing ordinary MFN tariff; in other words, they replace what in Spanish is called the "*derecho de aduana propiamente dicho*" (in English, the "ordinary customs duty") and the complainants wrongly consider that this is rather a "second tariff".[11] The Dominican Republic has explained that these measures *are not the same and do not have the same characteristics* as the ordinary MFN tariff or ordinary customs duty.

C. THE APPLICABILITY OF THE AS AND ARTICLE XIX TO THE INVESTIGATION AND PRELIMINARY AND DEFINITIVE DETERMINATIONS

11. The Dominican Republic affirms that a safeguards investigation can only be subject to certain requirements if it actually leads to the adoption of a safeguard measure.[12] The Dominican Republic disregards the Appellate Body's statement to the effect that there are two main factors when interpreting the AS: (i) the determination of the right to apply a safeguard measure, and (ii) the way in which the safeguard measure is applied.[13] Failure to impose a safeguard measure does not invalidate the determination a Member may make regarding the right to impose a safeguard measure, which may be exercised at any time.

12. The Dominican Republic contends that it fails to understand how reaching findings regarding the claims related to the investigation that did not lead to the adoption of measures would help in reaching a positive settlement of this dispute.[14] This is a new request by the Dominican Republic, that the Panel should abstain from reaching findings on this matter. We do not consider that such a request is admissible.

13. As found by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, "… any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[15] Accordingly, if the measures in question include the investigation and the specific determinations cited in this Panel's terms of reference, and there are specific claims about the way in which the investigation was conducted and these determinations were reached, there is then no reason why the Panel should abstain from reaching the relevant findings.

III. THE PRELIMINARY OBJECTIONS OF THE DOMINICAN REPUBLIC

14. The complainants responded in full to the preliminary objections at the first substantive meeting[16] and once again in their replies to the questions from the Panel.[17]

15. With regard to the objections against the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT, it is pertinent to repeat that these are not new claims, as argued by the

[11] *Idem.*
[12] *Ibid*., paragraph 27.
[13] Appellate Body Report, *US – Line Pipe*, paragraph 84.
[14] Second written submission of the Dominican Republic, paragraph 44.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paragraph 81.
[16] Opening oral statement by the complainants at the first substantive meeting, paragraphs 29-45.
[17] Replies by the complainants to questions 82, 85 and 86.

Dominican Republic.[18] The complainants included in the request for consultations a reservation that clearly allowed subsequent inclusion in the request for the establishment of a panel of claims relating to the GATT 1994, as was in fact done. Based on this reservation and on the discussions during the consultations, the complainants reformulated their arguments and included in the request for a panel alternative claims in conformity with the GATT 1994 relating to the most-favoured-nation principle and import charges other than customs duty. As confirmed by Panama, the issues relating to Articles I.1, II.1(a) and II.1(b) of the GATT were indeed discussed during the consultations.

16. The Dominican Republic has failed to prove how the alleged procedural defects have affected its right of defence.[19] The complainants have also rebutted the Dominican Republic's statement regarding the supposed change in the essence of the claims caused by the alleged inconsistency between the request for consultations and the request for the establishment of a panel.[20]

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

17. The Dominican Republic has not so far identified the paragraphs in its resolutions or reports in which the adequate and reasoned findings and conclusions on the definition of the imported product subject to investigation are to be found. On the contrary, it simply falls back on mere statements that do not reflect the reasoning or value judgement on the issue.[21]

18. The Dominican Republic asserts that the production process does not form part of the definition of the like domestic product, but was a decisive criterion when identifying the domestic industry.[22] With this statement, the Dominican Republic is recognizing that when it defined the domestic industry it based itself on criteria other than the nature of the domestic and imported products and the nature of like or directly competitive products. Already in *US – Lamb*, the Appellate Body considered that this criterion was not acceptable when defining the domestic industry.[23]

19. The Dominican Republic also mentions that Article 4.1(c) of the AS provides for the possibility of not taking into account all the domestic producers but only a major proportion.[24] Although Article 4.1(c) does allow for this possibility, what is certain is that in this case the Dominican Republic decided a priori to exclude certain "transformers" which it considered did not produce a domestic product.[25]

20. Moreover, the Dominican Republic excluded a producer which was at the same time an importer, even though Article 4.1(c) does not cover the eventuality of such exemption.[26] As can be seen, the Dominican Republic seeks to read into Article 4.1(c) rights that do not exist. Unlike the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, Article 4.1(c) of the AS does not allow for the possibility of a priori exemption of certain types of producers if these producers produce the like or directly competitive product. Nevertheless, only once

[18] First written submission by the Dominican Republic, paragraph 88.
[19] Second written submission of the complainants, paragraphs 47-50.
[20] *Ibid*., paragraphs 51-60.
[21] Second written submission of the Dominican Republic, paragraphs 58-60.
[22] *Ibid*., paragraphs 62 and 63.
[23] Appellate Body Report, *US – Lamb*, paragraphs 90 and 94.
[24] Second written submission of the Dominican Republic, paragraph 69.
[25] *Ibid*., paragraph 73.
[26] *Ibid*., paragraph 77.

all the producers producing the like or directly competitive product have been taken into consideration does Article 4.1(c) allow consideration of a major proportion rather than all of them.

