WORLD TRADE ORGANIZATION

WT/DS468/R

26 June 2015

(15-3266)

Original: English

UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

REPORT OF THE PANEL

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WTO AND GATT 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, p. 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, p. 575
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Preserved Peaches	Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted 15 April 2003, DSR 2003:III, p. 1037
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
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, p. 3127
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
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, p. 9
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, p. 3
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, p. 49
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, p. 10853
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
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, p. 6027
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, p. 4051

Short title	Full case title and citation
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, p. 4107
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, p. 1403
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, p. 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, p. 3273
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
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, DSR 2011:IX, p. 4811
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 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, p. 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, p. 779
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, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
Commission	The Interdepartmental Commission on Foreign Trade of Ukraine
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Key Findings	Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special investigation on Imports of Motors Cars to Ukraine Regardless of the Country of Origin and Export
Ministry	The Ministry of Economic Development and Trade of Ukraine
Notice of 14 March 2013	Notice of Imposition of Safeguard Measures on Imports of Motor Cars to Ukraine Regardless of Country of Origin and Export, as published in the *Uryadovyi Kuryer* No. 48 of 14 March 2013
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Safeguards Law	Ukraine's Law on Application of Safeguard Measures Against Imports to Ukraine, 22 December 1998, No. 332-XIV
The *Shorter Oxford Dictionary* (1993)	New Shorter Oxford English Dictionary, 1993 (4th edition), Volumes 1 and 2
The *Shorter Oxford Dictionary* (2002)	New Shorter Oxford English Dictionary, 2002 (5th edition), Volumes 1 and 2
The *Shorter Oxford Dictionary* (2007)	New Shorter Oxford English Dictionary, 2007 (6th edition), Volumes 1 and 2
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the WTO

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 30 October 2013, Japan requested consultations with Ukraine pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994") and Article 14 of the Agreement on Safeguards regarding the definitive safeguard measure[1] imposed by Ukraine on imports of certain passenger cars and the investigation that led to the imposition of this measure.[2] The European Union and the Russian Federation requested on 13 and 14 November 2013, respectively, to join the consultations pursuant to Article 4.11 of the DSU.[3] On 29 November 2013, Ukraine informed the DSB that it had accepted the requests of the European Union and the Russian Federation to join the consultations.[4]

1.2. Consultations were held on 29 November 2013 and 21 January 2014, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. At its meeting on 26 March 2014, the DSB established a panel pursuant to the request of Japan in document WT/DS468/5, in accordance with Article 6 of the DSU.[5]

1.4. 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 Japan in document WT/DS468/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[6]

1.5. On 10 June 2014, Japan requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

[1] Japan submits that we should refer to "safeguard measures" in the plural. In Japan's view, there are two measures at issue since Ukraine has imposed two different duty rates for passenger cars with different engine volumes. We agree that Ukraine has imposed different rates for different categories of passenger cars, and also note that the documents containing the relevant decisions refer to "safeguard measures" in the plural. However, the different rates of duty were imposed on the same date through a single decision with otherwise identical parameters, including the duration, the date of implementation, etc. and are also based on the same finding of injury or threat thereof caused by increased imports and the same decision regarding the national interest to impose additional duties. We also note that our findings in this dispute are the same for all categories of passenger cars covered by the measure at issue. For simplicity, we therefore prefer to refer to the "safeguard measure" at issue throughout this Report, mindful of the fact that it sets different duty rates for different categories of passenger cars.

[2] See WT/DS468/1.

[3] See WT/DS468/2 and WT/DS468/3.

[4] See WT/DS468/4.

[5] See WT/DSB/M/343.

[6] See WT/DS468/6.

1.6. On 20 June 2014, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr William Davey
Members:	Mr Felipe Hees Mr Chang-fa Lo

1.7. Australia, the European Union, India, Korea, the Russian Federation, Turkey and the United States have reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.8. After consultations with the parties, the Panel adopted its Working Procedures[7] and timetable on 29 July 2014.

1.9. The Panel held a first substantive meeting with the parties on 29 and 30 September 2014. A session with the third parties took place on 30 September 2014. The Panel held a second substantive meeting with the parties on 17 and 18 November 2014. On 5 December 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 12 February 2015. The Panel issued its Final Report to the parties on 18 March 2015.

1.3.2 Working procedures on BCI

1.10. At Ukraine's request and after consultations with both parties, the Panel adopted, on 8 August 2014, additional procedures for the protection of BCI.[8]

2 FACTUAL ASPECTS

2.1 The measure at issue

2.1. This dispute concerns the definitive safeguard measure imposed by Ukraine on imports of certain passenger cars to Ukraine and the investigation that led to the imposition of this measure.

2.2 Other factual aspects

2.2. Further to a complaint lodged by the Association of Ukrainian Vehicle Manufacturers "Ukravtoprom" on behalf of three Ukrainian automobile manufacturers (VO KrASZ LLC, ZAZ CJSC, Eurocar CJSC), Ukraine's Interdepartmental Commission on Foreign Trade adopted, on 30 June 2011, Decision No. SP-259/2011/4402-27 on the initiation and conduct of the safeguard investigation on imports of motor cars to Ukraine, regardless of country of origin and export.

2.3. The period of investigation covered three years, namely 2008-2010, with an additional assessment of certain factors during the first half of 2011.

2.4. On 2 July 2011, the safeguard investigation was formally initiated following publication of the Commission's decision of 30 June in the *Uryadovyi Kuryer* No. 118 of 2 July 2011. The investigation was carried out by the Ministry pursuant to Ukraine's Safeguards Law.

2.5. On 13 July 2011, the initiation of the safeguard investigation was notified[9] to the WTO pursuant to Article 12.1(a) of the Agreement on Safeguards.

2.6. On 6 March 2012, the Commission approved Decision No. SP-272/2012/4423-08 to extend the safeguard investigation for an additional 60 days in accordance with Article 8 of the Safeguards

[7] See the Panel's Working Procedures in Annex A-1.
[8] See Additional Working Procedures on BCI in Annex A-2.
[9] WTO document G/SG/N/6/UKR/9.

Law. The notice concerning this decision was published in the official gazette of Ukraine, the *Uryadovyi Kuryer*, on 7 March 2012.

2.7. On 11 April 2012, the Ministry circulated to Japan and several other exporting countries its Key Findings based on the results of the safeguard investigation. The Ministry proposed to impose safeguard measure in the form of a safeguard duty at a level of 6.46% for passenger cars with an engine volume of 1000cm^3 - 1500cm^3 and 15.1% for passenger cars with an engine volume of 1500cm^3 - 2200cm^3.

2.8. On 28 April 2012, the Commission took Decision No. SP-275/2012/4423-08 on Imposition of Safeguard Measures on Imports of Motor Cars into Ukraine Regardless of the Country of Origin or Export of 28 April 2012 (hereafter referred to as the "Decision"). A Notice of Imposition of Safeguard Measures on Imports of Motor Cars into Ukraine Regardless of the Country of Origin was published in the *Uryadovyi Kuryer* No. 48 on 14 March 2013. The safeguard measure in the form of a safeguard duty was imposed with the following rates: 6.46% for passenger cars with an engine volume of 1000cm^3 – 1500cm^3 and 12.95% for passenger cars with an engine volume of 1500cm^3 – 2200 cm^3. The measure entered into force 30 days after its official publication for a duration of three years.

2.9. According to Article 21 of the Safeguards Law, the above-mentioned safeguard measure was not applied to imports into Ukraine of the product concerned originating from the following countries – Members of the WTO: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.

2.10. On 21 March 2013, Ukraine submitted to the WTO a notification pursuant to Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, and pursuant to Article 12.1(c) and footnote 2 of Article 9 of the Agreement on Safeguards.[10]

2.11. By Decision No. SP-306/2014/4423-06 of 12 February 2014, the Commission decided to progressively liberalize the safeguard measure in accordance with the following schedule:

a. For cars with a cylinder capacity exceeding 1000 cm^3 but not exceeding 1500 cm^3, classified under UKTZED[11] code of 8703 22 10 00:

   i. In 12 months from the day of applying the measure: 4.31%

   ii. In 24 months from the day of applying the measure: 2.15%.

b. For cars with a cylinder capacity exceeding 1500 cm^3 but not exceeding 2200 cm^3, classified under UKTZED code of 8703 23 19 10:

   i. In 12 months from the day of applying the measure: 8.63%

   ii. In 24 months from the day of applying the measure: 4.32%.

2.12. A Notice concerning this decision was published in the *Uryadovyi Kuryer*, No. 57 of 28 March 2014. The decision on liberalization entered into force on the date of its publication.

2.13. This decision was notified to the Committee on Safeguards on 28 March 2014.[12]

[10] WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/1.
[11] Ukrainian Foreign Economic Activity Commodity Classification Code ("Customs Code of Ukraine").
[12] WTO document G/SG/N/8/UKR/3/Suppl.1-G/SG/N/10/UKR/3/Suppl.2-G/SG/N/11/UKR/1/Suppl.1.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel:

a. *find* that the safeguard measure adopted by Ukraine is inconsistent with its obligations under the Agreement on Safeguards and the GATT 1994 and, in particular, with:

i. Articles 3.1 and 4.2(c) of the Agreement on Safeguards, because Ukraine failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

ii. Article 3.1 of the Agreement on Safeguards, because Ukraine failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;

iii. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and an "unforeseen development"; and failed to provide reasoned and adequate findings and conclusions with regard to an "unforeseen development";

iv. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;

v. Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide reasoned and adequate findings and conclusions with regard to the increase in imports;

vi. Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to examine all relevant injury factors; and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of serious injury or threat of serious injury;

vii. Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged serious injury or threat thereof; failed to make a proper non-attribution analysis; and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link between the increased imports and the alleged serious injury or threat of injury and non-attribution of other factors;

viii. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measure by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measure is necessary to prevent or remedy the alleged serious injury;

ix. Article II:1(b) of the GATT 1994, because Ukraine imposes duties which are in excess of those set forth in its schedule through the unlawful safeguard measure at issue;

x. Articles 12.1 and 12.2 of the Agreement on Safeguards, because Ukraine did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

xi. Article 12.3 of the Agreement on Safeguards, because Ukraine did not provide adequate opportunities for prior consultations on the proposed safeguard measure and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;

xii. Article 12.5 of the Agreement on Safeguards, because Ukraine did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards;

xiii. Article 8.1 of the Agreement on Safeguards, because Ukraine did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994, in accordance with Article 12.3 of the Agreement;

b. *recommend* that the DSB, pursuant to Article 19.1 of the DSU, requests Ukraine to bring its measure into conformity with the relevant provisions of the Agreement on Safeguards and the GATT 1994; and

c. *suggest*, pursuant to the second sentence of Article 19.1 of the DSU, that Ukraine revoke its safeguard measure.

3.2. Ukraine requests that the Panel reject all of Japan's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Korea are reflected in its oral statement, while the arguments of Australia, the European Union, Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, …). India and the Russian Federation did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 12 February 2015, the Panel submitted its Interim Report to the parties. On 24 February 2015, Japan and Ukraine each submitted written requests for the review of precise aspects of the Interim Report and comments. Neither party requested an interim review meeting. On 3 March 2015, Japan submitted comments on Ukraine's requests for review and comments. Ukraine submitted no comments on Japan's requests for review and comments.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. References in this section to other sections, paragraph numbers and footnotes relate to the Interim Report.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties.

6.4. In order to facilitate understanding of the interim review comments and changes made, the following section is structured to follow the organization of the findings section of this Report (Section 7), with the review requests of the parties, and their comments, addressed sequentially, according to the paragraph numbers that attracted comments.

6.1 Preliminary matters

6.5. Regarding paragraph 3.1, Japan notes that the Panel decided to use the term "safeguard measure" in singular form throughout the Interim Report. However, Japan argues that, for the purpose of describing Japan's claim at paragraph 3.1, the term "safeguard measure" should appear in the plural.

6.6. The Panel recalls that its preference to use the term "safeguard measure" in the singular form is discussed and explained in detail at footnote 18. For simplicity and consistency, we also prefer to use one single form throughout our Report. Nevertheless, in response to Japan's comment we moved footnote 18 to paragraph 1.1, where the term "safeguard measure" appears for the first time in the Report.

6.7. Regarding paragraph 7.6, Japan requests the Panel to make one change concerning the date of the publication of Decision No. SP-259/2011/4402-27 and another concerning the use of one word in the description of the product concerned.

6.8. The Panel made appropriate changes to the first sentence and bullet points (a) and (b) of paragraph 7.6.

6.9. Regarding paragraph 7.15, numeral viii, Japan suggests using the same terms that are used in paragraph 3.1, numeral viii, including the phrase "by submitting a relevant timetable for progressive liberalization", which is missing from paragraph 7.15.

6.10. The Panel made the requested changes.

6.11. Regarding Section 7.1.5, and in particular paragraphs 7.29 to 7.37, Ukraine comments that it "maintains" its position regarding whether the Key Findings are a part of the published report of the Ministry. Ukraine submits that there is no reason to think that publication in the official newspaper *Uryadovyi Kuryer* is the only legally accepted method of publication provided by Ukraine's Safeguards Law. Ukraine adds that the *Uryadovyi Kuryer* is reserved only for notices about the Commission decisions. Moreover, Ukraine contends that the Key Findings were provided to all interested WTO Members and were therefore a part of the public record of the investigation and could have been made available by the Ministry upon a written request. Ukraine makes no specific request for a change.

6.12. Japan responds that the Panel has already dismissed Ukraine's arguments with regard to the Key Findings at paragraph 7.36. According to Japan, Ukraine's comments do not call for any modification of the Panel's findings in Section 7.1.5.

6.13. The Panel notes that paragraph 7.36 addresses this issue in detail. Even if it were correct, as Ukraine now suggests, that under the domestic law of Ukraine the Key Findings could not be published in the *Uryadovyi Kuryer*, this does not demonstrate that Ukraine met its obligation under the Agreement on Safeguards to publish them. While we therefore do not change our finding in this regard, in view of Ukraine's argument about the *Uryadovyi Kuryer* we deleted the reference to Ukraine's legal requirements in the fourth sentence of paragraph 7.36.

6.2 Claims relating to unforeseen developments and the effect of the obligations incurred under the GATT 1994

6.14. Regarding Section 7.2, Ukraine comments that it maintains its position that the unforeseen developments in the present case consisted of the global financial and economic crisis, and not the

different multiple factors cited by the Panel in this section. Ukraine makes no specific request for a change.

6.15. Japan responds by stating that Ukraine's comments should be dismissed since they are essentially a repetition of the arguments already presented by Ukraine throughout the panel proceedings and were dismissed by the Panel.

6.16. The Panel made no change, since the "different multiple factors" referred to by Ukraine have been identified by Ukraine itself during the course of the proceedings.

6.3 Claims relating to increased imports

6.17. Regarding paragraph 7.194, Japan suggests that the Panel insert in the second sentence of the paragraph one of its arguments so as to fully reflect Japan's position.

6.18. The Panel made the requested change.

6.19. Regarding Section 7.3.1.1, and in particular paragraphs 7.145 and 7.147 concerning the issue of the "significance" of the relative increase in imports, Ukraine comments that fully addressing the requirement to establish the "significance" of the increase in imports could result in a breach of the confidentiality obligations under Article 3.2 of the Agreement on Safeguards referred to in Ukraine's submissions to the Panel. In particular, Ukraine considers that providing the precise figures of the original ratio between domestic production and imports could make the confidential information concerning domestic production easily accessible. Ukraine makes no specific request for a change.

6.20. Japan submits that Ukraine's comments should be dismissed. According to Japan, Ukraine does not challenge the numbers provided by the Panel in Section 7.3.1.1, but instead repeats its arguments concerning confidentiality of the data on imports and domestic production. Japan argues that the Panel has already taken into account these arguments, as reflected in footnote 142.

6.21. The Panel recalls that at paragraphs 7.147-7.148 it determined that the competent authorities have not demonstrated, through reasoned explanations, that the relative increase was significant enough. Indeed, in the Notice of 14 March 2013, the competent authorities did not even characterize the relative increase at issue as "significant". At paragraph 7.147 we further observed that "[w]ithout additional information *or* relevant explanations" (emphasis added) the reference to the 37.9% increase is not sufficient by itself to demonstrate the required "significance" and we explained our view. Thus, we did not say, and do not wish to imply that Ukraine could only establish the significance of the relative increase by revealing confidential information in the determination. Nevertheless, in view of Ukraine's comment we added some clarification at the end of paragraph 7.147.

6.4 Claims relating to threat of serious injury

6.22. Regarding Section 7.4.1.1, Ukraine raises a concern that "fully adhering to the Panel's recommendations on the analysis of the increased imports may require violating the regulations of Article 3.2 of the Agreement [on Safeguards]". According to Ukraine, publication of information regarding the level of the market share of increased imports or the rate and amount of the increased imports risks revealing information claimed to be confidential by the domestic industry. However, Ukraine makes no specific request for any change to this section.

6.23. Japan notes that Section 7.4.1.1 deals with a different issue. Furthermore, Japan notes that the Panel has already taken Ukraine's arguments concerning confidentiality into consideration, in particular at paragraph 7.251.

6.24. The Panel notes that Ukraine's concern relates to Section 7.4.1.3. In Section 7.4.1.3, we are not suggesting that confidential information must be disclosed in order to make a finding of threat of serious injury consistent with the Agreement on Safeguards. As provided for in Article 3.2 itself, it is usually possible to provide a meaningful summary of confidential information that does not conflict with the confidentiality requirement under Article 3.2. An analysis and determination based

on such a non-confidential summary may well be sufficient to demonstrate that the requirements of the Agreement on Safeguards have been satisfied.[13]

6.25. As regards the amounts of the increase, Japan correctly points out that this issue is already addressed at paragraph 7.251. As concerns the rate of the increased imports, we fail to see how our findings would or could require a breach of the confidentiality obligation imposed by Article 3.2 on the part of the Ukrainian competent authorities. As we note at paragraph 7.251, the Notice itself refers to the 71% absolute decrease in imports and the 38% relative increase in imports, so Ukraine's competent authorities did not consider this information to be confidential.