21. Lastly, the Dominican Republic argues that the context of Article 4.1(c) of the AS endorses the possibility of basing oneself solely on a major proportion of the domestic industry inasmuch as the investigating authority must base itself on reliable data and collecting information from producers involved in other activities such as import and resale would raise problems in separating out the data concerning economic activities that are not related to the products produced by the producers.[27] The Dominican Republic's argument is no justification for excluding certain producers from consideration of the domestic industry. The investigating authority is obliged to process and separate information relevant to the purposes of the investigation. Using the same argument, it could be argued that any enterprise engaged in activities parallel to production of the like or directly competitive product could be excluded from the investigating authority's examination. This interpretation cannot be sustained.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

22. The Dominican Republic mentions that the clause on unforeseen developments in Article XIX(a) does not constitute a binding obligation.[28] The complainants have extensively rejected this defence based on Appellate Body case law.[29]

23. As a second line of defence, the Dominican Republic asserts that, even if the unforeseen developments clause is binding, its investigating authority complied with it. The Dominican Republic originally claimed before the Panel that the unforeseen developments comprised four elements: (i) China's accession to the WTO; (ii) tariff cuts resulting from free trade agreements; (iii) the 2008 economic and financial crisis; and (iv) the increase in production costs.[30] In its replies to the questions from the Panel, the Dominican Republic recently confirmed that only the first two of these elements constituted the alleged unforeseen developments.[31]

24. China's accession to the WTO cannot be considered an unforeseen development for the Dominican Republic.[32] At the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987.

25. The complainants also explained why the tariff cuts under free trade agreements are not an unforeseen development.[33] As the purpose of free trade areas is to achieve deeper liberalization than that within the WTO framework, it is not acceptable for the Dominican Republic to argue that its voluntary decision to implement tariff cuts under such agreements is an unforeseen development.

[27] *Ibid*., paragraph 79.
[28] First written submission of the Dominican Republic, paragraphs 258-293.
[29] Opening oral statement.
[30] First written submission of the Dominican Republic, paragraphs 287-289.
[31] Reply by the Dominican Republic to question 114 from the Panel.
[32] Second written submission of the complainants, paragraphs 176-184.
[33] *Ibid*., paragraphs 185-190.

26. In addition, in the relevant reports and resolutions there is no mention whatsoever of the *logical connection* which, according to the Appellate Body, must exist between the two events and the alleged increase in imports of polypropylene bags and tubular fabric.[34]

27. The complainants also contend that the Dominican Republic did not identify the relevant obligations incurred under the GATT and did not explain how those obligations resulted in the alleged increase in imports, as required by Article XIX.1(a).[35] In response to a question from the Panel, the Dominican Republic indicated that page 86 of the preliminary report supposedly contained identification of the corresponding tariff concessions.[36] We reiterate that nowhere in this paragraph does the investigating authority explicitly indicate that the alleged increase in imports was the result of obligations incurred under the GATT.[37]

VI. THE ALLEGED INCREASE IN IMPORTS

28. The investigating authority established that there was a "marked decline" in the trend in imports[38], but did not explain sufficiently and adequately why, despite a decline of such magnitude up to the end of the investigation period, here was an increase in imports in the form described by the Appellate Body.

29. The Dominican Republic claims that its conclusion regarding increased imports is valid because its technical reports clarify that the decline in imports was caused by the decrease in the country's total imports during 2009.[39] Subsequently, the Dominican Republic indicated that this decrease in imports was "incidental and temporary".[40]

30. As we have previously stated, the investigating authority's explanation is insufficient and invalid because the overall decline in the Dominican Republic's imports is a macroeconomic occurrence that affected imports in the whole of the tariff universe for goods.[41]

VII. THE ALLEGED SERIOUS INJURY

31. When defining a like or directly competitive product as one product, the investigating authority had to assume all the consequences of such a definition, for example, the need to make a separate analysis for each relevant segment. The Dominican Republic cannot take advantage of a broad definition of the domestic industry and at the same time absolve itself of the responsibilities inherent in opting for this definition.

32. As to the inclusion of information on products that are not those investigated, the Dominican Republic subsequently explains that these products account for around 15 per cent of domestic production.[42] It presents no further substantiation than its mere affirmation. The

[34] *Ibid*., paragraphs 180-184 and 189. See also the Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 92; Appellate Body Report, *Korea – Dairy*, paragraph 85.
[35] First written submission of the complainants, paragraphs 227-234; opening oral statement by the complainants at the first substantive meeting, paragraph 58.
[36] Reply by the Dominican Republic to question 115 from the Panel.
[37] Second written submission of the complainants, paragraphs 192-194.
[38] Preliminary report, page 68; final report, page 61.
[39] First written submission of the Dominican Republic, paragraphs 313-324.
[40] *Ibid*., paragraph 320.
[41] Reply by the complainants to question 118 from the Panel.
[42] Second written submission of the Dominican Republic, paragraph 99.

Dominican Republic's *ex post* explanation does not indicate whether the figure of 15 per cent of total output refers to the volume or total value of production.

33. Regarding the inclusion of information on export activities, it is meaningless to take into account this type of information for the purposes of the investigation. The purpose of the investigation is to examine the situation of the domestic industry producing the like product or the product directly competing with the imported product, in accordance with Article 4.1(c) of the AS. Obviously, the product intended for export does not compete with the imported product that is the subject of investigation.

34. Concerning depreciation and amortization costs, the Dominican Republic's explanation is *ex post*. The explanation now put forward cannot be found in any part of the technical reports or the resolutions. Furthermore, the Dominican Republic now acknowledges that the production of other products in the bags division accounts for around 15 per cent of domestic production, and that the bags division produces for export. On this basis, it is then necessary to make a *pro rata* calculation at least in proportion to this level of production for the product that is not a like or directly competitive product or is not sold on the Dominican market. As this explanation and *pro rata* calculation do not appear in the investigating authority's technical reports and resolutions, this confirms that the evaluation of losses and gains and cash flows based on the financial statements of the bags division was not a precise, sufficient and appropriate evaluation.

VIII. THE ALLEGED CAUSAL LINK

35. On previous occasions, the complainants fully responded to the Dominican Republic's arguments regarding the shortcomings in the determination of the causal link and the lack of a non-attribution examination.[43] We should like to point out that the Dominican Republic has presented no arguments in defence other than those to be found in its first written submission.

36. Consequently, for the purposes of this statement, the complainants reaffirm the claims mentioned and emphasize that the prima facie case already proven has not been effectively rebutted by the Dominican Republic.

IX. THE LACK OF PARALLELISM

37. The complainants reiterate their position that the parallelism obligation is mandatory irrespective of whether the imports excluded are imported from a free trade area or customs union, or are imports from developing countries under Article 9.1 of the AS.[44]

38. As the imports from Mexico, Panama, Colombia and Indonesia were exempt from application of the safeguard, logically, they should then have been exempt from the investigation. The Dominican Republic, however, did not do this and now argues that this basic concept of symmetry allows exceptions. The complainants reject this interpretation.

39. Precedents in the Panel and the Appellate Body Reports in *US – Wheat Gluten* do not support the Dominican Republic's position. First of all, the Appellate Body clarified that the United States

[43] Opening oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[44] *Ibid*., paragraph 118; second written submission of the complainants, paragraph 239.

was the one arguing that Article 9.1 is an exception to the parallelism rule.[45] Nevertheless, the Appellate Body never stated that it shared the United States' interpretation. Secondly, the Appellate Body then stated that Article 9.1 "is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members".[46] This statement does not mean that imports from developing countries should be exempt from application of the measure but not the underlying investigation. In mentioning that the exception to Article 9.1 concerns the *general rules* in the AS, the Appellate Body referred to the exceptional circumstance of excluding certain imports from the scope of the measure, hence without prejudice to also excluding these imports from the investigation. In fact, it is precisely the exceptional circumstances such as application of Article 9.1 or the exemption for imports from a free trade area or customs union which give rise to the parallelism obligation.

X. LACK OF NOTIFICATION, CONSULTATIONS AND MEANS OF TRADE COMPENSATION

40. In this connection, the Dominican Republic states that the hearings held during the safeguards investigation conducted by its investigating authority constitute the prior consultations referred to in Article 12.3 of the AS.[47] The Dominican Republic claims that "the consultations referred to in Article 12.3 of the Agreement on Safeguards were held on 12 May on the occasion of the public hearing" in the safeguards investigation.[48]

41. We reiterate that the hearings in the safeguards investigation conducted by the investigating authority cannot be cannot be treated as equivalent to consultations at the multilateral level as prescribed by Article 12.3 of the AS.[49]

42. In essence, the Dominican Republic argues that, by fulfilling Article 3.1 of the AS, there is automatically compliance with Article 12.3 of the AS. This goes against the principle of effectiveness in the interpretation of treaties as the Dominican Republic's interpretation would make Article 12.3 redundant.[50]

XI. VIOLATION OF ARTICLES I.1 AND II.1(A) AND II.1(B) OF THE GATT

43. If this Panel accepts that these measures are not safeguard measures within the meaning of Article XIX and the AS, the provisional and definitive measures are inconsistent with Articles I.1, II.1(a) and II.1(b) of the GATT.

A. VIOLATION OF ARTICLE I.1 OF THE GATT: THE MOST-FAVOURED-NATION PRINCIPLE

44. According to Article I.1 of the GATT, any advantage, favour, privilege or immunity granted to products of a particular country must be accorded immediately and unconditionally to the like

[45] Appellate Body Report, *US – Wheat Gluten*, footnote 96, first sentence ("The United States relies on Article 9.1 of the Agreement on Safeguards in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure.").

[46] *Ibid*., footnote 96, second sentence.