6.26. Concerning the "share of the domestic market taken by the increased imports", we have reviewed paragraph 7.249 in the light of Ukraine's comment and found it appropriate, for greater clarity and completeness, to provide some further elaboration in that paragraph and to insert two additional paragraphs.

6.5 Claims relating to causation

6.27. Regarding paragraph 7.291, Japan requests that the word "only" be deleted from the first sentence of the paragraph to avoid suggesting that in Japan's view, the coincidence in time between the increase of imports and the impairment of the domestic industry is not of importance at all. Japan notes that this was not its position.

6.28. The Panel made the requested change to paragraph 7.291.

6.6 Claims relating to the application, duration, and liberalization of the safeguard measure at issue

6.29. Regarding paragraphs 7.355 to 7.359, Japan submits that, contrary to what is stated in the Panel's findings, it did not argue that the failure to "notify" a timetable for progressive liberalization under Article 12.2 necessarily results in an inconsistency with Article 7.4.[14] Japan maintains that it cannot be excluded that, although a Member does not notify the timetable for progressive liberalization as required by Article 12.2, it nonetheless complies with Article 7.4. Japan notes that what it argued is that Article 12.2 confirms that the requirement included in Article 7.4 to provide for progressive liberalization has to be satisfied when the safeguard measure is applied. For these reasons, Japan requests that the Panel modify paragraphs 7.355 to 7.359 so that they correctly reflect its arguments.

6.30. The Panel made appropriate changes to paragraphs 7.355 to 7.359 to reflect more clearly that Japan's arguments relate to a failure to provide a timetable for progressive liberalization before the measure was applied rather than more narrowly only to a failure to notify such a timetable before the measure was applied.

6.31. Regarding paragraph 7.372, Japan submits that it did not argue that "failure to *notify* a timetable as required by Articles 12.1 and 12.2 establishes, by itself, that a Member has acted inconsistently with Articles 5.1 and 7.1"(emphasis added). Japan thus suggests that this sentence be corrected to accurately reflect its arguments.

6.32. The Panel made the requested change to more accurately reflect Japan's argument.

6.33. Regarding paragraphs 7.360 to 7.363, where the Panel addresses "whether Ukraine has acted inconsistently with Article 7.4 because, as of the date of establishment of this panel, it had failed to liberalize the safeguard measures", Japan argues that the Panel does not discuss the argument raised by Japan in paragraphs 56 and 57 of its comments on Ukraine's responses to the questions from the Panel about whether the Panel can review a measure which did not exist at the time of the establishment of the panel. Japan makes no specific request for a change.

[13] Particularly if the existence and location of the supporting confidential information in the record of the investigation is identified in the public report, even though the confidential information itself is not.

[14] Japan's response to Panel question No. 22.

6.34. The Panel recalls that on 12 February 2014, the competent authorities adopted Decision No. SP-306/2014/4423-06 that provided for the progressive liberalization of the safeguard measure at issue. Although that decision was published and entered into force on 28 March 2014, which was two days after the date of establishment of this Panel, the decision was taken before the date of establishment of this Panel. We further note that Japan at paragraphs 56 and 57 of its comments on Ukraine's responses to questions from the Panel also argues that actions by a responding party subsequent to the establishment of a panel can be taken into account as evidence to review the WTO-consistency of the measure at issue. Nevertheless, in view of Japan's comment we deleted the first sentence of paragraph 7.362.

6.35. Regarding Section 7.6.1, Ukraine recognizes the arguments of the Panel concerning the application and liberalization of its safeguard measure under Articles 5.1, 7.1, and 7.4. Ukraine strongly agrees that the obligations under Articles 7.4 and 12.2 are closely related but not similar. Ukraine further comments, in relation to Section 7.6.2, that Article 7.4, which provides for the obligation to progressively liberalize a safeguard measure, is dissimilar to and independent from the obligations imposed by Articles 5.1 and 7.1, which concern the extent of the safeguard measure. Ukraine makes no specific request for a change.

6.36. Japan submits that it fails to see what Ukraine is requesting the Panel to review, since Ukraine's comments express its agreement with the Panel's findings.

6.37. The Panel made no change in response to Ukraine's comment.

6.7 Claims under Article II:1(b) of the GATT 1994

6.38. Regarding paragraph 7.393, Japan considers that addressing its claim under Article II:1(b) of the GATT 1994 is important since that Article constitutes the fundamental obligation that Ukraine has violated by invoking Article XIX and the Agreement on Safeguards. Japan further argues that any compliance action by Ukraine must be fully consistent with this fundamental obligation. Japan makes no specific request for a change.

6.39. The Panel did not modify paragraph 7.393. We are not convinced that a finding on the consistency of Ukraine's safeguard measure with Article II:1(b) is necessary to enable the DSB to make sufficiently precise recommendations and rulings. In most panel reports dealing with disputes concerning safeguard measures, the complaining party either did not make a claim under Article II:1(b)[15] or made a claim under Article II:1(b) in the alternative to claims under Article XIX and the Agreement on Safeguards.[16] On one occasion, the complaining party made a claim under Article II:1(b) and the panel exercised judicial economy in respect of that claim, since a finding was not considered necessary to enable the DSB to make sufficiently precise recommendations and rulings.[17]

6.8 Claims relating to the conduct of the investigation and the investigation report

6.40. Regarding paragraph 7.410, Japan requests that the Panel delete the reference to the absence of specific concerns raised by Japan in the last sentence of that paragraph. Japan argues that it did raise specific concerns in its submissions to the Panel. Japan notes that in the course of the proceedings, it pointed out that the competent authorities had provided to Japan only very limited information including in the Notice of Initiation, which led Japan to submit only brief general observations. Furthermore, Japan recalls its statement that neither the Notice of Initiation nor any other document specifies the starting date of the period of investigation.

6.41. The Panel deleted the reference in question from the last sentence of paragraph 7.410. After reviewing paragraphs 7.404 to 7.412 in response to Japan's comment, we also deleted the third and fourth sentence of paragraph 7.411, since they addressed a broader argument than the one advanced by Japan.

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[15] See, for example, the panel reports in *US – Line Pipe*, *US – Steel Safeguards*, *Argentina – Peaches, US – Wheat Gluten, Argentina – Footwear,* and *Korea – Dairy.*

[16] See Panel Report, *Dominican Republic – Safeguard Measures,* para.7.110.

[17] See Panel Report, *US – Lamb,* para. 7.280.

6.42. Regarding paragraph 7.431, Japan requests that the Panel add a sentence after the third sentence to refer to its response to a question from the Panel.

6.43. The Panel added the proposed sentence to paragraph 7.431, which summarizes Japan's arguments.

6.44. Regarding Sections 7.8.1 and 7.8.2, Ukraine recognizes the conclusions of the Panel regarding the procedural obligations under Articles 3.1 and 4.2. Ukraine maintains that its Ministry provided all interested parties, including Japan, with the required information and therefore adhered to the requirement concerning reasonable public notice. Ukraine fully agrees that no information in addition to that provided during the investigation and in the relevant notices and Key Findings needed to be made available to the interested parties. Furthermore, Ukraine observes that the interested parties were given full access to all non-confidential information available to the Ministry (including the arguments and presentations of the other interested parties).

6.45. Japan submits that, contrary to Ukraine's comments, the Panel did not find that no information in addition to that provided during the investigation and in the relevant notices and Key Findings needed to be made available to the interested parties. Japan further comments that the Panel did not find that the interested parties were given full access to all non-confidential information available to the Ministry.

6.46. The Panel made no change in response to Ukraine's comment.

6.9 Claims relating to notifications, prior consultations, and the level of concessions

6.47. Regarding footnote 506, Japan requests that the Panel add a reference to Japan's response to Panel question No. 106, as the arguments already referenced in footnote 506 were reiterated in that response.

6.48. The Panel made the appropriate changes in footnote 506.

6.49. Regarding Section 7.9.1.1.1, Ukraine comments that it did not have all the relevant documents available in one of the WTO official languages and that an additional effort was therefore required of it to translate these documents when making notifications to the Committee on Safeguards. Ukraine points out that this is especially true for a newly-acceded Member with limited resources. Ukraine further comments that this factor has to be taken into proper consideration in the Panel's conclusion regarding the immediacy of the notification under Article 12.1(a). Ukraine makes no specific request for a change.

6.50. Japan notes that Ukraine merely reiterates the arguments it presented in its submissions. Japan is of the view that there is no need to consider these arguments further, since the Panel has already addressed them.

6.51. The Panel made no change in response to Ukraine's comment. Section 7.9.1.1.1 already takes appropriate account of the need to translate relevant documents into an official language of the WTO.

6.52. Regarding Section 7.9.1.1.2, Ukraine comments that the decision on the actual application of the safeguard measure and the finalization of the Commission's conclusions on the threat of injury caused by increased imports occurred on 14 March 2013 and not on 28 April 2012. Ukraine submits that no position could be considered official and could be publicly disseminated before the Notice of Imposition was published on 14 March 2013. Ukraine states that it therefore agrees with the position of the Panel concerning the notification under Article 12.1(c). At the same time, Ukraine maintains its view that its joint notification under Articles 12.1(b) and 12.1(c) was made immediately upon finding a threat of serious injury caused by increased imports and taking a decision to apply the safeguard measure. Ukraine makes no specific request for a change.

6.53. Japan responds that the Panel has already dismissed the arguments that Ukraine reiterates in its comments and that they should therefore not be taken into account.

6.54. The Panel made no change in response to Ukraine's comment. Section 7.9.1.1.2 already takes appropriate account of the arguments presented by Ukraine.

6.55. Regarding Section 7.9.2, Ukraine "maintains" that adequate opportunity for prior consultations was provided to interested Members as the Ukrainian competent authorities provided them with all necessary information. However, Ukraine makes no specific request for a change.

6.56. Japan notes that Ukraine's comments in this regard relate to Section 7.9.3, not 7.9.2. Furthermore, Japan argues that Ukraine's comments should be dismissed because they are no different from Ukraine's arguments made during the panel proceedings and have been rejected by the Panel.

6.57. The Panel agrees that Ukraine's comments relate to Section 7.9.3. In the absence of any specific request from Ukraine, we made no change to this section.

6.58. Regarding paragraph 7.533, Japan submits that the Panel's argument summary does not fully reflect its submissions. Japan requests the Panel to add an additional sentence after the first sentence of this paragraph.

6.59. The Panel modified paragraph 7.533 to better reflect Japan's position.

6.60. Regarding Section 7.9.5, Ukraine "maintains" that since the consultations with WTO Members, including Japan, were meaningful and an adequate opportunity for prior consultations was provided to interested Members pursuant to Article 12.3, Ukraine did endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and the exporting Members which would be affected by the safeguard measure. Ukraine makes no specific request for a change to this section.

6.61. Japan requests the Panel to dismiss these arguments because the Panel has already fully addressed Ukraine's arguments in Sections 7.9.3 and 7.9.4 of the Interim Report.

6.62. The Panel made no modifications to this section, since Ukraine merely reiterates a position that was considered and rejected by the Panel, for the reasons set out in Section 7.9.5.

6.10 Conclusions

6.63. Ukraine in a concluding comment states that the Panel's Interim Report "denies the legal right of Ukraine to apply safeguard measures as a developing country when the underlying conditions are met".[18] Ukraine makes no specific request for a change in this respect.

6.64. The Panel notes that this was the first time in the context of these panel proceedings that Ukraine referred to itself as a developing country. The comment in question relates to the right to apply a safeguard measure. However, neither Article 9, which contains additional provisions concerning developing country Members, nor any other provision of the Agreement on Safeguards provides for special or differential treatment for developing country Members with regard to the conditions and circumstances under which a safeguard measure can be applied – all WTO Members are subject to the same requirements in this regard.

7 FINDINGS

7.1 Preliminary matters

7.1. Before examining Japan's claims in the present dispute, the Panel will describe in more detail Ukraine's safeguard measure at issue and the underlying investigation. Next, we will go on to provide an overview of Japan's claims and describe the order in which we will carry out our assessment. We will then recall some general principles governing the standard of review applicable to disputes arising under the Agreement on Safeguards and the GATT 1994. Finally, we will consider which is the relevant Ukrainian document setting out supporting findings and

[18] Ukraine's comments on the Interim Report of the Panel, p. 6.

conclusions by the Ukrainian competent authorities on the basis of which we will conduct our review.

7.1.1 The safeguard measure at issue

7.2. The present dispute concerns a safeguard measure that Ukraine's competent authorities imposed in April 2013 for three years on imports of passenger cars from all sources, and the investigation that led to the imposition of the measure. More specifically, Japan's claims concern the following measures, and their amendments, replacements, implementing acts or any other related measure in connection with them:

a. Decision No. SP–259/2011/4402-27 of the Interdepartmental Commission on Foreign Trade of 30 June 2011 on the initiation and conducting of the investigation process as to import into Ukraine of motor cars[19] irrespective of the country of origin and export, and the Notice concerning it;[20]

b. Decision No. SP-272/2012/4423-08 of the Interdepartmental Commission on Foreign Trade of 6 March 2012 whereby the duration of the investigation was extended by 60 days, and the Notice concerning it;[21]

c. Decision No. SP-275/2012/4423-08 of the Interdepartmental Commission on Foreign Trade of 28 April 2012 on the imposition of safeguard measures on imports of motor cars to Ukraine regardless of country of origin and export, and the Notice concerning it;[22]

d. Decision No. SP-288/2013/4423-06 of the Interdepartmental Commission on Foreign Trade of 11 April 2013 on the amendments to the Commission's decision No. SP-275/2012/4423-08 of 28 April 2012 on the application of safeguard measures on imports of cars in Ukraine regardless of their country of origin and export, and the Notice concerning it;[23]

e. Decision No. SP-306/2014/4423-06 of the Interdepartmental Commission on Foreign Trade of 12 February 2014 that provides for progressive liberalization of the measure, and the Notice concerning it.[24]

7.3. The safeguard measure at issue applies to imports of the following products:

> Motor cars and other motor vehicles principally designed for the transport of persons (category M1 – vehicles with no less than 4 wheels and no more than 8 sitting places except driver sitting place), with spark-ignition internal combustion engine and crank gear of a cylinder capacity exceeding 1000 cm^3 but not exceeding 2200 cm^3, new, classified under UKTZED[25] codes 8703 22 10 00 and 8703 23 19 10.

7.4. It takes the form of special customs duties imposed at different rates differentiated by engine volumes:

> – for cars of a cylinder capacity exceeding 1000 cm^3 but not exceeding 1500 cm^3: 6.46%

[19] We note that the English translation of the Ukrainian documents refers consistently to the term "motor cars". For the purpose of this Report, we prefer to use the term "passenger cars" in view of the specific category of product covered by the measure at issue. We note that the term "motor cars" may cover potentially a wider category of cars.
[20] A Notice concerning this decision was published in the *Uryadovyi Kuryer* No. 118 on 2 July 2011.
[21] A Notice concerning this decision was published in the *Uryadovyi Kuryer* No. 44 on 7 March 2012.
[22] A Notice concerning this decision was published in the *Uryadovyi Kuryer* No. 48 on 14 March 2013.
[23] A Notice concerning this decision was published in the *Uryadovyi Kuryer* No. 75 on 20 April 2013.
[24] A Notice concerning this decision was published in the *Uryadovyi Kuryer* No. 57 on 28 March 2013.
[25] Ukrainian Foreign Economic Activity Commodity Classification Code ("Customs Code of Ukraine").

– for cars of a cylinder capacity exceeding 1500 cm^3 but not exceeding 2200 cm^3: 12.95%.

7.5. These special duty rates were subsequently liberalized in accordance with the following schedule:

- for cars with a cylinder capacity exceeding 1000 cm^3 but not exceeding 1500 cm^3, classified under UKTZED code of 8703 22 10 00:

  i. In 12 months from the day of applying the measure (i.e. 14 March 2013): 4.31%

  ii. In 24 months from the day of applying the measure (i.e. 14 March 2013): 2.15%.

- for cars with a cylinder capacity exceeding 1500 cm^3 but not exceeding 2200 cm^3, classified under UKTZED code of 8703 23 19 10:

  i. In 12 months from the day of applying the measure (i.e. 14 March 2013): 8.63%

  ii. In 24 months from the day of applying the measure (i.e. 14 March 2013): 4.32%.

7.1.2 Procedure carried out by the competent authorities[26]

7.6. By Decision No. SP–259/2011/4402-27 of 30 June 2011 of the Interdepartmental Commission on Foreign Trade of Ukraine[27], published in the official gazette *Uryadovyi Kuryer* on 2 July 2011, the Ministry of Economic Development and Trade of Ukraine initiated a safeguard investigation into:

a. Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars with spark-ignition internal combustion engine and crank gear of a cylinder capacity exceeding 1000 cm^3 but not exceeding 1500 cm^3, new, classified under UKTZED code 8703 22 10 00;

b. Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars with spark-ignition internal combustion engine and crank gear of a cylinder capacity exceeding 1500 cm^3 but not exceeding 2200 cm^3, new, classified under UKTZED code 8703 19 10 00.[28]

[26] Throughout this Report, we use "the competent authorities" to refer to the Ukrainian competent authorities responsible for the safeguard investigation and the adoption and imposition of the safeguard measure pursuant to the Safeguard Law, namely the Ministry of Economic Development and Trade of Ukraine (hereafter the "Ministry") and the Interdepartmental Commission on Foreign Trade of Ukraine (hereafter the "Commission").