[47] First written submission of the Dominican Republic, paragraphs 502-549.

[48] Reply by the Dominican Republic to question 167 from the Panel.

[49] Second written submission of the complainants, paragraphs 248-251.

[50] Appellate Body Report, *US – Gasoline*, page 25; see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81 and 82.

product of other WTO Members. A violation of Article I.1 implies proof of various elements, which were set out in our second written submission[51] and which are summarized below:

- The decision not to apply the tariff surcharge to imports from Mexico, Panama, Colombia and Indonesia constitutes an advantage, favour, privilege or immunity related to import duties;

- this advantage, favour, privilege or immunity granted by the Dominican Republic to Mexico, Panama, Colombia and Indonesia is not extended to other WTO Members, because exemption from the measure only benefits these four countries.

45. The Dominican Republic has acknowledged on a number of occasions that, if the measures contested are not deemed to be safeguards, exempting certain countries from the measure becomes "problematic".[52] The Dominican Republic does not seek to justify this violation under any provision of the GATT. Accordingly, it is obvious that the Dominican Republic acted in a manner inconsistent with Article I.1 of the GATT by not applying the tariff surcharge on a most-favoured-nation basis.

B. VIOLATION OF THE PROHIBITION ON IMPOSING DUTIES AND CHARGES OTHER THAN ORDINARY CUSTOMS DUTY

46. The complainants have also contended throughout the procedure that the provisional and definitive measures are contrary to Article II.1(a) and II.1(b), second sentence, of the GATT. The Dominican Republic has not presented any better defence against these claims than the statement that these measures simply constitute a tariff increase and has put forward this statement only in the context of the applicability of the AS and Article XIX.[53]

47. We have already dealt with these arguments in regard to the applicability of the AS and Article XIX. In our view, the Dominican Republic has not submitted sufficient factual elements to refute those cited by the complainants.[54] We consider that this is the case because it is difficult to explain how a measure whose characteristics are not the same as a tariff, and which even the Dominican Republic recognizes is applied in replacement of the ordinary customs duty, could be termed a tariff. In addition, we reaffirm that the Dominican Republic has not registered any duty or charge other than the ordinary customs duty in its Schedule of Concessions. Consequently, the Panel will have to determine whether the complainants have proved that the provisional and definitive measures constitute duties and charges other than ordinary customs duty and that, accordingly, they are inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

XII. CONCLUSION

48. Based on the foregoing, the complainants request the Panel to confirm that the AS and Article XIX apply to the provisional and definitive measures and to find that the measures, and the investigation and substantive determinations contested, are inconsistent with Article XIX and the

[51] Second written submission of the complainants, paragraphs 256-282.

[52] Closing statement by the Dominican Republic at the first substantive meeting, paragraph 17; reply by the Dominican Republic to question 52 from the Panel; reply by the Dominican Republic to question 2 from the complainants.

[53] Second written submission of the Dominican Republic, paragraphs 15-25.

[54] See the complainants' response to the request for a preliminary resolution, paragraph 123; opening oral statement by the complainants at the first substantive meeting, paragraphs 136-145; reply of the complainants to questions 26 and 27.

various provisions of the AS cited. Likewise, the complainants request the Panel to find that the lack of notification, consultations and adequate means of compensation are inconsistent with Articles 8.1 and 12.3 of the AS and XIX.2 of the GATT.

49. Alternatively, the complainants request the Panel to find that the selective exemption of imports from the provisional and definitive measures is inconsistent with Article I.1 and that both measures are also inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

50. Lastly, in view of the serious and numerous anomalies in the investigation, and in the application of the provisional and definitive measures, the complainants consider that the Panel would be justified in exercising its authority, pursuant to Article 19.1 of the DSU, to make suggestions regarding implementation. In this connection, the complainants request the Panel to suggest that the Dominican Republic withdraw the definitive measure with immediate effect.

ANNEX F-3

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chairman, members of the Panel:

1. The Dominican Republic thanks you for your efforts and questions yesterday and today at this second substantive meeting of the Panel. As this meeting draws to a close, the Dominican Republic would merely like to make a few general remarks that it would ask the Panel to bear in mind when reaching its conclusions and findings.

2. It has become clear that the measures at issue before the Panel do not suspend any obligations or modify or withdraw a concession within the meaning of Article XIX:1(a) of the GATT. The complainants nevertheless maintain that GATT Article XIX and the Agreement on Safeguards apply to the measures in dispute.

3. To support their arguments, the complainants have resorted to interpretations according to which the essential function of a safeguard measure is to prevent or remedy serious injury to a domestic industry by adopting measures as a "safeguard" duty that is different from a simple MFN tariff increase. According to this interpretation, the idea of suspending an obligation or withdrawing or modifying a concession is not essential to the notion of safeguard in WTO law.[1] According to the complainants, the suspension of an obligation or the modification or withdrawal of a concession would only be necessary when the "safeguard duty" results in an increase that exceeds the bound rate. Thus, an additional duty below the bound level would constitute a "safeguard" duty although it does not involve the suspension, withdrawal or modification of an obligation or concession. This interpretation introduces an artificial distinction between the first and second parts of Article XIX:1(a) of the GATT in which the second part provides for cases in which such a safeguard measure is inconsistent with other GATT obligations.

4. Essentially, it became clear as the proceedings went forward that the complainants were trying to create a sort of *sui generis* trade remedy that is not provided for in the WTO Agreements. This remedy would cover any measure whose function consists of resolving injury or threat of serious injury situations without taking account of the objective conditions that define the notion of safeguard and the scope of application of GATT Article XIX and the Agreement on Safeguards. The Dominican Republic urges the Panel not to adopt this novel interpretation of Article XIX of the GATT, which would be tantamount to creating a new trade remedy and applying disciplines to measures that would otherwise be authorized under the GATT.

5. The interpretation of the complainants should not be adopted lightly: to apply disciplines to certain measures that can normally be freely adopted, as in the case of a tariff increase to a level below the bound rate, would be to undermine the flexibility that is inherent and essential to the WTO's system of tariff concessions, i.e. the margin for manoeuvre represented by the difference between the bound rate and the applied tariff.

6. For WTO Members, this margin of flexibility provided by the difference between the applied tariff and the bound rate is essential. Moreover, several of the complainants joined the Dominican Republic in defending this margin in recent non-agricultural market access negotiations,

[1] Reply of the complainants to question 58 of the Panel.

stressing that "[t]ariffs serve multiple purposes in small, vulnerable economies, the most important of which are to ensure the viability of vulnerable domestic industries …".[2] The Dominican Republic asks the Panel not to create a precedent that would undermine the incentives for Members to apply tariffs at a rate significantly below the bound rate, as this would affect one of the cornerstones of the GATT, namely the system of tariff concessions as a ceiling below which Members are given ample freedom of action.

7. The Dominican Republic trusts that the Panel will not adopt an interpretation that turns the notion of safeguard into a trade defence instrument similar to an anti-dumping procedure. The purpose of imposing a safeguard measure is the suspension, modification or withdrawal of an obligation or concession. This is why Article XIX is known as an escape clause. It would be counter-productive to impose the disciplines of the Safeguards Agreement on tariff increases within the margin of flexibility between the bound rate and the applied tariff. Such an increase does not require recourse to any escape clause, considering that there is no obligation being suspended or concession being modified.

8. Mr Chairman, members of the Panel, I thus conclude my oral statement. The Dominican Republic would like to thank you and the Secretariat once again for your efforts in this dispute.

[2] Market Access for Non-Agricultural Products: Treatment of Small, Vulnerable Economies in the NAMA Negotiations; Communication from Antigua and Barbuda, Barbados, Bolivia, Dominica, Dominican Republic, El Salvador, Fiji, Grenada, Guatemala, Honduras, Mongolia, Nicaragua, Papua New Guinea, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago, 10 November 2005, TN/MA/W/66, paragraph 4.

ANNEX F-4

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Mr Chairman, members of the Panel:

1. In this last statement, the complainants present some reactions to the opening statement by the Dominican Republic yesterday.

2. With regard to the preliminary objections that seek to exclude certain claims from the Panel's terms of reference, during this second hearing we have not heard any additional substantive argument from the Dominican Republic in support of its position. The Dominican Republic still fails to explain how its right of defence was specifically affected. It has not shown either how the alleged inconsistency between the request for consultations and the request for the establishment of a panel changed the essence of the claims.

3. The arguments concerning Articles I.1, II.1(a) and II.1(b) of the GATT fall fully within the terms of reference for this dispute because of the reservation contained in the request for consultations that enabled the complainants to bring up issues in conformity with the GATT during the consultations, and also because of the fact that these issues were in fact discussed during the consultations. Moreover, these arguments are clearly included in the request for the establishment of a panel. The Dominican Republic nevertheless continues to seek ways of depriving these facts of any substance; for example, by stating that the issues concerning Articles I and II of the GATT were not discussed during the consultations. In this connection, we repeat that Panama, being the only country which participated in the consultations as an associate member, clarified that these issues were effectively addressed in the consultations. Consequently, this discussion has already concluded.

4. We also note that the Dominican Republic has not put forward any formal defence concerning the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT. It simply addressed these issues in connection with the discussion on the applicability of Article XIX and the AS to the provisional and definitive measures.

5. Regarding the applicability of the AS and Article XIX, the Dominican Republic finds it pertinent to cite the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which indicates that any suspension, withdrawal or modification under what today would be Article XIX.1(a) must not discriminate against imports from any Member country. It then states that this logic has applied since the very first days Article XIX came into force.[1]

6. The complainants consider that the interpretative note referred to by the Dominican Republic does not form part of the ordinary meaning, context, object and purpose of the GATT, in particular, Article XIX, so it plays no role in the task of interpreting Article XIX.1(a). Article XIX has no interpretative notes and the meaning of the words "obligations" and "obligation" in its context is unequivocal and is not qualified.