[27] Decision No. SP–259/2011/4402-27 of the Interdepartmental Commission on Foreign Trade "On initiation and conducting of the investigation process as to import into Ukraine of motor cars irrespective of the country of origin and export". See also Notice on Initiation and Conducting of the Safeguard Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export, as published in the *Uryadovyi Kuryer* No. 118 of 2 July 2011 (Exhibit JPN-3).

[28] Ukraine clarified that the Notice of Initiation contained a clerical error regarding this particular UKTZED code. According to Ukraine, the correct reference is UKTZED code 8703 23 19 10 as reflected in Decision No. SP-275/2012/4423-08 of the Interdepartmental Commission on Foreign Trade of 28 April 2012 on the imposition of safeguard measures on imports of motor cars to Ukraine regardless of the country of origin and export, and the Notice of 14 March 2013 referring to it. Ukraine confirmed that despite this error, the product concerned was the same throughout the investigation at issue. See Ukraine's response to Panel question Nos. 58 and 109.

7.7. The investigation was initiated following an application lodged by the Association of the Ukrainian Carmakers "UkrAvtoprom" on behalf of three Ukrainian automobile manufacturers.[29] Ukraine notified this decision to the WTO Committee on Safeguards on 13 July 2011 and the notification was circulated to WTO Members on 15 July 2011.[30]

7.8. The investigation period was established as of 1 January 2008 to 31 December 2010. During the course of the investigation, the competent authorities extended the duration of the investigation by 60 days by Decision No. SP-272/2012/4423-08 of 6 March 2012.[31]

7.9. On 11 April 2012, Ukraine sent a letter to the Embassy of Japan in Ukraine inviting Japan to consultations.[32] Attached to that letter was a document entitled "Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export"[33], in which the Ministry of Economic Development and Trade concluded that:

> Given the foregoing and results of analysis of information obtained in the course of the safeguard investigation, the Ministry concludes that there is sufficient evidence and grounds for having the Commission to review the proposals concerning application of safeguard measures regarding the import of motor cars to Ukraine regardless of the country of origin and export, for a three-year period.
>
> ...
>
> The safeguard measures shall be applied in the form of a special duty for the import of the above-mentioned products into Ukraine depending on engine volume: for those exceeding 1000 cm^3, but not exceeding 1500 cm^3– at the rate of 6.46%, and for those exceeding 1500 cm^3, but not exceeding 2200 cm^3 – at the rate of 15.1%.

Consultations between Ukraine and Japan took place in Kiev on 19 April 2012.

7.10. On 28 April 2012, by Decision No. SP-275/2012/4423-08 of the Interdepartmental Commission on Foreign Trade, the competent authorities decided to impose a safeguard measure on imports of motor cars to Ukraine regardless of the country of origin or export.[34]

7.11. On 14 March 2013, the Notice of Imposition of a safeguard measure was published in the official gazette.[35] The Notice of Imposition provides in relevant part:

> Taking all of this into account, the Commission has decided that:
>
> - During the period of investigation, import of motor cars to Ukraine regardless of the country of origin and export increased relative to domestic production by the domestic industry, and that such increase took place under conditions and volume which threatened to cause serious injury to the domestic industry;

[29] Application of the Association of the Ukrainian Carmakers "UkrAvtoprom"(applied on behalf of Ltd. "PA KrACZ", CJSC "Zaporizhia Automobile Building Plant" ("ZAZ"), CJSC "Eurocar") on the initiation and conducting of the investigation process as to import into Ukraine of motor cars classified under UKTZED code 8703 22 10 00 and under UKTZED code 8703 23 19 10.

[30] Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it – Ukraine (Motor Cars), WTO document G/SG/N/6/UKR/9 (Exhibit JPN-4).

[31] See footnote 21 above.

[32] The letter dated 11 April 2012 from the competent authorities to the Embassy of Japan in Ukraine specifically refers to the proposed consultations as consultations pursuant to Article 12.3 of the Agreement on Safeguards. Japan contends that these consultations were not consultations pursuant to Article 12.3. See para. 7.528 below.

[33] Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export (Exhibit JPN–6 Revised Version).

[34] Decision No. SP-275/2012/4423-08 of the Interdepartmental Commission on Foreign Trade, as referred to in Exhibit JPN-7 and Exhibit JPN-2. The Decision itself has not been published.

[35] The Notice of Imposition of Safeguard Measures on Imports of Motor Cars to Ukraine Regardless of Country of Origin or Export, published in the *Uryadovyi Kuryer* No. 48 of 14 March 2013 (Exhibit JPN-2).

> - The national interests of Ukraine require imposition of safeguard measures against such imports.
>
> Therefore, pursuant to Article 16 of the [Safeguards Law of Ukraine], the Commission approved Decision No. SP-275/2012/4423-08 on 28 April 2012, according to which safeguard measures were imposed against imports of the Product to Ukraine regardless of the country of origin and export, which is defined as follows: Motor cars and other motor vehicles principally designed for the transportation of persons (category M1 – vehicles with no less than 4 wheels used to transport passengers and with no more than 8 sitting places except driver sitting place), with spark-ignition internal combustion engine and crank gear of a cylinder capacity exceeding 1000 cm^3 but not exceeding 2200 cm^3, new, classified under UKTZED codes 8703 22 10 00 and 8703 23 19 10.
>
> Safeguard measures shall be imposed for 3 years in the form of a special duty applicable to imports into Ukraine of the above-mentioned commodities based on engine volume:
>
> - 1000 cm^3- 1500 cm^3- 6.46%
>
> - 1500 cm^3- 2200 cm^3- 12.95%.
>
> According to Article 21 of the [Safeguards Law of Ukraine], the above-mentioned safeguard measures shall not apply to imports to Ukraine of the Product originating from the following countries – members of the WTO: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.
>
> The Commission's Decision shall enter into force 30 days after the official publication of this Notice.[36]

The aforementioned safeguard measure thus became effective as of 14 April 2013[37] for a period of 3 years.

7.12. On 21 March 2013, Ukraine submitted to the WTO Committee on Safeguards a notification pursuant to Articles 12.1(b) and (c) of the Agreement on Safeguards and footnote 2 of Article 9 of the Agreement on Safeguards. The notification was circulated to WTO Members on 25 March 2013.[38]

7.13. On 11 April 2013, the competent authorities, by Decision No. SP-288/2013/4423-06 "On amendments to the decision of the Interdepartmental Commission on International Trade No. SP-275/2012/4423-08 of 28 April 2012 on the application of safeguard measures on imports of cars in Ukraine regardless of their country of origin and export"[39], suspended the safeguard measure from 20 April 2013 until 28 February 2014 for certain types of cars with hybrid propulsion, namely:

> Motor cars and other motor vehicles principally designed for the transport of persons (category M1 – vehicles with no less than 4 wheels and no more than 8 sitting places except driver sitting place), with spark-ignition internal combustion engine and crank

[36] Notice of Imposition of 14 March 2013, pp. 3 and 4.

[37] Since the Notice indicates that the safeguard measure was to go into force 30 days after its publication, i.e. 14 March 2013, based on the calendar for 2013, it would appear that the date of entry into force of the safeguard measure should have been Saturday, 13 April 2013. However, Ukraine, in its response to Panel question No. 98, stated that the date of entry into force was actually Sunday, 14 April 2013.

[38] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, Notification pursuant to Article 12.1(c) of the Agreement on Safeguards and Notification pursuant to Article 9, footnote 2, of the Agreement on Safeguards, WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/1, 25 March 2013 (Exhibit JPN-7).

[39] WTO document G/SG/N/10/UKR/3/Suppl.1, 22 May 2013.

gear of a cylinder capacity exceeding 1000 cm^3 but not exceeding 2200 cm^3, new, classified under UKTZED codes 8703 22 10 00 and 8703 23 19 10 with hybrid power system (electric motor-driven wheels).

This decision was published on 20 April 2013 and notified to the WTO Committee on Safeguards on 20 May 2013.[40]

7.14. On 12 February 2014, the competent authorities adopted Decision No. SP-306/2014/4423-06 that provides for progressive liberalization of the measure.[41] This decision became effective on the date of its publication, i.e. on 28 March 2014, and was notified to the WTO Committee on Safeguards on the same day.[42]

7.1.3 Overview of claims and order of the Panel's analysis

7.15. Japan set out the following claims in its request for the establishment of a panel:[43]

i. Ukraine acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

ii. Ukraine acted inconsistently with Article 3.1 of the Agreement on Safeguards because it failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;

iii. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because it failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and the alleged "unforeseen developments"; and failed to provide reasoned and adequate findings and conclusions with regard to such "unforeseen developments";

iv. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because it failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;

v. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards because it failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide

[40] Notification pursuant to Article 12.1(c) of the Agreement on Safeguards, WTO document G/SG/N/10/UKR/3/Suppl.1, 22 May 2013.

[41] Decision № SP-306/2014/4423-06, published in the *Uryadovyi Kuryer*, No. 57 of 28 March 2014 (Exhibit JPN-9).

[42] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports; Notification under Article 12.1(c) of the Agreement on Safeguards on taking a decision to apply a safeguard measure; Notification pursuant to Article 9, footnote 2, of the Agreement on Safeguards, WTO document G/SG/N/8/UKR/3/Suppl.1-G/SG/N/10/UKR/3/Suppl.2-G/SG/N/11/UKR/1/Suppl.1, 31 March 2014 (Exhibit JPN-9).

[43] Japan's first written submission, para. 377; second written submission, para. 298. We observe that although Japan identified a claim under Article X:3(a) of the GATT 1994 in its request for the establishment of a panel, it has not raised any such claim during the panel proceedings, let alone provided arguments to support such a claim. Therefore, this Report is based on the premise that this claim was not pursued by Japan.

reasoned and adequate findings and conclusions with regard to the increase in imports;

vi. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because it failed to examine all relevant factors and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of serious injury or threat of serious injury;

vii. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because it failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged serious injury or threat thereof; failed to make a proper non-attribution analysis and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link between the increased imports and the alleged injury or threat of injury and non-attribution of other factors;

viii. Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards because it has failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measure by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measure is necessary to prevent or remedy the alleged serious injury;

ix. Ukraine acted inconsistently with Article II:1(b) of the GATT 1994 because it imposed duties which are in excess of those set forth in its schedule through the unlawful safeguard measures at issue;

x. Ukraine acted inconsistently with Articles 12.1 and 12.2 of the Agreement on Safeguards because it did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

xi. Ukraine acted inconsistently with Article 12.3 of the Agreement on Safeguards because it did not provide adequate opportunities for prior consultations on the proposed safeguard measures and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;

xii. Ukraine acted inconsistently with Article 12.5 of the Agreement on Safeguards because it did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards; and

xiii. Ukraine acted inconsistently with Article 8.1 of the Agreement on Safeguards because it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994, in accordance with Article 12.3 of the Agreement on Safeguards.

7.16. Japan also requests the Panel to exercise its authority under the second sentence of Article 19.1 of the DSU to suggest ways in which Ukraine could implement the recommendations of the Panel. In particular, Japan requests the Panel to suggest that Ukraine revoke its definitive safeguard measure.[44] Japan considers that in the present dispute, the size and number of errors made by the competent authorities during the safeguard investigation resulted in multiple inconsistencies with the Agreement on Safeguards and the GATT 1994, so that the only way that

[44] Japan's first written submission, para. 374.

Ukraine could properly implement possible recommendations of the Panel is the revocation of its definitive safeguard measures.[45]

7.17. Ukraine requests that all of Japan's claims be rejected.

7.18. The Panel notes that under the Agreement on Safeguards and Article XIX of the GATT 1994, a Member wishing to impose a safeguard measure must comply with two main sets of requirements. The first comprises substantive requirements, including the circumstances and conditions[46] that must be demonstrated to justify the application of a safeguard measure. Specifically, a Member must demonstrate that, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994, the product to be subjected to a safeguard measure is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry in that territory producing like or directly competitive products. The second comprises procedural requirements, including requirements to allow interested parties to present evidence and views, transparency requirements such as notifications to the WTO Committee on Safeguards, and procedural requirements to provide an opportunity for consultations to other Members.

7.19. We observe that Japan has advanced claims relating to both substantive and procedural requirements. We will begin our assessment with the claims concerning the substantive requirements. Specifically, we will first examine Japan's claims relating to unforeseen developments and the effect of GATT 1994 obligations. We will then continue with the claims relating to the conditions, namely, increased imports, serious injury or threat thereof and the causal link between these two conditions for imposing a safeguard measure. Next, we will turn to the claims that concern, not the right to apply any safeguard measure, but the particulars of the safeguard measure actually imposed. These are the claims relating to the necessity of the safeguard measure at issue and its liberalization, as well as Article II:1(b) of the GATT 1994. After that, we will address the claims concerning the procedural requirements. This analysis will begin with the claims concerning the investigative process and the resulting investigation report. We will end with the claims concerning, or linked to, the notification and consultation requirements.

7.20. In addressing these claims, we will make use, as appropriate, of the principle of judicial economy. According to the Appellate Body, this principle:

> allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute." Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute", and panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'." Nonetheless, the Appellate Body has cautioned that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy", and that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'[47]

7.21. Accordingly, the Panel will not necessarily make findings on all claims put forward by Japan in this dispute.

7.1.4 Standard of review

7.22. The Agreement on Safeguards is silent as to the standard of review to be applied by panels in reviewing the WTO-consistency of safeguard measures and the associated investigations.

[45] Japan's first written submission, para. 376.
[46] See section 7.2 below.
[47] Appellate Body Report, *Argentina – Import Measures*, para. 5.190. (quoting Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *US – Tuna II (Mexico)*, paras. 403-404; *US – Upland Cotton*, para. 732; *Australia – Salmon*, para. 223.) (footnotes omitted; emphasis original).

Previous panel and Appellate Body reports have established that the general standard of review contained in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of the GATT 1994.[48]

7.23. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant agreements.[49] In *US – Cotton Yarn,* the Appellate Body examined the scope of this general rule regarding the standard of review applicable to disputes under the Agreement on Safeguards and summarized its views 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 judgement for that of the competent authority.[50]

7.24. As explained by the Appellate Body, the standard of review applicable to panels' examination of a competent authorities' determination involves neither a *de novo* review nor "total deference" to the competent authorities' determinations.[51] Rather, a panel is required to assess whether the competent authorities have examined all the relevant facts and have provided a reasoned and adequate explanation as to how the facts support their determination.[52] In *US – Lamb*, the Appellate Body stated that:

> a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[53]

7.25. We note that this standard of review was articulated by the Appellate Body in the context of a claim under Article 4.2(a) of the Agreement on Safeguards. However, the Appellate Body in *US – Steel Safeguards* made it clear that the same standard should be applied to other obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994.[54]

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[48] See, e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 120; and *US – Lamb*, paras. 100-102; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.4.

[49] Article 11 of the DSU provides in relevant part that "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided in the covered agreements".

[50] Appellate Body Report, *US – Cotton Yarn*, para. 74 (referring at paras. 71-73 to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 121; *US- Lamb*, para. 103; and *US – Wheat Gluten*, para. 55). We note that while the dispute in *US – Cotton Yarn* concerned a safeguard measure imposed under the Agreement on Textiles and Clothing, the quoted statement and the other disputes referred to all concerned safeguard measures imposed under the Agreement on Safeguards. Thus, the statement in *US – Cotton Yarn* is relevant to the dispute before us.

[51] Appellate Body Reports, *US – Lamb*, para. 101; *US – Tyres (China)*, para. 123; *US – Cotton Yarn*, para. 69; and *Argentina –Footwear (EC)*, para. 119.

[52] Appellate Body Reports, *US – Lamb*, para. 103; *US – Line Pipe*, para. 217; and *US – Steel Safeguards*, paras. 296-297.

[53] Appellate Body Report, *US – Lamb*, para. 106.

[54] Appellate Body Report, *US – Steel Safeguards*, para. 276 (stating that "[O]ur finding in those cases [such as *US – Lamb*] did not purport to address solely the standard of review that is appropriate for claims

7.26. A panel's assessment of whether the competent authorities have complied with their obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 should be based on the relevant report published by the authorities.[55] Article 3.1, last sentence, requires the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Moreover, Article 4.2(c) obliges the competent authorities to 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 in *US – Steel Safeguards* stated in this respect that:

> [i]t is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11.[56]

The Appellate Body went on to conclude that:

> the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[57]

7.27. Accordingly, our examination of the competent authorities' determinations will be based on the report published by the competent authorities. With respect to the published report, the Appellate Body also observed that panels should not be "left to 'deduce for themselves' from the report of the competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority'".[58] Thus, the explanations contained in the report must be "explicit", "clear and unambiguous", and must not "merely imply or suggest an explanation".[59] In case there is no reasoned and adequate explanation in the published report to support the competent authorities' determinations, "the panel has no option but to find that the competent authority has not performed the analysis correctly".[60] This notably implies that reasoning, analysis and demonstrations provided after publication of the report – i.e. *ex post* explanations – are irrelevant and cannot be relied upon to remedy any deficiencies of the competent authorities' determinations.

7.28. The Appellate Body further stated, in *US – Tyres*, that "a panel should 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".[61] Thus, for purposes of assessing whether the explanations provided in the published report are adequate, we will also take into account relevant evidence submitted to us from the record of the investigation and plausible alternative explanations for the developments relied upon by the competent authorities in making their determination.

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arising under Article 4.2 of the Agreement on Safeguards. We see no reason not to apply the same standard generally to the obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994").

[55] See, e.g. Appellate Body Reports, *US – Steel Safeguards*, para. 299; *US – Lamb*, para. 105; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.9.

[56] Appellate Body Report, *US – Steel Safeguards*, para. 299.

[57] Ibid.

[58] Ibid. para. 288.