[1] Opening oral statement of the Dominican Republic at the second meeting of the Panel, paragraphs 17 and 18.

7. Furthermore, even if this note played any interpretative role, the complainants consider that its import does not support the Dominican Republic's position, but rather supports what the complainants contend to the effect that it indicates that the GATT Contracting Parties decided to exclude this limitation from the scope of Article XIX of the GATT. Accordingly, the Dominican Republic failed to explain what happened to this interpretative note.

8. This interpretative note was included in the text of the Havana Charter in relation to Article 40 (now Article XIX). Unlike other provisions and interpretative notes, however, including Article 40 itself (i.e. Article XIX), it did not survive the transition from the Havana Charter to the GATT 1947 and was not incorporated into the text of the GATT 1947.

9. As can be seen from the document we are attaching as exhibit CEGH-39, the Havana Charter contains several provisions that are today included in the GATT. Article 40 almost literally reflects what we now know as Article XIX of the GATT. Moreover, the Havana Charter included interpretative notes on various of its substantive provisions. Many of these interpretative notes survived the transition from the Havana Charter to the GATT 1947. This was the case, for example, with the note concerning Article 18 of the Havana Charter, which is now the interpretative note to Article III.2 of the GATT concerning internal taxes. Other notes, however, were not incorporated into the GATT. This was the case for the note concerning Article 40 of the Havana Charter, cited by the Dominican Republic in its oral statement yesterday.

10. What does this omission signify? In our view, that the Contracting Parties to the GATT 1947 clearly rejected the limitation on the scope of Article XIX.1(a), which it was sought to establish by means of the interpretative note referred to by the Dominican Republic.

11. It should also be pointed out that the Dominican Republic did not quote the interpretative note to Article 40 of the Havana Charter in full. The text in full reads as follows:

> It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries.[2]

12. It should be noted that the last part of this note qualifies the measure in such a way that the action to be avoided, to the fullest extent possible, is causing injury to other Members suppliers of the product in question. These words cast doubt on the absolute nature of the "non-discrimination" which it is sought to establish in the first part of the interpretative note.

13. Consequently, the Dominican Republic only related part of the story, leaving out a detail which in fact backs up the position of the complainants in the sense that Article XIX.1(a) applies to all the GATT provisions, including Article I.1.

14. This position is supported by another fact that the Dominican Republic also omitted to mention concerning the early days of the GATT 1947. As can be seen from the document attached as Exhibit CEGH-40, page 13, in connection with the revision of the GATT in 1955, there was an attempt on the part of delegations of certain Scandinavian countries to reintroduce the interpretative note to Article 40 of the Havana Charter by means of a new provision. The proposal was submitted to

[2] Exhibit CEGH-39.

the sub-committee revising the GATT, which rejected it. There was no general agreement on it. In the end, it had to be withdrawn.

15. Contrary what is stated by the Dominican Republic, this shows that in the early years of the GATT the interpretative note to the Havana Charter did not have the effect which the Dominican Republic is now seeking to give it. Moreover, it also shows that, since the early days of the GATT 1947, the GATT Contracting Parties were not prepared to accept a limitation on the scope of Article XIX.1(a) of the GATT.

16. In addition, the Dominican Republic cites a report by the Ad Hoc Committee on the accession of Japan to the GATT 1947[3] in support of its statement that Article XIX.1 does not allow suspension of Article I.1 of the GATT. What the Dominican Republic does not indicate is that this report was situated in a context in which several Contracting Parties were concerned about Japan's accession to the GATT and wondered whether it would not perhaps be appropriate to apply a safeguard focusing on Japan with a view to remedying serious injury, not just for a specific producer but for various production sectors.[4]

17. It was in this context that some members of the Committee expressed the view that the measures adopted pursuant to Article XIX could not be discriminatory.[5] This was the limited opinion of some members of the Committee. It did not reflect a consensual or general opinion of the Committee, still less of the Contracting Parties to the GATT 1947. Accordingly, this position of *some parties during negotiations* has to be viewed in the light of its due and limited scope in the context of those negotiations.

18. The Dominican Republic states that in Japan's accession procedure the possible extension of Article XIX also to constitute suspension of Article I.1 was rejected.[6] What was in fact rejected, however, was extension of Article XIX to include conditions in addition to those provided in the first part of Article XIX.1(a) concerning imports from one Contracting Party in particular.[7] Perhaps this rejection was attributable to the opinion mentioned by the Dominican Republic, but it might also be attributable to the view that there was no need to extend Article XIX.1(a), either because the additional conditions sought were already covered by Article XXIII of the GATT[8], or because some of the Committee's members considered that Article XIX.1(a) allowed for the possibility of applying safeguards to imports from specific countries. The report cited by the Dominican Republic does not enable a conclusion to be reached either way, so it does not constitute elucidatory and relevant information.

19. For the foregoing reasons, the complainants do not consider that the additional elements presented by the Dominican Republic provide confirmation that Article XIX.1(a) excludes Article I.1 of the GATT from its application.