[59] Ibid. paras. 296- 297; and *US – Line Pipe*, para. 217.

[60] Appellate Body Report, *US – Steel Safeguards*, para. 303.

[61] Appellate Body Report, *US – Tyres (China)*, para. 123. We note that this was a dispute concerning a transitional safeguard measure based on the provisions of China's Protocol of Accession. However, in support of the quoted statement, the Appellate Body referred to a number of Appellate Body Reports, including those in *Argentina – Footwear* (EC), *US – Lamb*, *US – Steel Safeguards* and *US – Wheat Gluten*, which concerned the Agreement on Safeguards.

7.1.5 Relevant Ukrainian documents

7.29. The Panel now turns to the question of which documents comprise the competent authorities' "published report" within the meaning of Articles 3.1, last sentence, and 4.2(c). The last sentence of Article 3.1 provides:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Article 4.2(c) provides that:

> 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 relevant of the factors examined.

7.30. The verb "publish" is defined as "make generally known; declare or report openly; announce; disseminate (a creed or system)".[62] We further note that the panel in *Chile – Price Band System* ascertained the meaning of the verb "publish" in Article 3.1, last sentence, by considering it in context and determined that in this particular context it "must be interpreted as meaning 'to make generally available through an appropriate medium', rather than simply 'making publicly available'".[63] We see no reason not to follow this interpretation also in the present dispute.

7.31. The parties to this dispute do not agree as to which of two principal documents, the Notice of 14 March 2013 and the Key Findings, sent to certain interested parties on 11 April 2012, we should, or may, take into account in our analysis of Ukraine's safeguard measure. In addition, Ukraine also views as relevant its Notification to the WTO Committee on Safeguards under Articles 12.1(b) and (c), dated 21 March 2013.

7.32. According to Japan, in this dispute, the "published report" within the meaning of Articles 3.1 and 4.2(c) is the Notice of 14 March 2013, and Japan submits that the Panel should limit its examination to that document. Japan contends that Ukraine itself, in the letter dated 17 June 2013 sent to Japan by its competent authorities[64], confirmed that the Notice of 14 March 2013 is the report containing the findings and reasoned conclusions. Japan argues that the "published report" must be "made generally available through an appropriate medium"[65], and that the "Key Findings" were not made "generally available" and consequently were not "published". Japan also notes that this document was not explicitly referred to in the Notice of 14 March 2013.[66]

7.33. Ukraine submits that the Key Findings, the Notice of 14 March 2013 and the Notification contained a non-confidential summary of findings and reasoned conclusions reached on all pertinent issues of fact and law, as required by Articles 3.1 and 4.2(c). In Ukraine's view, these documents can serve as a basis for the Panel's analysis of Japan's claims. Ukraine argues that while the Key Findings were not published in the newspaper *Uryadovyi Kuryer* in the same way that the Notice of 14 March 2013 was, it is up to the competent authorities to decide the appropriate medium of publication, as long as the information is made publicly available. According to Ukraine, the Key Findings were sent directly to the representatives of the affected exporting countries in April 2012 in order to comply with Articles 3, 4, and 12 and Article XIX:2. Moreover, Ukraine argues that the Key Findings, as well as any other non-confidential information on the investigation, were also available to the interested parties, as any of the interested parties could access any relevant non-confidential information upon a written request under Article 9.6 of Ukraine's Safeguards Law.[67]

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[62] The *Shorter Oxford Dictionary* (2002), Vol. 2, p. 2394.
[63] Panel Report, *Chile – Price Band System*, para. 7.128.
[64] Letter of the Ministry of Foreign Affairs of Ukraine to the Embassy of Japan in Ukraine, 17 June 2013, (Exhibit JPN-11).
[65] Panel Report, *Chile – Price Band System*, para. 7.128.
[66] Japan's first written submission, paras. 53- 54; opening statement at the first meeting of the Panel, paras. 40 and 44- 45; second written submission, paras. 26-28 and 30; opening statement at the second meeting of the Panel, paras. 9–11; and Response to Panel question No. 117.
[67] Ukraine's response to Panel question Nos. 5, 6, 10, 17, 34 and 36.

7.34. The Panel agrees that the Notice of 14 March 2013 constitutes a "published report" within the meaning of Article 3.1, last sentence, and also an "analysis" and "demonstration" within the meaning of Article 4.2(c). The Notice was published in Ukraine's official gazette on 14 March 2013[68], and it sets forth the Commission's findings and reasoned conclusions, as well as detailed analysis and a demonstration of the relevance of the factors examined.

7.35. Ukraine's notification to the WTO Committee on Safeguards under Articles 12.1(b) and (c) is dated 21 March 2013. Since it contains no analysis, findings or reasoning in addition to those included in the Notice of 14 March 2013, we do not consider it necessary to decide whether this document was published by Ukraine within the meaning of Articles 3.1 and 4.2(c). Generally speaking, the parties in their submissions have not referred to this document, but rather to the Notice of 14 March 2013 or the Key Findings.

7.36. Turning, finally, to the Key Findings, we note that they contain analysis and recommended findings and conclusions of the Ministry addressed to the Commission. However, the Key Findings are not specifically referred to in the Commission's Notice of 14 March 2013, which was published later, nor have they been appended thereto. As regards publication, the Key Findings were sent out to certain interested parties on 11 April 2012. But they were not "published" by Ukraine, in the way the Notice of 14 March 2013 was. Although Ukraine argues that the Key Findings were sent directly to some affected exporting countries, and were available on request to the interested parties under Article 9.6 of Ukraine's Safeguards Law, we cannot conclude that this constitutes publication for purposes of Articles 3.1 and 4.2(c). Nothing in either Article 3.1 or Article 4.2(c) suggests that publication may be limited to certain, or even all, interested parties. Moreover, we fail to see how the Key Findings could be considered as having been "published" when, except for those interested parties sent a copy by the competent authorities, interested parties needed to make a specific written request to see the document.[69] Finally, we question whether interested parties could, in fact, have seen the document, given that the relevant provision of Ukraine's Safeguards Law allows interested parties to see information submitted by other interested parties, but not "official documents of the Ministry...".[70] Therefore, in our view, as the Key Findings were not "made generally available through an appropriate medium", we consider that they were not "published" within the meaning of Articles 3.1 and 4.2(c). In the light of the foregoing, we conclude that the Key Findings do not constitute the kind of published report required by Articles 3.1 and 4.2(c). Indeed, as noted by Japan, Ukraine itself in a letter to Japan referred to the Notice of 14 March 2013, but not the Key Findings, as the report within the meaning of Articles 3.1 and 4.2(c).[71]

7.37. Therefore, as stated previously, our examination of the competent authorities' determinations in this case will be based on the published report, that is to say, the Notice of 14 March 2013. Nevertheless, the Key Findings unquestionably form part of the record of the safeguard investigation at issue. That being the case, we will take them into account, as appropriate, for purposes of understanding the explanations provided in the Notice of 14 March 2013 and assessing their adequacy.

7.2 Claims relating to unforeseen developments and the effect of the obligations incurred under the GATT 1994

7.38. The Panel now turns to examine Japan's claim of violation of Article XIX:1(a) and Articles 3.1, 4.2(c) and 11.1(a) concerning the competent authorities' determination regarding unforeseen developments and the effect of the obligations incurred under the GATT 1994.

7.39. Japan claims that Ukraine has failed to demonstrate the existence of and evaluate unforeseen developments as required by Article XIX:1(a), Articles 3.1, 4.2(c) and 11.1(a), and as

[68] Exhibit JPN-7, p. 4.

[69] The panel in *Chile – Price Band System* similarly noted that "the Minutes … have not been 'published' through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of 'whoever wishes to consult them at the library of the Central Bank of Chile". Panel Report, *Chile – Price Band System*, para. 7.128.

[70] Article 9.6 of the Safeguards Law.

[71] Exhibit JPN-11. The letter in question was sent in response to a letter from Japan in which Japan inquired whether Ukraine had published a report within the meaning of Articles 3.1 and 4.2(c). Exhibit JPN-10.

a consequence, has acted inconsistently with these provisions.[72] In particular, Japan claims that Ukraine has (i) failed to demonstrate the existence of unforeseen developments; (ii) failed to demonstrate the existence of a logical connection between the alleged unforeseen developments and the increased imports; and (iii) as a consequence failed to give reasoned and adequate explanations on these issues thus acting inconsistently with Articles 3.1 and 4.2(c).[73]

7.40. Japan also claims that Ukraine has acted inconsistently with Article XIX:1(a) and Article 11.1(a) because it failed to demonstrate in its published report that it incurred obligations concerning the imported products involved in the dispute under the GATT 1994 and how the increase in imports was an effect of these obligations. Japan further argues that since the published report does not contain any findings and reasoned conclusion on this issue, Ukraine has also acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[74]

7.41. Ukraine responds that all of Japan's claims under Article XIX:1(a) and Articles 3.1, 4.2(c) and 11.1(a) must be rejected since Japan (i) did not establish that the existence of unforeseen developments and the effect of the obligations incurred under the GATT 1994 are each a "prerequisite" for the imposition of a safeguard measure; (ii) did not show that the circumstances that Ukraine demonstrated to exist as a matter of fact were anything other than "unexpected" and thus "unforeseen" in the sense of Article XIX:1(a); (iii) did not show that Ukraine failed to provide in the Key Findings or the Notice of 14 March 2013 sufficiently reasoned and adequate explanations regarding unforeseen developments;[75] and (iv) did not show that Ukraine had not made tariff concessions applicable to the imported products involved in the dispute and that Ukraine had not demonstrated the existence of such concessions as a matter of fact.[76]

7.42. The Panel will begin its analysis with Japan's claim under Article XIX:1(a). We will first consider Ukraine's argument regarding the legal nature of the two textual elements at issue – "unforeseen developments" and the "effect of the obligations incurred under [the GATT 1994]" (hereafter "effect of GATT 1994 obligations"). Then, we will consider Ukraine's identification and demonstration of unforeseen developments and the logical connection between the unforeseen developments and the increased imports. Finally, we will consider Ukraine's identification of the obligations incurred under the GATT 1994 and the logical connection with the increased imports. After completing our analysis of the claims under Article XIX:1(a), we will proceed to consider the claims under Articles 11.1(a), 3.1 and 4.2(c).

7.2.1 Claims under Article XIX:1(a) of the GATT 1994

7.43. Article XIX:1(a) provides 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.

7.44. As indicated, the Panel will begin its assessment of Japan's claim under Article XIX:1(a) by considering the issue raised by Ukraine regarding the legal nature of "unforeseen developments" and the effect of GATT 1994 obligations.

[72] Japan's first written submission, para. 168.
[73] Japan's second written submission, para. 72.
[74] Japan's first written submission, para. 189; and second written submission, para. 100.
[75] Ukraine's first written submission, paras. 90-93.
[76] Ukraine's first written submission paras. 102-105; opening statement at the first meeting of the Panel, para. 54; and second written submission paras. 43-44.

7.2.1.1 Unforeseen developments and the effect of GATT 1994 obligations

7.45. Ukraine submits that the term "unforeseen developments" is not a prerequisite or "prior condition" for imposing a safeguard measure since it does not appear in the text of Article 2. According to Ukraine, Article 2 establishes only three conditions for the imposition of a safeguard measure, namely (i) that a product must be imported in increased quantities, (ii) so as to cause, (iii) serious injury to the domestic industry. In Ukraine's view, a determination regarding unforeseen developments is therefore not a "prerequisite", that is to say, "a thing required as a prior condition"[77], for the adoption of a safeguard measure. As a consequence, Ukraine submits that Japan's claim must fail since it has not established that the existence of unforeseen developments is a condition that must be met before a safeguard measure may be adopted.[78]

7.46. Ukraine recalls that in the context of Article XIX, the Appellate Body in *Argentina – Footwear (EC)* determined with regard to unforeseen developments that they are not a "condition" for imposing safeguard measures, but rather "a circumstance which must be demonstrated as a matter of fact" and that an important distinction is to be drawn between a "condition" and a "circumstance which must be demonstrated as a matter of fact".[79] As regards the effect of GATT 1994 obligations, Ukraine observes that according to the Appellate Body this element likewise is not a "condition" listed in Article 2 and thus not a "prerequisite" but only a circumstance which must be demonstrated as a matter of fact.[80] Ukraine therefore submits that Japan's claim in respect of this element suffers from the same flaw as the claim concerning unforeseen developments.[81]

7.47. Japan counters that the existence of unforeseen developments and of the effect of GATT 1994 obligations does constitute a "prerequisite" or "legal requirement" that must be demonstrated to apply a safeguard measure consistently with Article XIX.[82] According to Japan, Ukraine ignores that the Appellate Body has stated that the Agreement on Safeguards and Article XIX are to be considered in conjunction and that any safeguard measure must be in conformity with both agreements.[83]

7.48. Japan submits that regardless of the actual term used - a "circumstance" or a "prerequisite" – unforeseen developments and the effect of GATT 1994 obligations constitute "legal requirement[s]" that must be satisfied in order for a safeguard measure to be applied in accordance with the WTO disciplines.[84] Japan argues that "unforeseen developments" and the effect of GATT 1994 obligations are not simply circumstances that must "exist as a matter of fact" given that the demonstration of the existence of these elements must be made *before* a safeguard measure is applied.[85]

7.49. Japan also submits that, contrary to what Ukraine asserts regarding the effect of GATT 1994 obligations, the importing Member must not only have incurred obligations under the GATT 1994 as a matter of fact, the importing Member must also identify those obligations.[86]

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[77] Ukraine refers to the *Shorter Oxford Dictionary* (1993), Vol. 2, p. 2338.

[78] Ukraine's first written submission, paras. 73 and 75; opening statement at the first meeting of the Panel, para. 35; and second written submission, para. 29.

[79] Ukraine's first written submission, para. 74 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 92).

[80] Ukraine's first written submission, para. 97 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 84).

[81] Ukraine's first written submission, para. 98; opening statement at the first meeting of the Panel, para. 44; and Ukraine's second written submission para. 37.

[82] Japan's opening statement at the first meeting of the Panel, paras. 6, 52 and 61; second written submission, paras. 76 and 103; and opening statement at the second meeting of the Panel, paras. 16 and 25.

[83] Japan's second written submission, para. 75 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 84).

[84] Japan's second written submission, para. 78 (referring to Panel Report, *US – Lamb*, para. 7.19).

[85] Japan's second written submission, para. 79 (referring to Appellate Body Report, *US – Lamb*, para. 72); opening statement at the first meeting of the Panel, para. 53; and opening statement at the second meeting of the Panel, para. 16.

[86] Japan's opening statement at the first meeting of the Panel, para. 61; second written submission, para. 103; and opening statement at the second meeting of the Panel, para. 25.

7.50. The Panel begins its analysis by noting that Ukraine's arguments raise three issues: first, whether unforeseen developments and the effect of GATT 1994 obligations should be characterized as circumstances, conditions or prerequisites; second, what legal consequences flow from this characterization; and third, whether Japan misunderstood the nature of these two elements and thus Japan's claims should fail for this reason.

7.51. Regarding the first issue, the Appellate Body has clarified in several reports the legal nature of the elements contained in the first clause of Article XIX:1(a) and their relationship with the *conditions* established in the second clause of Article XIX:1(a):

> The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions … " – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent conditions for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph*, we do believe that the first clause describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994*. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[87] (Emphasis added; original emphasis omitted)

7.52. Thus, the two elements of the first clause of Article XIX:1(a) constitute *circumstances* that must be demonstrated as a matter of fact, distinct from the *conditions* established under the second clause. We also observe that on one occasion, the Appellate Body also referred to the existence of one of these two elements as a "prerequisite" to be demonstrated in order for a safeguard measure to be applied.[88] Therefore, to us it is clear that (i) the two elements in the first clause of Article XIX:1(a) are circumstances that have to be demonstrated as a matter of fact, (ii) that they are legally different from the conditions in the second clause of the same provision, and (iii) that the Appellate Body has also used the term "prerequisite" to refer to them.

7.53. Regarding the second issue, the Appellate Body in *US – Lamb* elaborated on the legal consequences of the interpretation given in *Korea – Dairy* and *Argentina – Footwear (EC)* and discussed when and where the demonstration of these *circumstances* should occur. It stated that the demonstration must occur *before* a safeguard measured is applied, and that this demonstration must feature in the same report of the competent authorities in which the *conditions* are demonstrated:

> [A]s the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied" consistently with Article XIX of the GATT 1994, *it follows that this demonstration must be made before the safeguard measure is applied.* Otherwise, the legal basis for the measure is flawed. We find instructive guidance for where and when the "demonstration" should occur in the "logical connection" that we observed previously between the two clauses of Article XIX:1(a). The first clause, as we noted, contains, in part, the "circumstance" of "unforeseen developments". The second clause, as we said, relates to the three "conditions" for the application of safeguard measures, which are also reiterated in Article 2.1 of the Agreement on Safeguards. Clearly, the fulfilment of these conditions must be the central element of the report of the competent authorities, which must be published under Article 3.1 of the Agreement on Safeguards. *In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these*

[87] Appellate Body Report, *Korea – Dairy*, para. 85; and Appellate Body Report, *Argentina – Footwear (EC),* para. 92.

[88] See Appellate Body Report, *US – Lamb*, para. 72.

> *circumstances must also feature in the same report of the competent authorities*. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.[89] (Emphasis added; original emphasis omitted)

7.54. As mentioned by the Appellate Body, the demonstration of the existence of the circumstances in question must be provided in the competent authorities' published report required under Articles 3.1 and 4.2(c). Accordingly, to meet the Appellate Body's conclusion, as quoted above at paragraph 7.51, that these circumstances must be demonstrated as a matter of fact, we understand that this means that competent authorities must explain in their published report how the factual evidence before them demonstrates the existence of these circumstances. Therefore, it is not sufficient for competent authorities to satisfy themselves that these circumstances exist as a factual matter; they must also provide a demonstration of their existence in their published report.

7.55. Another element of the above statements of the Appellate Body is worth highlighting. The Appellate Body concluded that the circumstances in question must be demonstrated *before* a safeguard measure is imposed. In our view, this implies that any demonstration of the existence of these circumstances that is provided *after* imposition of a safeguard measure will not be sufficient to comply with the requirements of Article XIX:1(a). In this context, we observe that the Appellate Body has already had occasion to address this issue and concluded that the analysis of the pertinent issues of fact and law referred to in Article 3.1, and to be set out in the competent authorities' published report, cannot be supplemented by the Member concerned during the course of WTO dispute settlement procedures or in a document other than the competent authorities' report (e.g. an unpublished report).[90] Therefore, it is clear to us that any *ex post facto*[91] explanation purporting to demonstrate the existence of the circumstances required by the first clause of Article XIX:1(a) cannot cure the lack of such demonstration in the competent authorities' published report.

7.56. With regard to the published report, it is useful to clarify one additional point. The Appellate Body has stated that since unforeseen developments are a "pertinent issue of fact and law" within the meaning of Article 3.1, the competent authorities must provide "reasoned and adequate explanations" of how the facts support their determination of "unforeseen developments" under Article XIX:1(a).[92] Although the Appellate Body did not refer explicitly to the effect of GATT 1994 obligations in making this statement, we consider that the effect of GATT 1994 obligations is similarly a "pertinent issue of fact and law" within the meaning of Article 3.1, and the competent authority must similarly provide reasoned and adequate explanations regarding it in their published report. Accordingly, the Panel's task is to review whether Ukraine demonstrated in its published report, through reasoned and adequate explanations, the circumstances identified in the first clause of Article XIX:1(a).

7.57. In sum, we consider that the two elements of the first clause of Article XIX:1(a), "unforeseen developments" and the effect of GATT 1994 obligations, are *circumstances* that the competent authorities are legally required under Article XIX:1(a) to demonstrate as a matter of fact.[93] They are not *conditions*. The conditions for the application of a safeguard measure are contained in the second clause of Article XIX:1(a) and Article 2. Although different in legal nature, the relevant *conditions* and *circumstances* have in common that: (i) their satisfaction or existence

[89] Appellate Body Report, *US – Lamb*, para. 72.

[90] In *US – Wheat Gluten,* the Appellate Body reversed the panel's finding that the United States had provided adequate explanations on one of the factors of Article 4.2(a) since it "relied heavily on supplementary information" that was not contained in the competent authority's report (paras. 156-163). In *US – Lamb*, it rejected the United States' argument that it was sufficient that the existence of unforeseen developments could be inferred from the factual record, and that the existence of such developments could be demonstrated during WTO dispute settlement proceedings. In that case, the Appellate Body concluded that the United States had failed to *demonstrate* this element since the competent authorities' report did not discuss or offer any explanation in this regard (para. 73).

[91] Panel Report, *Chile – Price Band System,* para. 7.139.

[92] Appellate Body Reports, *US – Steel Safeguards*, para. 279.

[93] We agree with the panel in *US – Lamb* that the demonstration of unforeseen developments under Article XIX:1(a) is a "legal requirement". Panel Report, *US – Lamb*, para. 7.19. We find that this conclusion is also applicable to the effect of GATT 1994 obligations.

must be demonstrated by the competent authorities, through reasoned and adequate explanations, (ii) in the published report, and (iii) before a safeguard measure is applied.

7.58. Regarding the third issue presented by Ukraine's arguments, we do not interpret Japan's argument to be that unforeseen developments and the effect of GATT 1994 obligations are "conditions" similar to the ones contained in the second clause of Article XIX:1(a) or Article 2. Throughout its submissions, Japan has used the terms "circumstances", "prerequisite" or "legal requirement" to refer to these elements and not the term "condition".[94] Therefore, we disagree with Ukraine's argument that Japan has erroneously referred to the elements of the first clause of Article XIX:1(a) as "conditions". Regarding the terms "prerequisite" or "legal requirement", we recall that they were also used in previous Appellate Body and panel reports when addressing the same matter and therefore Japan has not erred by using them. We thus reject Ukraine's argument that Japan erroneously characterized the two elements in the first clause of Article XIX:1(a) as conditions.

7.59. Consequently, we proceed with our analysis of Japan's claims on the basis that "unforeseen developments" and the effect of GATT 1994 obligations are "circumstances" that the competent authorities are legally required to demonstrate as a matter of fact, and that such demonstration is to be conducted (i) before a safeguard measure is applied, (ii) through reasoned and adequate explanations, and (iii) in the competent authorities' published report.

7.2.1.2 Unforeseen developments

7.60. The Panel now turns to examine Japan's claim as it relates to unforeseen developments. Japan's claim is based on two main arguments. Japan asserts that Ukraine's competent authorities have not properly demonstrated the existence of unforeseen developments and that Ukraine has not explained how the alleged unforeseen developments resulted in increased imports.

7.2.1.2.1 The unforeseen developments alleged in this case

7.61. The Panel begins by considering Japan's argument that Ukraine's competent authorities have failed to properly demonstrate the existence of unforeseen developments. We recall in this respect that the term "unforeseen developments" has been interpreted to mean developments that are "unexpected".[95]

7.62. Japan argues that the sole reference to unforeseen developments in either the Notice of 14 March 2013 or the Key Findings is the increase in imports and that it therefore appears that the competent authorities identified the increase in imports as the unforeseen development. Japan submits that this is improper because the increase in imports must be a result of unforeseen developments and, therefore, the unforeseen developments must necessarily be something other than the increase in imports themselves. Referring to the panel report in *Argentina – Preserved Peaches,* Japan contends that the text of Article XIX:1(a) does not permit an interpretation that would equate increased imports with unforeseen developments.[96] Japan concludes that, to the extent that Ukraine considered the increased imports as an unforeseen development, it failed to demonstrate this circumstance and thus acted inconsistently with Articles XIX:1(a).[97]

7.63. Ukraine submits that the unforeseen developments in the present case are explained by the "perfect storm" caused by the confluence of the serious contraction in demand and the dramatic increase in imports in relative terms against the backdrop of the global financial and economic

[94] Japan's first written submission, paras. 72, 75, 84, 87, 166, 187; second written submission, paras. 76 and 103.

[95] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[96] Japan's first written submission, para. 174 (referring to the Panel Report, *Argentina – Preserved Peaches,* para. 7.18, where it is stated that "[t]he text of Article XIX:1(a) cannot support an interpretation that would equate increased quantities of imports with unforeseen developments"); opening statement at the first meeting of the Panel, para. 54; second written submission, para. 80; opening statement at the second meeting of the Panel, para. 18.

[97] Japan's first written submission, paras. 171-172 and 174; opening statement at the first meeting of the Panel, para. 54; second written submission, para. 80; and opening statement at the second meeting of the Panel, para. 17.

crisis in the second half of 2008 and Ukraine's significant reduction of tariffs on passenger cars pursuant to its accession to the WTO in May 2008. Ukraine further argues that although it expected that some sectors in which it had made significant WTO tariff commitments could face increased competition from imports, it was unexpected that as a result of the global financial and economic crisis soon after its accession to the WTO, consumer demand would contract as much as it did, and that this would coincide with such an increase in imports that displaced domestic products. Ukraine submits that the Notice of 14 March 2013 and the Key Findings contained an analysis of the impact of the global financial and economic crisis.[98]

7.64. Ukraine argues that in the Notice of 14 March 2013 and the Key Findings, the Ministry explained that it was unforeseen that imports into Ukraine would increase by 37.9% relative to domestic automobile production in 2010 compared to 2008, despite the decrease in import volumes in absolute terms. Ukraine alleges that the significant increase in market share came on the heels of the global financial and economic crisis, which had a significant impact on the Ukrainian passenger car industry.[99]

7.65. In Ukraine's view, the existence of the global financial and economic crisis is a matter of fact that does not require much demonstration. Ukraine submits that since the 2008 global financial and economic crisis is a widely accepted and probably even an uncontested fact, no additional evidence is required to prove its existence. Moreover, Ukraine contends that as this circumstance was not questioned by the interested parties, it was concluded by the Ministry that it existed and did not need any confirmation. Ukraine considers that Japan cannot seriously claim not to be aware of this global crisis during the period of investigation.[100]

7.66. Japan responds that it is only in Ukraine's first written submission that the global financial and economic crisis is identified as the unforeseen development. According to Japan, nowhere in the Notice of 14 March 2013 or the Key Findings was the crisis identified as the unforeseen development, nor is there any discussion or explanation as to why it constituted an unforeseen development in the sense of Article XIX.[101] Japan recalls that according to the Appellate Body, the demonstration of unforeseen developments must be made *before* the application of a safeguard measure, in the published report.[102] Japan submits that any identification of the unforeseen developments after the imposition of a safeguard measure cannot, therefore, render a safeguard measure consistent with Article XIX:1(a). Japan further argues that, as the panel found in *Chile – Price Band System*, an *ex post facto* explanation cannot cure the importing Member's failure to meet the requirement of demonstrating unforeseen developments in the published report.[103]

7.67. The Panel observes that the issue to be examined is whether Ukraine identified and demonstrated the existence of unforeseen developments as required by Article XIX:1(a). As explained above, this requires us to determine whether the competent authorities identified the relevant unforeseen developments in their published report. At the outset, we recall our view that the Notice of 14 March 2013 constitutes the published report within the meaning of Article 3.1, as discussed in Section 7.1.5 above.

[98] Ukraine's first written submission, para. 79; opening statement at the second meeting of the Panel, para. 28; and responses to Panel question Nos. 39 and 40. In response to Panel question No. 116, Ukraine stated that it considered the effects of the global financial and economic crisis in the section of the Key Findings that deals with the issue of non-attribution.

[99] Ukraine's first written submission, para 80; opening statement at the first meeting of the Panel, para. 37; and opening statement at the second meeting of the Panel, para. 30. Ukraine further observes that the panel in *US – Steel Safeguards* found that a financial crisis was a "plausible set of circumstances" that could be considered as unforeseen (Ukraine's first written submission para. 82 (referring to Panel Report, *US – Steel Safeguards*, paras. 10.110 and 10. 121)).

[100] Ukraine's first written submission, paras. 80 and 86; second written submission, para. 30; and opening statement at the second meeting of the Panel, para. 29.

[101] Japan's opening statement at the first meeting of the Panel, para. 55; second written submission, para. 81; and opening statement at the second meeting of the Panel, para. 18.

[102] Japan's second written submission, para. 81 (citing the Appellate Body Report, *US – Lamb*, para. 72).

[103] Japan's opening statement at the second meeting of the Panel, para. 18 (citing the Panel report in *Chile – Price Band System*, para. 7.139). See also Japan's opening statement at the second meeting of the Panel, para. 55.

7.68. The Notice of 14 March 2013 contains the following succinct passage on unforeseen developments:

> The occurrence of "unforeseen developments" is explained by a 37.9% increase of the share of imported motor cars relative to domestic production during 2010 when compared to 2008, despite decreased import volumes in absolute terms and an overall contraction in consumption of motor cars within the domestic market of Ukraine during this period.[104]

7.69. Apart from this reference, we do not find any other mention of unforeseen developments in the Notice of 14 March 2013.[105]

7.70. The Key Findings and Ukraine's notification to the WTO Committee on Safeguards under Articles 12.1(b) and (c) also refer to unforeseen developments, using language almost identical to that contained in the Notice of 14 March 2013. The relevant passages in the Key Findings and notification to the WTO are the following:

> The occurrence of "unforeseen developments" *is explained by* a 37.9% increase of the share of imported products relative to domestic automobile production in Ukraine in 2010 compared to 2008, despite decreased import volumes in absolute terms and an overall contraction in consumption of automobiles within the domestic market of Ukraine during this period.[106] (emphasis added)

> The fact of "unforeseen developments" *is present in* increase of import share by 37.9% relative to applicant's production of motor cars in 2010 compared with 2008 despite of the general decrease of import in quantitative equivalent and general decrease of consumption of motor cars at the domestic market in this period.[107] (emphasis added)

7.71. Japan submits that these statements suggest that the increase in imports *is* the unforeseen development. Ukraine did not respond directly to this argument. It argues instead that the occurrence of unforeseen developments is explained by the "perfect storm" formed by a confluence of several factors in the context of the 2008 global financial and economic crisis, and that it was unforeseen that imports would increase by 37.9% relative to domestic automobile production in Ukraine in 2010, compared to 2008.

7.72. In examining the passage provided in the Notice of 14 March 2013, we note the statement that the occurrence of unforeseen developments "is explained by" the relative increase in imports. For us, this means that the occurrence of unforeseen developments is "made clear or intelligible"[108], or "made plainly visible"[109] by the relative increase in imports. Thus, the most natural reading of this translated phrase, in the context of the cited reference of the Notice of 14 March 2013, is that the competent authorities considered that the occurrence of unforeseen developments was demonstrated by the relative increase in imports, in spite of an absolute decrease in imports and an overall contraction in the consumption of automobiles. It is also noteworthy that Ukraine itself has described the conclusions of the competent authorities in the Notice of 14 March 2013 along very similar lines in its first written submission:

> In its findings, the Ministry *explained that it was unforeseen that imports would increase by 37.9 percent* relative to domestic automobile production in Ukraine in

[104] Exhibit JPN-2, p. 1.
[105] We note that our assessment is based on Exhibit JPN-2, which contains an English translation of the Notice of 14 March 2013 that was prepared by Japan, which Ukraine did not contest. We understand this to be the case based on a statement by Japan during the course of the first substantive meeting with the Panel and Japan's response to Panel question No. 7. Ukraine in fact referred to exhibit JPN-2 throughout its submissions to the Panel (e.g. Ukraine's first written submission, footnote 18; Ukraine's second written submission, footnote 4).
[106] Exhibit JPN-6 (Revised Version).
[107] WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/1. Exhibit JPN-7.
[108] The *Shorter Oxford Dictionary* (2007), Vol 2. p. 900.
[109] Ibid.

> 2010 compared to 2008, despite the decrease in import volumes in absolute terms.[110] (emphasis added)

7.73. Therefore, we find that the Notice of 14 March 2013 identifies the relative increase in imports as the unforeseen development. We recognize that the Notice of 14 March 2013 also refers to an absolute decrease in imports and a contraction in demand that occurred during the same period. But nothing in the Notice of 14 March 2013 suggests that either of these was considered an unforeseen development by the competent authorities. Consequently, it is clear to us that the development that the Notice of 14 March 2013 identifies as unforeseen is the relative increase in imports.

7.74. We consider, next, Ukraine's arguments regarding what were the unforeseen developments in this case, as there is a difference between Ukraine's submissions to this Panel and the actual content of the Notice of 14 March 2013.

7.75. In its first written submission, Ukraine not only describes the content of the Notice of 14 March 2013 reproduced above, but also identified as the unforeseen development a "perfect storm" involving a "confluence of factors" in the context of the 2008 global financial and economic crisis:

> [I]t was unexpected that, as a result of the global crisis soon after its accession, consumption demand would contract to the extent it did, and this would coincide with such an increase in imports completely displacing domestic producers. That unfortunate "perfect storm" is essentially what the Ministry highlighted in the section on unforeseen development in the Key Findings.[111]
>
> ...
>
> The confluence of the serious contraction in demand and the dramatic increase in imports in relative terms against the backdrop of the global financial crisis in the second half of 2008, at the same time that Ukraine significantly lowered tariffs on passenger cars pursuant to WTO obligations, was unexpected and thus unforeseen.[112]

7.76. In response to a request from the Panel, Ukraine elaborated as follows:

> While it is obvious that the global financial crisis led both to the significant increase in imports in relative terms and the decrease in consumption, the latter was a different factor that cannot be associated with the increase in imports and was referred to in the non-attribution section of the Key Findings.[113]

7.77. In its second written submission, Ukraine stated:

> [I]t was unexpected that, as a result of the global crisis immediately after its accession, the increase in imports would be so significant as to completely displace domestic production.[114]
>
> ...

[110] Ukraine's first written submission, para. 80. In its third-party submission, the European Union argues that the phrase "explained by" should not be understood as meaning that the unforeseen development is the increase in imports. In the European Union's view, the occurrence of unforeseen developments is merely evidenced by the increase, in the sense that unforeseen developments have resulted in increased imports. The European Union provides no further arguments in support of this position, however. European Union's third-party submission, para. 21.

[111] Ukraine's first written submission, para. 79.

[112] Ukraine's first written submission, para. 83.

[113] Ukraine's response to Panel question No. 40.

[114] Ukraine's second written submission, para. 26.

> The facts confirm the unforeseen combination of a global economic crisis affecting in particular this industry right at the time of tariff liberalization and major changes in the Ukrainian economy as a result of the WTO accession.[115]

7.78. Thus, it seems Ukraine has put forward multiple versions of what the unforeseen developments were in the present case: (i) the simultaneous contraction in demand and increase in imports; (ii) the confluence of a contraction in demand, tariff liberalization, and a relative increase in imports; (iii) the global financial and economic crisis; (iv) the increase in imports; and (v) the combination of a global financial and economic crisis and tariff liberalization. There is a stark contrast between Ukraine's submissions to the Panel, which for the most part suggest that the unforeseen developments were events either caused by, coinciding with, or including, the global financial and economic crisis, and the actual text of the Notice of 14 March 2013, which identifies only the relative increase in imports as an unforeseen development.