20. With regard to the definition of the domestic industry, the Dominican Republic indicates that the complainants argue that the Panel was obliged to revise the definition of the product subject to investigation in the light of the report of the Appellate Body in *EC – Aircraft*. The reason why the

[3] Exhibit RDO-27.
[4] *Ibid*., paragraphs 3-6.
[5] *Ibid*., paragraph 6.
[6] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 18.
[7] Exhibit RDO-27, paragraph 7.
[8] *Idem.*

Dominican Republic considers that this report is irrelevant is that the definition of subsidized product in a complaint of serious injury is submitted by a WTO Member and refers to the relevant market, whereas the definition of the product subject to investigation in a domestic procedure is made by the investigating authority.[9] This reason does not appear valid to us. The fact that the evaluation by a panel (in the case of serious injury) by comparison with a domestic authority (in the case of safeguards) does not have any consequences, it does not lessen the duty of objectiveness, impartiality and neutrality that must be the feature of investigations, whether by a panel or by a domestic investigating authority in the case of safeguards.

21. Moreover, a claim of serious injury concerns trade that is distorted by recurrent or unlawful subsidies, whereas a safeguards investigation concerns trade that is conducted lawfully along the lines to be expected in trade relations among Members. This fundamental distinction indicates even more clearly that the principles which govern determination of the product investigated in a claim of serious injury must be respected in an investigation relating to safeguard measures, and confirm to this Panel that the considerations taken into account by the Dominican Republic in order not to provide adequate and reasoned explanations of the product subject to investigation when defining the domestic industry are insufficient.

22. As to the alleged increase in imports, the Dominican Republic repeats its arguments that "overall during the investigation period imports increased by 50.06 per cent".[10] This spontaneous and abrupt statement by the Dominican Republic reflects its underlying assumption, namely, for it the criterion followed first and foremost to determine the increase in imports was increases at each extremity of the period.

23. Subsequently, concerning the decrease in 2009, the Dominican Republic indicated that this can be explained by the reduced growth in the Dominican economy and that the temporary nature of this decline was confirmed by the import figures for 2010.[11] The complainants ask themselves where, in the respective reports, it is determined that the decline was "incidental" and "temporary" in the light of these considerations? Reading these reports does not lead to such conclusions or to an explanation of how a macroeconomic occurrence that affects the economy in general (and hence questionably "incidental") or an increase based on imports distorted by the conduct of the investigation and the imposition of the provisional measure (and hence questionably proof of their "temporary" nature) can lead to the conclusion that the decline in imports up to the end of the investigation period was irrelevant.

24. Lastly, the complainants would like to emphasize the systematic repercussions of this dispute at three levels: at the level of consideration of safeguards within the WTO, at the level of trade remedies, and at the level of regional and multilateral trade policy.

25. As to the consideration of safeguards within the WTO, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, this would allow investigating authorities to initiate investigation procedures in order to apply safeguard measures, involving several interested parties and governments of exporting countries (with high costs for participation, legal representation, trade uncertainties, and political manoeuvring), and subsequently avoid *multilateral control*. In other words, it would encourage the initiation of supposedly "harmless" investigation procedures and there would be no form of control even if they

[9] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 35.
[10] *Ibid*., paragraph 50.
[11] *Idem*.

would undoubtedly have the effect of disguised barriers to trade and international competition. Such an outcome would be directly contrary to the object and purpose of the AS, as set out in its preamble, and would raise serious doubts about the feasibility of contesting such measures through the dispute settlement mechanism.

26. With regard to trade remedies, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, in anti-dumping or countervailing procedures investigating authorities could use this interpretation as a perverse incentive to avoid obligations under the anti-dumping and subsidies and countervailing measures agreements. An investigating authority following this line could then decide to initiate an anti-dumping or countervailing duty investigation into imports from several origins, collect the necessary information, evaluate whether there are "unfair practices", injury and a causal link, and if this evaluation did not yield the expected results, it could terminate the investigation and then impose a "tariff increase", even though this increase might exceed the margin of dumping or subsidization, as may be the case. Even if it was determined that there was an unfair practice, injury and a causal link, an investigating authority might deem it appropriate not to impose an anti-dumping or countervailing duty and *replace it* with a straightforward tariff increase in order to avoid the expiry period of five years applicable to such measures. It would also be a dangerous incentive that could place WTO Members in the situation prior to the existence of the GATT 1947: soon, there could be a proliferation of measures that were not only obstacles to international trade but, quite simply, escaped from any multilateral control.

27. Lastly, as regards regional and multilateral policy, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, there would be inconsistency between the regional provisions on safeguard measures and the WTO provisions. Many WTO Members have managed to negotiate a harmonious balance between these provisions by retaining the rights and obligations of Article XIX and the AS at the regional level in order to apply the so-called global safeguards. This balance has been reached not only between the Dominican Republic and the complainants in the DR-CAFTA and Central America-DR agreements, it is a common mechanism in several regional agreements and is desirable because it makes safeguards disciplines at the regional level and those envisaged at the multilateral level consistent.