7.79. The Panel asked Ukraine to clarify whether the Notice of 14 March 2013 contains any reference to the global financial and economic crisis in the section of the Notice of 14 March 2013 dealing with unforeseen developments. In its response, Ukraine stated that the competent authorities considered the effects of the global financial and economic crisis in the non-attribution section of the Key Findings.[116] For our part, we see nothing in the Notice of 14 March 2013 that could be understood to identify the global financial and economic crisis as being the unforeseen development or an integral part thereof.

7.80. In this regard, we disagree with Ukraine's suggestion that explicit identification of the 2008 global financial and economic crisis was in any event not required, as its existence is a widely known and accepted fact. Even if the events that are alleged to be unforeseen are widely known and accepted, this does not relieve the competent authorities of their obligation to explicitly identify in the published report the unforeseen developments that have been determined to exist.

7.81. As concerns the Key Findings, which are in any event not a published report within the meaning of Article 3.1, it is of no avail that the effects of the global financial and economic crisis are mentioned in the non-attribution section of the Key Findings. The issue of non-attribution relates to one of the conditions to be demonstrated – causation – and not the circumstance here in question. Also, the relevant passage in the Key Findings that deals with unforeseen developments does not refer to the non-attribution section. Furthermore, we recall that according to the Appellate Body, it is not for panels to read into the report of the competent authorities linkages that they failed to make.[117] Consequently, even if the Panel were to accept the Key Findings as part of the published report under Article 3.1, the general reference to the global financial and economic crisis in a different section of the Key Findings is in our view not sufficient to clearly identify it as an unforeseen development in this case.

7.82. In the light of the foregoing, we find that owing to the absence of any reference in the Notice of 14 March 2013 to developments other than the relative increase in imports, the additional developments, or combinations of developments, identified by Ukraine before the Panel constitute *ex post facto* explanations regarding what the unforeseen developments were. As such, and for purposes of our review, they need not be taken into account.

7.83. Having found that Ukraine in its published report determined that the relative increase in imports was the unforeseen development, it remains for us to determine whether this is sufficient to satisfy the requirements of Article XIX:1(a). In relevant part, that Article refers to a product being imported in increased quantities "as a result of unforeseen developments". The phrase "as a result of" implies a relationship of cause and effect, indicating that unforeseen developments and increased imports cannot be one and the same thing. Furthermore, as elaborated above, there is a clear distinction between the circumstances contained in the first clause of Article XIX:1(a) and the conditions contained in the second clause. Increased imports are one of these conditions. Were we to accept that increased imports may be at the same time a relevant circumstance and a

[115] Ukraine's second written submission, para. 28.
[116] Ukraine's response to Panel question No. 116.
[117] Appellate Body Report, *US – Steel Safeguard*, para. 322.

condition, we would disregard the distinction between the two and conflate two distinct legal requirements under Article XIX:1(a).[118]

7.84. Therefore, we find that Ukraine has failed to make a proper determination on unforeseen developments, because the competent authorities in their published report identified the relative increase in imports as the unforeseen development rather than identifying and explaining any unforeseen developments that resulted in that relative increase in imports. Having failed to make a proper determination in respect of one of the relevant circumstances, we conclude that Ukraine has, to that extent, acted inconsistently with Article XIX:1(a).

7.2.1.2.2 Logical connection between the unforeseen developments and the relative increase in imports

7.85. The Panel will now address Japan's arguments regarding the demonstration of the logical connection between the unforeseen developments and the relative increase in imports. We recall that Japan argues that according to the Appellate Body the competent authorities are required by Article XIX:1(a) specifically to demonstrate that the identified unforeseen developments have resulted in increased imports.[119]

7.86. Japan argues that neither the Notice of 14 March 2013 nor the Key Findings provide any explanation with regard to how the alleged unforeseen developments resulted in the increase in imports.[120] Referring to the Appellate Body report in *US – Steel Safeguards*, Japan observes that it is for the competent authorities to demonstrate the logical connection between the alleged unforeseen developments and the increase in imports, and that the Panel may not read into the report linkages that the competent authorities failed to make.[121]

7.87. Japan further argues that, even assuming that the global financial and economic crisis had been recognized by the competent authorities as the unforeseen development, Ukraine does not provide any explanation as to how these unforeseen developments actually resulted in the increase in imports. In Japan's view, it is not sufficient that the global financial and economic crisis merely coincided in time with the increase in imports. According to Japan, it must also be demonstrated that the unforeseen developments caused a change in the competitive relationship between imported and domestic products to the detriment of the latter.[122]

7.88. Ukraine disagrees with Japan's position that the unforeseen developments must cause a change in the competitive relationship. In Ukraine's view, the unforeseen developments and the obligation incurred under GATT 1994 need not modify the competitive relationship between the imports and domestic products, but cause the increase in imports directly. Ukraine further submits that its analysis of the issue of unforeseen developments was conducted by the competent authorities during the investigation, and that much of their analysis is confidential, such that only the results have been included in the Key Findings.[123]

7.89. Japan counters that regardless of whether Ukraine properly treated the analysis as confidential or not, the competent authorities were still required to provide a reasoned and adequate explanation on how the facts support their determination.[124]

7.90. The Panel recalls its findings above that Ukraine failed to make a proper determination on unforeseen developments under Article XIX:1(a). In the light of this, there is no need for us to

[118] See also Panel Report, *Argentina – Preserved Peaches*, para. 7.18 (stating that "[t]he text of Article XIX:1(a) cannot support an interpretation that would equate increased quantities of imports with unforeseen developments").

[119] Japan's first written submission, para. 177 (referring to the Appellate Body Report, *US – Steel Safeguards*, para. 316); and second written submission, para. 82.

[120] Japan's first written submission, para. 176; opening statement at the first meeting of the Panel, para. 60; and second written submission, para. 82.

[121] Japan second written submission, para 84 (referring to the Appellate Body Report, *US – Steel Safeguards*, para. 322).

[122] Japan second written submission, paras. 83-84; opening statement at the first meeting of the Panel, para. 56; and opening statement at the second meeting of the Panel, paras. 19 and 21-22.

[123] Ukraine's first written submission, para. 85; and response to Panel question No. 42.

[124] Japan second written submission, para. 97.

make findings regarding whether the competent authorities examined the "logical connection" between the unforeseen developments and the relative increase in imports. In the absence of a sufficient determination of unforeseen developments, there is no occasion to consider whether there is a sufficient connection between such developments and increased imports.

7.2.1.3 Effect of GATT 1994 obligations

7.91. The Panel now turns to Japan's claim regarding the effect of GATT 1994 obligations. As with the parallel claim concerning unforeseen development, this claim rests on two main arguments. Japan argues first that Ukraine's competent authorities have failed to properly demonstrate the effect of GATT 1994 obligations, and second, that Ukraine has not explained how the effect of any such obligations resulted in increased imports.

7.2.1.3.1 Identification of the effect of relevant GATT 1994 obligations

7.92. The Panel begins by examining Japan's argument that Ukraine's competent authorities have failed to properly demonstrate the existence of the effect of relevant GATT 1994 obligations.

7.93. Japan argues that a Member wishing to impose a safeguard measure must not only have incurred obligations under the GATT 1994, but must identify those obligations and demonstrate them in its published report. Japan submits that Ukraine failed to do so since neither the Notice of 14 March 2013 nor the Key Findings identify or analyse the effect of the obligations incurred by Ukraine under the GATT 1994. Japan therefore submits that Ukraine failed to demonstrate as a matter of fact that it incurred obligations under the GATT 1994, and that this is a violation of Article XIX:1(a).[125]

7.94. Ukraine argues that there can be no debate about the existence of the effect of the obligations incurred under the GATT 1994. According to Ukraine, it is as an obvious fact that it made tariff concessions on passenger cars when it joined the WTO in 2008 and reduced the import duty on passenger cars from 25% to 10%. Ukraine submits that Japan cannot deny this fact given its active involvement in the negotiations on Ukraine's WTO accession. Ukraine further alleges that the existence of WTO commitments is a fact mentioned in the Key Findings.[126]

7.95. Japan responds that the fact that Ukraine made tariff commitments with regard to the product concerned does not cure the competent authorities' failure to identify such commitments in their published report.[127]

7.96. The Panel recalls that pursuant to Article XIX:1(a), a Member imposing a safeguard measure must demonstrate that a product has been imported in increased quantities as a result of the effect of GATT 1994 obligations of the Member concerned. In our view, given that there may be several obligations that apply to the product in question, this demonstration necessitates identification of the specific relevant obligation(s), as it is difficult to see how this demonstration could otherwise be made. In addition, it should be remembered that pursuant to Article XIX:1(a) it is not just the obligation per se that is to be identified, but also its effect. This suggests that in the case of tariff concessions, the bound tariff rate applicable to the product is directly relevant, including any different rates applicable to sub-groups of the product. Moreover, it may be unclear which of several applicable obligations the competent authorities consider to be constraining their freedom of action. It is therefore important for competent authorities to be clear as to which of the applicable obligations they find to have resulted in imports in increased quantities. For these reasons, we are unable to accept Ukraine's argument that just because it is a known or knowable fact that Ukraine made tariff concessions on passenger cars when it joined the WTO, there was no

[125] Japan's first written submission, para. 193; opening statement at the first meeting of the Panel, para. 61; second written submission, para. 105; and opening statement at the second meeting of the Panel, para. 26.

[126] Ukraine's first written submission, para. 100; opening statement at the first meeting of the Panel, para. 44; second written submission paras. 40-42; and opening statement at the second meeting of the Panel, para. 37.

[127] Japan's opening statement at the first meeting of the Panel, para. 61; second written submission, para. 104; and opening statement at the second meeting of the Panel, para. 25.

need for the competent authorities to identify adequately the applicable GATT 1994 obligations and their effect.

7.97. Turning to Ukraine's published report, the Notice of 14 March 2013, we note that it contains no mention or analysis of the effect of the GATT 1994 obligations. The only reference to Ukraine's commitments under the GATT 1994 is contained in the Key Findings, which are not a published report. However, that reference appears in the context of the causation analysis:

> At the same time, WTO accession of Ukraine and its commitments to reduce the import duty from 25% to 10% as well as the abolition of government support could have negatively impacted the domestic car industry's financial condition, rather than this being a consequence of growing import of cars to Ukraine.[128]

7.98. To us, it is clear that Ukraine was analysing the tariff reduction as a possible factor causing injury to the domestic industry and did not refer to it as one of the *circumstances* that must be demonstrated under Article XIX:1(a). We also recall that as we mentioned in paragraph 7.81 above, the Appellate Body in *US – Steel Safeguards* has clarified that it is not for the Panel to read into the report linkages that the competent authority failed to make.[129] Therefore, even if we were to take into account the Key Findings, this reference in a section dealing with one of the conditions – causation – is not sufficient to identify the circumstance here at issue, that is to say, the relevant GATT 1994 obligations and their effect.

7.99. We therefore find that Ukraine has failed to make a proper determination on the effect of GATT 1994 obligations, because it has not identified in its published report the effect of GATT 1994 obligations. Having failed to make a proper determination also in respect of this circumstance, we conclude that Ukraine has, to that extent, acted inconsistently with Article XIX:1(a).

7.2.1.3.2 Logical connection between the effect of GATT 1994 obligations and the relative increase in imports

7.100. The Panel now addresses Japan's arguments regarding the demonstration of the logical connection between the effect of GATT 1994 obligations and the relative increase in imports.

7.101. Japan argues that since the text of Article XIX:1(a) establishes that the increase in imports must occur "as a result" of the effect of GATT 1994 obligations, it follows that a Member must not only identify the specific obligations it incurred under the GATT 1994, but must also explain how the effect of these obligations resulted in the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic industry. Japan further contends that it must be explained how these obligations had the effect of preventing the Member concerned from taking WTO-consistent measures in order to prevent or remedy the change generated by the unforeseen developments in the competitive relationship between imports and the domestic product.[130]

7.102. Japan notes that the Notice of 14 March 2013 and the Key Findings are silent on this issue and that it is only in its first written submission that Ukraine makes a reference to this analysis by stating that its market access commitments "pulled imports of passenger cars into the Ukraine market".[131] Japan argues that in making this statement, Ukraine confuses unforeseen developments with the effect of GATT 1994 obligations. The former must have resulted in the increase in imports, while the latter must prevent the importing Member from taking appropriate measures to limit the increased imports that resulted from unforeseen developments.[132]

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[128] Exhibit JPN-6 (Revised Version), p. 6.

[129] Appellate Body Report, *US – Steel Safeguards*, para. 322.

[130] Japan's first written submission, para. 193; opening statement at the first meeting of the Panel, para. 62; second written submission, paras. 106-107; and opening statement at the second meeting of the Panel, para. 27.

[131] Japan's second written submission, para. 108 (citing Ukraine's response to Panel question No. 43).

[132] Japan's opening statement at the first meeting of the Panel, para. 62; second written submission, para. 108; and opening statement at the second meeting of the Panel, para. 108.

7.103. Ukraine argues that after it had reduced its tariffs as a result of its accession to the WTO, imports of passenger cars into Ukraine increased relatively to domestic production. Ukraine recognizes that although other factors may have existed to drive imports of passenger cars into Ukraine, the reduction of the tariff rate by ten percentage points pulled imports of passenger cars into its market, despite the decrease in demand as a result of the effect of the global financial crisis on Ukraine consumers.[133]

7.104. The Panel recalls its findings above that Ukraine failed to make a proper determination on the effect of GATT 1994 obligations under Article XIX:1(a). In the light of this, there is no need for us to make findings regarding whether the competent authorities examined the "logical connection" between the effect of GATT 1994 obligations and the relative increase in imports. In the absence of a sufficient determination of the effect of GATT 1994 obligations, there is no occasion to consider whether there is a sufficient connection between such element and increased imports.

7.2.1.4 Overall conclusion

7.105. Having found that Ukraine in its published report has failed to make a proper demonstration on unforeseen developments and the effect of GATT 1994 obligations, we conclude that Ukraine has acted inconsistently with Article XIX:1(a).

7.2.2 Claim under Article 11.1(a)

7.106. The Panel now turns to Japan's claim regarding Article 11.1(a), which provides as follows:

> A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

7.107. Japan submits that as a consequence of Ukraine's failure to demonstrate unforeseen developments and in the effect of GATT 1994 obligations, Ukraine has acted inconsistently with Article 11.1(a).[134]

7.108. Ukraine submits that Japan's claim under Article 11.1(a) must be rejected for the reasons set out in paragraphs 7.41 and 7.94 above.

7.109. The Panel has concluded in Section 7.2.1.4 above that Ukraine has acted inconsistently with Article XIX:1(a). In the light of this, we see no need, for the purposes of resolving this dispute, to make additional findings regarding whether, as a consequence of that conclusion, Ukraine has also acted inconsistently with Article 11.1(a). We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.2.3 Claims under Articles 3.1 and 4.2(c)

7.110. The Panel turns, finally, to Japan's claims under Articles 3.1, last sentence, and Article 4.2(c). Article 3.1, last sentence, provides:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

> In turn, Article 4.2(c) provides:

[133] Ukraine's first written submission, para. 100; opening statement at the first meeting of the Panel, para. 44; second written submission paras. 40-41; and opening statement at the second meeting of the Panel, para. 37.

[134] Japan's first written submission, paras. 178 and 194; and second written submission, paras. 72 and 100.

> 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.

7.111. Japan argues that the existence of unforeseen developments and the effect of GATT 1994 obligations are a "pertinent issue … of fact and law" within the meaning of Article 3.1 and, consequently, the published report of the competent authorities must contain a "finding" or a "reasoned conclusion" on these circumstances.[135] Japan further argues that the Appellate Body in *US – Steel Safeguards* established that Article 4.2(c) also applies to the competent authorities' demonstration of unforeseen developments under Article XIX:1(a).[136] Japan therefore contends that, with respect to the circumstances identified in Article XIX:1(a), "the competent authorities are required by Article 3.1, last sentence, to 'give an account of' a 'judgement [sic] or statement which is reached in a connected or logical manner or expressed in a logical form'", on the existence of these circumstances, "'distinctly', or in detail".[137]

7.112. With regard to unforeseen developments, Japan submits that the Notice of 14 March 2013 only contains a brief reference and that such reference cannot be considered a "reasoned and adequate explanation" since this statement does not "give an account of a judgment or statement".[138] Japan also notes that both the Notice of 14 March 2013 and the Key Findings fail to identify any unforeseen developments, apart from the increase in imports, and *a fortiori* fail to provide any discussion or explanation as to why such events should be considered as unforeseen and why they resulted in the increase in imports. With regard to the effect of GATT 1994 obligations, Japan argues that neither the Notice of 14 March 2013 nor the Key Findings contain any analysis of the effect of the GATT 1994 obligations and, therefore, Ukraine has violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[139]

7.113. Ukraine responds that, as far as unforeseen developments are concerned, Japan simply takes issue with the competent authorities' conclusion and arguments on unforeseen developments but cannot claim that it does not understand the reasoning supporting this conclusion. Ukraine also argues that Japan's claim is not supported by the record.[140] With regard to the effect of GATT 1994 obligations, Ukraine argues that there is no need for any reasoned conclusion and other explanation when, as a matter of fact, it is uncontested that Ukraine made significant tariff commitments in respect of passenger cars when it joined the WTO in 2008. Ukraine submits that Japan cannot seriously deny that as a matter of fact this is the case given its active involvement in Ukraine's accession negotiations.[141]

7.114. The Panel has concluded in Section 7.2.1.4 above that Ukraine has failed to make a proper determination on unforeseen developments and the effect of GATT 1994 obligations and, consequently, acted inconsistently with Article XIX:1(a). In the light of this, we see no need, for the purposes of resolving this dispute, to make additional findings regarding whether Ukraine has also acted inconsistently with Articles 3.1 and 4.2(c) in relation to the account it gave of the aforementioned determination in its published report. We therefore exercise judicial economy and decline to make findings with respect to these claims.

7.3 Claims relating to increased imports

7.115. The Panel next addresses Japan's claims relating to Ukraine's determination of increased imports based on Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) and Article XIX:1(a). Since

[135] Japan's first written submission, para. 180 (referring to Appellate Body Report, *US – Lamb*, para. 76); and second written submission, para. 88.
[136] Japan's first written submission, para. 180 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 290).
[137] Japan first written submission, para 181 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 287).
[138] Japan's first written submission, para. 183; and second written submission, para. 91.
[139] Japan's first written submission, para. 196; second written submission, paras. 112-113; and opening statement at the second meeting of the Panel, para. 31.
[140] Ukraine's first written submission paras. 87-88 and 89; second written submission, para. 34; and opening statement at the second meeting of the Panel, para. 34.
[141] Ukraine's first written submission, para. 101.

Article 2.1 sets forth the fundamental legal requirements – i.e. the conditions – for application of a safeguard measure, we will first address Japan's claims under Article 2.1.

7.3.1 Claims under Article 2.1

7.116. The Panel recalls that Article 2.1 provides as follows:

> 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.

7.117. Japan claims that Ukraine acted inconsistently with Article 2.1 in making its determination of increased imports. In particular, Japan contends that Ukraine failed to (i) demonstrate a "recent" increase in imports; (ii) demonstrate that the increase in imports was sudden, sharp and significant enough; (iii) conduct a complete qualitative analysis, including an analysis of the intervening trends and the amounts[142] of imports; and (iv) examine the "conditions" under which the imports occurred.[143]

7.118. Ukraine submits that Japan's claim under Article 2.1 regarding the determination of increased imports is not well-founded. Ukraine argues that it met its obligations by examining all aspects of the increase in imports. In Ukraine's view, the data used during the investigation and presented to Japan in consultations demonstrates that the relative increase in imports was sufficiently recent, sudden, sharp, and significant, both quantitatively and qualitatively.[144]

7.119. The Panel recalls that an increase in imports is the defining prerequisite for the application of a safeguard measure. Article 2.1 does not merely refer to an "increase" in imports, but requires that "the product is being imported … in *such* increased quantities, absolute or relative to domestic production" (emphasis added) as to cause or threaten to cause serious injury. Thus, not any increase in imports is sufficient to satisfy this condition. As found by the Appellate Body in *Argentina – Footwear (EC)*, Article 2.1 "requires 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'".[145] Furthermore, Article 2.1 refers to increased quantities, "absolute or relative to domestic production". The word "or" indicates that a safeguard measure may be applied, subject to other conditions and circumstances being met, in either of these two factual scenarios. Finally, Article 2.1 also stipulates that the product concerned must be imported "under such conditions" as to cause or threaten to cause serious injury. As we explain below[146], in our view this is relevant to the requirement that there be a causal link between increased imports and serious injury or threat thereof to the domestic industry, which is itself another condition for applying a safeguard measure.

7.120. We thus consider based on the text of Article 2.1 as interpreted by the Appellate Body that for Japan's claim to succeed, Japan must establish that Ukraine did not properly demonstrate that:

a. there was either an absolute increase in imports or an increase relative to domestic production (hereafter, "relative increase");

b. the increase in imports was sudden enough, sharp enough, and significant enough, quantitatively and qualitatively; and

[142] We note that Japan uses "amounts" in the plural throughout its submissions.
[143] Japan's first written submission, paras. 207, 224-228; opening statement at the first meeting of the Panel, paras. 67-71; second written submission, paras. 115, 132 and 138; and opening statement at the second meeting of the Panel, paras. 39–43.
[144] Ukraine's first written submission, paras. 114 and 126; opening statement at the first meeting of the Panel, paras. 48, 50 and 53; second written submission, paras. 49, 50 and 54; and opening statement at the second meeting of the Panel, para. 54.
[145] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[146] See para. 7.190 below.

c. the increase in imports was recent enough.

We will address these issues in the order listed.

7.3.1.1 Increased imports

7.121. The Panel turns first to the competent authorities' determination that there was a relative increase in imports during the period of investigation, 2008-2010. Specifically, Ukraine's competent authorities determined in the Notice of 14 March 2013 that during the period of investigation, imports of passenger cars increased by 37.9% relative to domestic production. Japan did not contest that there was a relative increase between 2008 and 2010, but questioned other aspects of the competent authorities' determination of increased imports to which we turn below.

7.122. We therefore do not need to address this aspect further, except to note that evidence provided by Ukraine during the course of these proceedings suggests that there was an absolute and relative decrease in imports from 2008 to 2009, followed by an absolute and relative increase in imports from 2009 to 2010.[147] The impact of the relative increase by 37.9% on the respective market shares of imports and domestic production is not ascertainable from the Notice of 14 March 2013, because it contains no data on import and domestic production volumes.[148]

7.3.1.2 "[I]n such increased quantities"

7.123. Turning to the requirement in Article 2.1 that a product must be imported "in *such* increased quantities" (emphasis added), the Panel notes that the parties to this dispute disagree over whether Ukraine's competent authorities demonstrated that the relative increase in imports was sudden enough, sharp enough, and significant enough, and whether they conducted a proper qualitative analysis of the data on imports, specifically with regard to trends in imports and the amounts of imports. Thus, we now proceed to consider, in turn, the following issues:

a. whether the competent authorities in this case provided an adequate explanation concerning the trends in imports that occurred during the period of investigation;

b. whether the competent authorities demonstrated that the relative increase in imports was sudden enough, sharp enough, and significant enough; and

c. whether the competent authorities should have provided the amounts of imports.

7.3.1.2.1 Analysis of intervening trends in imports

7.124. The Panel first examines whether the competent authorities have analysed intervening trends in imports.

7.125. Japan, referring to the statement of the Appellate Body in *Argentina – Footwear (EC)*, submits that to make a proper qualitative analysis and evaluation of increased imports, the competent authorities must not only examine the end-points of the data, but also intervening trends. According to Japan, the panel report in *Argentina – Preserved Peaches* and the Appellate Body report in *US – Steel Safeguards* indicate that the analysis under Articles XIX and 2.1 requires an examination of the trends in imports over the entire period of investigation. Japan maintains that it is the explanation concerning the trends in imports "that allows a competent authority to demonstrate that 'a product is being imported in such increased quantities'".[149]

[147] Exhibit UKR–3.

[148] Ukraine stated that it treated domestic production volumes as confidential in response to a request from the domestic industry and that the Notice provided no actual import volumes because this, together with the 37.9% figure, would have permitted inferences to be drawn concerning domestic production volumes. See Ukraine's response to Panel question Nos. 64 and 100. Japan provided the volumes of imports. See Japan's response to Panel question No. 14. See also Graphs 1 and 2 below at paras. 7.137 and 7.142.

[149] Japan's first written submission, paras. 103 and 227 (referring to Appellate Body Reports, *Argentina – Footwear (EC)*, para.129; and *US – Steel Safeguards*, paras. 354–355); opening statement at the

7.126. Japan argues, in addition, that the use of the phrase "such increased quantities" makes it clear that a comparison of end points will not suffice to demonstrate that a product "is being imported in such increased quantities" within the meaning of Article 2.1, and that "in cases where an examination does not demonstrate […] a clear and uninterrupted upward trend in imports volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points".[150] Japan thus submits that it is evident from the text of Article 2.1 and the jurisprudence that the condition of "increased imports" is not simply that imports have increased based on comparing data for the beginning and end of the period of investigation. Rather, Article 2.1 requires an analysis of the intervening trends.[151]

7.127. Japan argues that in this case, Ukraine's competent authorities failed to examine the intervening trends with regard to imports, as they did not analyse what happened between 2008 and 2009 and between 2009 and 2010. According to Japan, in both the Notice of 14 March 2013 and the Key Findings, Ukraine provided only an end-to-end-point comparison when it found that imports increased between 2008 and 2010 by 37.9% relative to domestic production and by 37.1% relative to domestic consumption, and did not provide data for, or analyse what occurred in, 2009.[152] According to Japan, Ukraine's simple end-point-to-end-point analysis "could easily be manipulated to lead to different results, depending on the choice of end points".[153] In Japan's view, this is because the data does not demonstrate "a clear and uninterrupted upward trend".[154] Japan notes that not only did the absolute volume of imports decrease significantly over the entire period of investigation, but imports also decreased relative to domestic production from 2008 to 2009. Japan considers that a clear upward trend in imports over an entire period of investigation could not have existed, if during half of the period of investigation the imports were actually decreasing in both absolute and relative terms. Japan also notes that the data concerning intervening trends and the *ex post* analysis of these data provided by Ukraine in its first written submission cannot be found in the Notice of 14 March 2013 or the Key Findings and thus are not relevant for the Panel's examination. Japan therefore considers that the competent authorities failed to examine the trends over the period of investigation and to include their conclusions in the published report, and they have consequently not satisfied the requirements of Article 2.1.[155]

7.128. Ukraine responds that a qualitative analysis involving consideration of intervening trends is not pertinent to the issue of increased imports, but rather concerns the question of causation. Regarding the analysis of its competent authorities in the present case, Ukraine submits that imports trended upward over the course of the period of investigation, as is evidenced by the fact, stated in the Key Findings, that imports increased between 2008 and 2010 by 37.9% and 37.1% relative to domestic production and domestic consumption, respectively. Ukraine further states that in terms of domestic production, from 2008 to 2009, imports decreased by 8.9%, whereas in 2010, imports increased by 37.9% over 2008 levels relative to domestic production. Regarding Japan's argument about manipulation, Ukraine points out that its competent authorities were strictly bound by Ukraine's domestic law in determining the years to be included in the period of investigation, and that no manipulation was therefore possible. Finally, regarding its published report, Ukraine contends that a more detailed analysis was conducted by its Ministry during the investigation and that the results were presented to the Commission and formed the basis for the imposition of the safeguard measure. According to Ukraine, that analysis is confidential, however, and was therefore not disclosed to Japan.[156]

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first meeting of the Panel, para. 71 (referring to Appellate Body Report, *US– Steel Safeguards*, para. 355 and Panel Report, *Argentina – Preserved Peaches*, para. 7.55); second written submission, para. 134 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 374); and response to Panel question No. 46.

[150] Appellate Body Report, *US – Steel Safeguards*, paras. 354 and 355.

[151] Japan's first written submission, paras. 104 and 225; second written submission, paras. 132 and 136; and opening statement at the second meeting of the Panel, para. 38.

[152] Japan's first written submission, paras. 225 and 227; opening statement at the first meeting of the Panel, para. 71; second written submission, para.133; opening statement at the second meeting of the Panel, para. 42.

[153] Appellate Body Report, *US – Steel Safeguards*, para. 354.

[154] Ibid.

[155] Japan's opening statement at the first meeting of the Panel, para. 71; second written submission, paras. 133, 135, and 136; and response to Panel question No. 132.

[156] Ukraine's first written submission, paras. 115-118, 121, 122, 124 and 125; opening statement at the first meeting of the Panel, para. 52; second written submission, para. 53; and opening statement at the second meeting of the Panel, para. 49.

7.129. The Panel begins by recalling the views of the Appellate Body in *Argentina – Footwear (EC)*, which are relevant to the issue raised by Japan. In that dispute, the Appellate Body observed that:

> [T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago.[157]

7.130. The Appellate Body in the same dispute also identified an additional element that competent authorities must consider when determining whether a product has been imported "in such increased quantities". Agreeing with the panel in that dispute, it stated that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)".[158] (emphasis original)

7.131. While this statement does not specifically refer to Article 2.1, in the immediately following paragraph the Appellate Body referred to the phrase "is being imported" in Article 2.1 in support of its view that the competent authorities must also examine recent imports, "and not simply trends in imports" during a period of several years.[159] Moreover, in *US – Steel Safeguards*, the Appellate Body reiterated its view that an examination of trends is required and stated that the importing Member in that dispute could not properly have found that imports had "increased" as required by Article 2.1, without having addressed an "intervening trend" showing a decrease in imports at the end of the period of investigation.[160] In the same dispute, the Appellate Body also stated that:

> The use of the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the "rate and amount" of the increase, make it abundantly clear, however, that such a comparison of end points will *not* suffice to demonstrate that a product "is being imported in such increased quantities" within the meaning of Article 2.1. Thus, a demonstration of "any increase" in imports between any two points in time is not sufficient to demonstrate "increased imports" for purposes of Articles XIX and 2.1. Rather, as we have said, competent authorities are required to examine the trends in imports over the entire period of investigation.[161] (emphasis original)

Finally, the Appellate Body emphasized that:

> [W]hat is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of "such increased quantities" within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports—over the entire period of investigation—that allows a competent authority to *demonstrate* that "a product is being imported in such increased quantities".[162] (emphasis original)

7.132. To us, these statements make it clear that, for an affirmative determination of increased imports to be consistent with Article 2.1, it is not sufficient for the competent authorities to establish an increase in imports through a simple mathematical comparison of data for the two end points marking the beginning and end of the period of investigation. It is necessary, though still not sufficient by itself[163], that the competent authorities also set out in their published report a reasoned and adequate explanation concerning the development of imports between the end

[157] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[158] Ibid. para. 129.
[159] Ibid. para. 130.
[160] Appellate Body Report, *US – Steel Safeguards*, para. 388. The Appellate Body also endorsed use of the term "intervening trends in imports" in *Argentina – Footwear (EC)*. See Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[161] Appellate Body Report, *US – Steel Safeguards*, para. 355.
[162] Ibid. para. 374 .
[163] As we have already mentioned, the competent authorities must also consider whether any increase in imports has been sharp enough, sudden enough, and significant enough to cause or threaten to cause serious injury.

points, i.e. concerning the intervening trends in imports that occurred during the period of investigation.

7.133. We note that the Notice of 14 March 2013 explains the competent authorities' determination "[r]egarding increased imports to Ukraine and degree of such increase" in one short sentence:

> During the investigation period in 2010, compared to 2008, imports of motor cars to Ukraine increased by 37.9% compared to domestic industry output and 37.1% relative to domestic demand.[164]

7.134. The Key Findings make the same point and clarify that the percentage figures given in the Notice of 14 March 2013 refer to import volumes in relative terms.[165] Both the Notice of 14 March 2013 and the Key Findings also indicate, albeit in sections not addressing the competent authorities' determination of increased imports, that "the volume of imports of motor cars to Ukraine in absolute terms in 2010 compared to 2008 decreased by 71%".[166]

7.135. We recall that we must base our review in this dispute on the published report, which we have concluded is contained in the Notice of 14 March 2013. As is apparent from the above-quoted statement, the Notice of 14 March 2013 compares imports relative to domestic production in 2010 – the end point of the period of investigation in this case – to imports relative to domestic production in 2008 – the starting point of the period of investigation. The Notice of 14 March 2013 does not set out the import volume in relative terms for 2009, and neither do the Key Findings. There is, accordingly, no corresponding data regarding the volume of imports relative to domestic production during the two periods 2008-2009 and 2009-2010.

7.136. Thus, the published report of the competent authorities contains only an end-point-to-end-point comparison and analysis, finding that the import volume relative to domestic production was 37.9% higher in 2010 than in 2008. The published report provides neither data nor an explanation concerning intervening trends in relative imports, and specifically, makes no reference to import volume relative to domestic production in 2009.

7.137. Ukraine has provided relevant data and analysis of intervening trends in imports in relative terms in its first written submission. However, as we have pointed out above[167], such an *ex post* explanation cannot remedy the deficiency in the competent authorities' determination as set out in the Notice of 14 March 2013. Nevertheless, it is instructive to consider briefly the data that Ukraine has provided to us, but did not set out or examine in the Notice of 14 March 2013. We set out this data in Table 1 and represent it graphically in Graph 1 below. The data suggests that there was an overall relative increase in imports over the three-year period of investigation. The data also appears to show that the relative increase in imports that was determined to have occurred, based on the end-point-to-end-point comparison, is the result of an initial relative decrease from 2008 to 2009 that was followed by a more substantial relative increase in imports from 2009 to 2010. More particularly, the data suggests that in the investigation at issue, a relative increase in imports did not occur until the second half of the period of investigation. A brief look at intervening trends thus reveals that the competent authorities' end-point-to-end-point analysis is not sufficient on its own to explain adequately why and how the facts of this case supported the conclusion of the competent authorities that passenger cars "[were] being imported in *such* increased quantities" (emphasis added) relative to domestic production.