28. This harmonious balance, however, could be distorted if, in order to abstain from compliance with its regional commitments, a party to these regional agreements makes use of and benefits from the WTO provisions and then, when facing questions in the WTO and in order to abstain from compliance with its WTO commitments, this party goes back on itself and contends that the measure from which it benefited is not a safeguard measure in WTO terms. The result of the foregoing would be that, in order to contest the measures in question, a complainant would first have to do so using the dispute settlement mechanism in the regional agreement in question; wait for the argument of the defence that it is a WTO safeguards measure; and only after this has been accepted, may it bring the matter up at the WTO, where the defendant still has the possibility of arguing that it is not a safeguard measure in accordance with the AS because it does not involve suspension of obligations or concessions.

29. In the light of the foregoing, as a matter of trade policy, it would not be acceptable to allow a country to benefit in two ways from acts that are unrelated, particularly if these acts are committed at the expense of the interests and expectations in good faith on the part of other trading partners.

30. For all the reasons explained during this procedure, we hope that the Panel will objectively evaluate this dispute and find that the provisional and definitive measures are inconsistent with Article XIX and the AS (or alternatively with Articles I.1, II.1(a) and II.1(b) of the GATT) and that the other measures at issue are also inconsistent with Article XIX and the AS.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY COSTA RICA

WORLD TRADE ORGANIZATION

WT/DS415/7
22 December 2010

(10-6862)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Costa Rica

The following communication, dated 15 December 2010, from the delegation of Costa Rica to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Costa Rica requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Costa Rica and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Costa Rica requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Costa Rica the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

---

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Costa Rica notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Costa Rica considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Costa Rica considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Costa Rica requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Costa Rica hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY GUATEMALA

WORLD TRADE ORGANIZATION

WT/DS416/7
22 December 2010

(10-6864)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Guatemala

The following communication, dated 15 December 2010, from the delegation of Guatemala to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Guatemala requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Guatemala and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Guatemala requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Guatemala notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Guatemala considers that:

(a) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Guatemala considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Guatemala requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Guatemala hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-3

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY HONDURAS

WORLD TRADE ORGANIZATION

WT/DS417/7
6 January 2011

(11-0013)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by Honduras

The following communication, dated 20 December 2010, from the delegation of Honduras to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 18 October 2010, Honduras requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Honduras and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Honduras requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] The duration of the provisional safeguard measure was 200 days. On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4]

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Honduras, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Honduras notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Honduras considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Honduras considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Honduras requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Honduras hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-4

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY EL SALVADOR

WORLD TRADE ORGANIZATION

WT/DS418/7
6 January 2011

(11-0014)

Original: Spanish

DOMINICAN REPUBLIC - SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

Request for the Establishment of a Panel by El Salvador

The following communication, dated 20 December 2010, from the delegation of El Salvador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 October 2010, El Salvador requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

El Salvador and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, El Salvador requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for El Salvador, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

---

[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

El Salvador notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, El Salvador considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, El Salvador considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, El Salvador requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, El Salvador hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX H

COMMUNICATION FROM THE PANEL

ANNEX H

COMMUNICATION FROM THE PANEL IN RESPONSE TO THE REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING

(12 May 2011)

On 18 April 2011, the Dominican Republic, as the responding party in the dispute, requested the Panel to issue a preliminary ruling determining that GATT Article XIX and the Agreement on Safeguards were not applicable to the present dispute and that this dispute was therefore devoid of purpose. The Dominican Republic also requested the Panel to suspend the present proceedings until it had issued its preliminary ruling and to postpone the deadlines provided for in the timetable, including the deadline for the Dominican Republic to present its first written submission.

On 21 April 2011, the Panel invited the complaining parties to respond in writing to the Dominican Republic's request and informed the parties that, for the time being, the deadlines provided for in the timetable would be maintained, including those for the Dominican Republic and the third parties to present their written submissions. On 21 April and 3 May 2011, the complaining parties submitted their response to the Dominican Republic's request for a preliminary ruling.

Having considered the written submissions of the Dominican Republic and the complaining parties, the Panel considers it inappropriate to make a preliminary ruling on whether GATT Article XIX and the Agreement on Safeguards are applicable to the present dispute. The Panel thus considers it inappropriate to suspend the proceedings and postpone the deadlines provided for in the timetable.

The Panel also notes the argument put forward by the Dominican Republic concerning the Panel's alleged lack of jurisdiction to rule in a dispute that relates to the violation of concessions granted outside the WTO sphere. The Panel notes the response of the complainants in this respect. Since the Dominican Republic did not request a preliminary ruling on this argument, the Panel considers it unnecessary to refer to it at the present time.

The Panel invites the parties to develop their arguments on the issues raised by the Dominican Republic. It will also consider with interest any arguments put forward by third parties in relation to these issues. The Panel reserves the right to submit questions to the parties and third parties on the issues raised by the Dominican Republic.

The Panel will rule on the issues raised by the Dominican Republic in its final report.