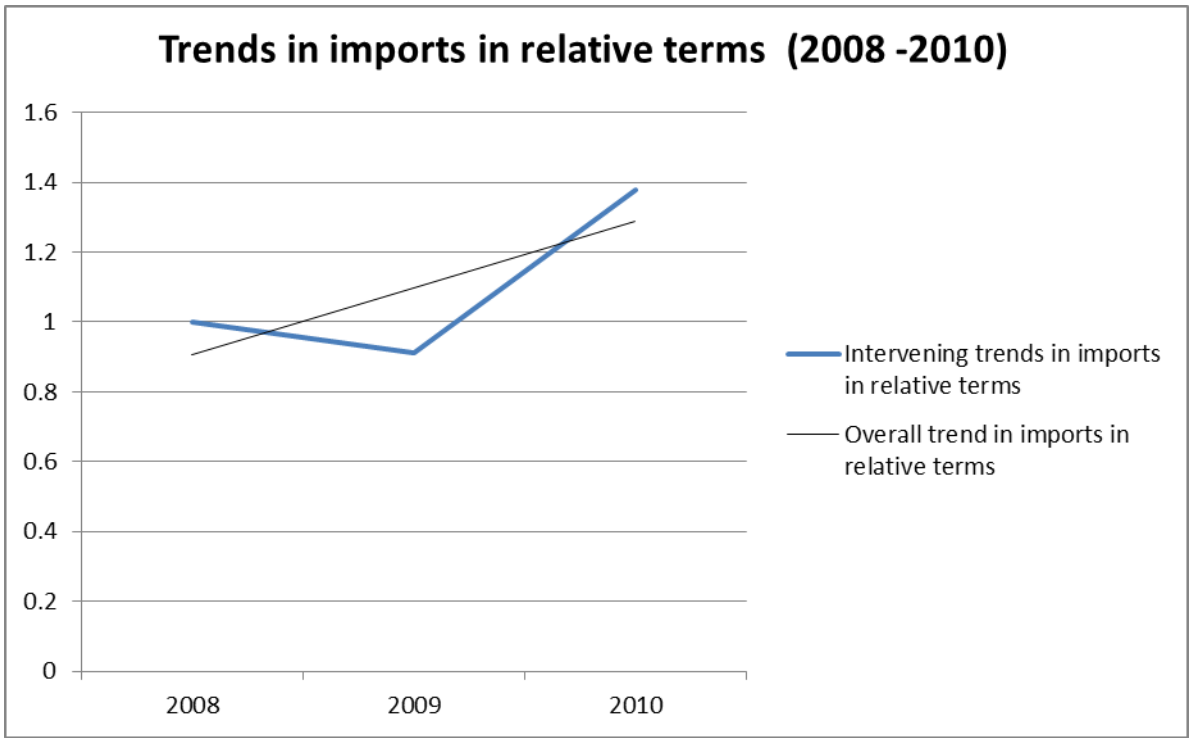
Table 1: Changes of imports in relative terms

Indicator	2008	2009	2010
Ratio of imports to domestic production, %	[ ]	[ ]	[ ]
Change since 2008, %	-	*-8.9*	*+37.9*

Source of data: Exhibit UKR–3.

[164] Exhibit JPN-2, p. 1.
[165] The Key Findings talk about "the share of the Product imports volume … relative to Products produced by the domestic industry" (Exhibit JPN-6 (Revised Version)).
[166] Exhibit JPN-2. See also Exhibit JPN-6 (Revised Version).
[167] See para. 7.27 above.

Graph 1: Trends in imports of passenger cars into Ukraine in relative terms (2008–2010)[168]



7.138. Ukraine has asserted that a more detailed analysis was performed regarding increased imports and that its results were the basis for the imposition of the safeguard measure. Ukraine further submits, however, that that analysis is confidential. Ukraine did not explain how or why an analysis of intervening trends (as opposed to the actual import volumes) could be confidential. But even assuming that Ukraine could justifiably withhold certain analysis or data, we note that the competent authorities in this case published data concerning the relative increase for 2010 compared to 2008. In the light of this, we are not persuaded that the competent authorities could not similarly have published data concerning the relative increase or decrease for 2009 compared to 2008, and for 2010 compared to 2009. In our view, such additional data would have permitted the competent authorities to provide at least some explanation concerning intervening trends. We recall that the Notice of 14 March 2013 contains no explanation at all regarding intervening trends.

7.139. For all the above reasons, the Panel finds that Ukraine has acted inconsistently with Article 2.1 by failing to provide an explanation in its published report regarding how intervening trends in imports relative to domestic production supported the competent authorities' determination that there was a relative increase for the period of investigation 2008-2010.

7.3.1.2.2 Sudden, sharp, and significant increase

7.140. The next issue the Panel turns to is whether, as Japan contends, Ukraine has failed to demonstrate that the increase in imports was sudden enough, sharp enough, and significant enough.

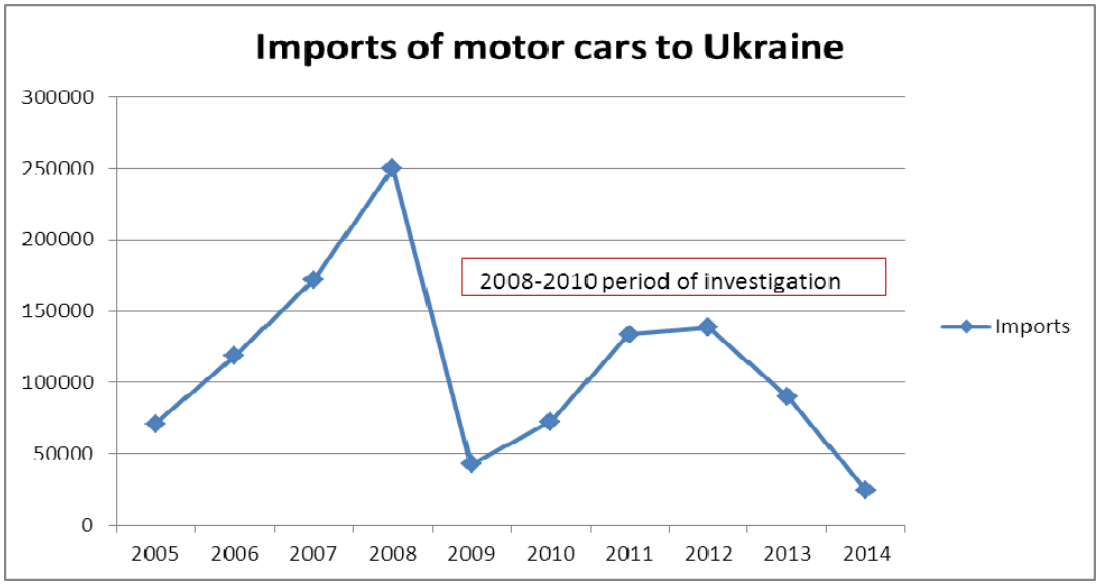
7.141. We recall at the outset that both parties have referred to the Appellate Body report in *Argentina – Footwear (EC)*. According to the Appellate Body, the phrase "in such increased quantities" in Article 2.1 indicates that an increase in imports must have been sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten

[168] Prepared by the Panel; source of data: Exhibit UKR–3.

to cause "serious injury".[169] This view was followed by the panels in *US – Wheat Gluten* and *Argentina – Preserved Peaches* and subsequently confirmed by the Appellate Body in *US – Steel Safeguards*.[170] The Appellate Body in *US – Steel Safeguards* upheld the panel's conclusion that there are no absolute standards in judging how sudden and significant the increase must be in order to qualify as an "increase" within the meaning of Article 2.1.[171] Rather, this assessment is to be made by the competent authorities on a case-by-case basis.[172]

7.142. Japan argues that the Notice of 14 March 2013 and the Key Findings do not contain any determination by the competent authorities that the alleged increase in imports was sudden, sharp, and significant enough. Japan contends that the increase in imports identified by Ukraine was not "sudden" because the competent authorities focused mainly on an increase in imports which took place between 2008 and 2010 and ignored the fact that in 2005, 2006 and 2007 imports of the product concerned were steadily increasing at a significant rate. According to Japan, in reaching its conclusion regarding the increase in imports, Ukraine should also have taken into account the data from 2005-2007.[173] In supporting its arguments, Japan provided the following graph.

Graph 2: Trends in imports of passenger cars into Ukraine in absolute terms (2005–2014)[174]



7.143. Ukraine contends that a closer examination of the data considered during the investigation demonstrates that the relative increase in imports was sufficiently sudden, sharp, and significant. Ukraine argues that although the volume of imports into Ukraine decreased by 71%, there was a significant increase in imports in relative terms. According to Ukraine, relative to domestic production, imports decreased modestly in 2009 over 2008 by 8.9%, whereas in 2010, imports relative to domestic production increased sharply, significantly, and suddenly, by 37.9% compared to 2008. Ukraine further submits that its Ministry undertook such an analysis during the

[169] Japan's first written submission, para. 219; opening statement at the first meeting of the Panel, para. 64; and Ukraine's first written submission, paras. 110-111.

[170] Panel Reports, *US – Wheat Gluten*, para. 8.31; and *Argentina – Preserved Peaches*, para. 7.54; and Appellate Body Report, *US – Steel Safeguards*, paras. 345 and 346.

[171] Panel Reports, *US – Steel Safeguards*, para. 10.168; Appellate Body Report, *US – Steel Safeguards*, paras. 358–361.

[172] Appellate Body Report, *US – Steel Safeguards*, para. 360.

[173] Japan's first written submission, paras. 219 and 221-222; opening statement at the first meeting of the Panel, paras. 15, 16 and 70;

Second written submission, paras. 126, 128 and 129; and opening statement at the second meeting of the Panel, para. 41; response to Panel question No. 14; and Panel Reports, *US – Steel Safeguards*, para. 10.166.

[174] Graph prepared by Japan; source of data: Japan obtained these data on its own initiative from the Ukrainian Statistics Service, see Japan's response to Panel question No. 14.

investigation and that it is summarized in the Key Findings. According to Ukraine, the more detailed analysis and its results, which were presented to the Commission, were the basis for the imposition of the safeguard measure, but were confidential and were therefore not disclosed to Japan.[175]

7.144. Japan responds that the data and the analysis in Ukraine's written submission are entirely *ex post* and are not included in the Notice of 14 March 2013 or in the Key Findings and are therefore irrelevant. In Japan's view, such *ex post* analysis cannot cure the absence of any such analysis in the published report of the competent authorities. Japan therefore considers that Ukraine failed to provide a reasoned and adequate explanation as to why the alleged increase in imports was sudden enough, sharp enough, and significant enough.[176]

7.145. The Panel notes that in the Notice of 14 March 2013, and also in the Key Findings, it is stated that in 2010 imports increased by 37.9% relative to domestic production, compared to 2008. Neither document characterizes this increase as "sudden", "sharp" or "significant" or uses any similar language. Accordingly, the lack of analysis on this issue in the Notice of 14 March 2013 and Key Findings is similar to the lack of analysis with respect to the intervening trends discussed above. Ukraine submits that its relevant analysis is confidential. However, Ukraine offered no explanation as to why an analysis of the "suddenness", "sharpness" and "significance" of the relative increase in imports (as opposed to the actual import volumes) should be confidential.

7.146. We first consider the requirement that the increase in imports be "sudden" and "sharp". The dictionary meaning of "sharp" is "involving sudden change of direction; abrupt, steep"[177] while "sudden" is defined as "happening or coming without warning; unexpected", or "abrupt, sharp".[178] Without information about the intervening trends, the reference in the Notice of 14 March 2013 to a relative increase by 37.9% in 2010 compared to 2008 is consistent with very different factual scenarios, including, for example, (i) a relative increase in imports between 2008 and 2009 followed by a smaller relative decrease between 2009 and 2010; (ii) a relative decrease in imports between 2008 and 2009 and then a larger relative increase between 2009 and 2010; and (iii) a steady or gradual relative increase over three years (2008-2010). It appears to us that certainly under the third possible scenario, the relative increase in imports could not properly be described as "sharp" or "sudden". Therefore, by itself, the reference to a relative increase of 37.9% in 2010 compared to 2008 does not demonstrate that the relative increase in imports was either "sharp" or "sudden".

7.147. As regards the required "significance" of the increase, we note that the Notice of 14 March 2013 provides neither the volumes of imports and domestic production nor the ratios of import volumes to domestic production volumes in any year of the period of investigation. Neither do the Key Findings. However, if for example the ratio of import volume to domestic production volume was quite large at the beginning of the period of investigation, a 37.9% relative increase in imports at the end of the period might, in our view, not be sufficient to qualify as "significant". Without additional information or relevant explanations in the Notice of 14 March 2013, we are therefore unable to accept that a reference to a 37.9% relative increase in imports alone is sufficient to demonstrate that the increase was "significant".[179] The *ex post* explanations provided by Ukraine in the context of the present proceedings cannot cure this defect. We must note here that we do not wish to imply that Ukraine could only establish the significance of the relative increase by revealing confidential information in the determination. If no additional information could be provided for reasons of confidentiality, the competent authorities must nevertheless provide, to the fullest extent possible, a reasoned and adequate explanation in support of a

[175] Ukraine's first written submission, paras. 119–124; opening statement at the first meeting of the Panel, paras. 50–53; second written submission, paras. 50–53; opening statement at the second meeting of the Panel, para. 49.

[176] Japan's opening statement at the first meeting of the Panel, para. 70; second written submission, paras. 129–130.

[177] The *Shorter Oxford Dictionary* (2007), Vol. 2, p. 2790.

[178] Ibid. p. 3095.

[179] Our situation is different from that of the panel in *US – Steel Safeguards*, which found that a 19.3% relative increase in imports was "significant", as in that dispute, the competent authorities' report contained information regarding the ratio of import volume to domestic production volume, on the basis of which the issue of significance could be assessed. See Panel Reports, *US – Steel Safeguards*, para. 10.254.

determination that the increase was significant.[180] Moreover, there may be ways of presenting sensitive data in the report itself, but in a form that avoids improper disclosure. For instance, with regard to the ratio of import volume to domestic production volume, it may be possible, in the case of confidential information, to specify a range of values that includes but does not reveal the actual value, which would facilitate review of the competent authorities' evaluation.

7.148. Based on the foregoing considerations, we find that Ukraine has acted inconsistently with Article 2.1 by failing to demonstrate in its published report, through reasoned explanations, that there was an increase in imports during the period of investigation 2008-2010 that was sudden enough, sharp enough, and significant enough.

7.3.1.2.3 Amounts of imports

7.149. The Panel now turns to Japan's argument that Ukraine's competent authorities failed to provide and examine the "amounts" of imports and thereby acted inconsistently with Article 2.1. By "amounts" of imports, Japan means the quantities of imports.

7.150. Japan claims that Ukraine failed to provide and examine the amounts of imports throughout the period of investigation, since both the Notice of 14 March 2013 and the Key Findings only indicate a rate of decrease in the absolute volume of imports and a rate of increase in the relative imports. Japan argues that the evaluation of the amount of the increase in imports, expressly required under Article 4.2(a), is necessarily relevant to the competent authorities' determination concerning increased imports. Relying on the panel's finding in *Argentina – Footwear (EC)*, which was affirmed by the Appellate Body, Japan argues that to determine whether imports have entered in "such increased quantities", Articles 2.1 and 4.2(a) require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production. Japan contends that without providing the amounts of imports, a full qualitative analysis would not be possible. Japan further argues that the amounts of imports are particularly relevant in the situation of this case, where imports decreased substantially in absolute terms. According to Japan, the fact that imports decreased at a lower rate than did domestic production, but were still decreasing in substantial amounts, is a factor that creates serious doubt as to whether the products could be considered to be imported "in such increased quantities".[181]

7.151. In response, Ukraine argues that the requirement of Article 4.2(a) to evaluate the rate and amount of the increase in imports is relevant in the context of causation analysis. In Ukraine's view, Japan is seeking to add to the obligations of Ukraine by requiring under Article 4.2(a) what would amount to a breach of Article 3.2, which provides that information which is by nature confidential or which is provided to the competent authorities on a confidential basis "shall not be disclosed without permission of the party submitting it". In Ukraine's view, by providing the amounts of the imports, Ukraine would act inconsistently with Article 3.2 and invalidate all the efforts it took to protect the domestic industry's confidential data, because a simple numerical analysis of the indexed import data provided by the competent authorities would suffice to derive the confidential information. Ukraine refers to the panel report in *US – Steel Safeguards* and argues that the non-disclosure requirement prevails, provided the competent authorities are able to resort to "ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality".[182] Ukraine further submits that its demonstration of the import increase on the basis of relative data makes the need to analyse imports in absolute terms less important. Finally, Ukraine asserts that the rates of the increase in imports it provided in the Notice of 14 March 2013 and Key Findings were in fact based on absolute amounts.[183]

[180] Panel Reports, *US – Steel Safeguards*, para. 10.274. For instance, a specific reference in the published report indicating where in the record of the investigation confidential information in support of a particular conclusion can be found might allow a panel to consider that information on review on a confidential basis, even though the report itself does not disclose the confidential information.

[181] Japan's first written submission, para. 228; second written submission, para. 137; response to Panel question No. 120; Panel Report, *Argentina – Footwear (EC)*, para. 8.141; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[182] Panel Reports, *US – Steel Safeguards*, para. 10.274.

[183] Ukraine's opening statement at the second meeting of the Panel, paras. 50–54; response to Panel question No. 100; Panel Report, *Argentina – Footwear (EC)*, para. 8.237.

7.152. Japan responds that an analysis of the absolute and relative amounts of imports would not lead to a breach of Ukraine's obligation of confidential treatment of information submitted to its competent authorities. According to Japan, the amounts of imports cannot be considered confidential, noting that the total annual amount of imports is publicly available information that can be obtained, by product code, from the Ukrainian Statistical Service. Japan also disagrees that in a relative increase scenario, the rate and amount of the increase in imports need not be evaluated in absolute terms. According to Japan, the need for analysis of the import increase in absolute terms is not left to the discretion of the competent authorities, as Article 4.2(a) requires such an analysis.[184]

7.153. The Panel recalls its findings above that Ukraine has acted inconsistently with Article 2.1 by failing to provide an explanation in its published report regarding how intervening trends in imports relative to domestic production supported the competent authorities' determination that there was a relative increase for the period of investigation 2008-2010. In the light of this, there is no need for us to consider or make any additional finding regarding whether the competent authorities should also have provided an analysis of the amounts of imports, as Japan contends. We therefore exercise judicial economy and decline to make findings on this issue.

7.3.1.3 "[I]s being imported"

7.154. As noted above, Article 2.1 provides that a Member may apply a safeguard only if a product "is being imported" in increased quantities. The Appellate Body has interpreted this requirement to mean that the increase in imports must be "recent" enough to cause or threaten to cause serious injury.[185] The Panel now turns to whether, as claimed by Japan, Ukraine failed to demonstrate a "recent" increase in imports.

7.155. Japan submits that Ukraine must establish that the increase in imports is recent, current and ongoing. Referring to the Appellate Body report in *Argentina – Footwear (EC)*, Japan contends that the period of investigation should be the recent past.[186] Japan further argues that the determination regarding whether the conditions for the application of the safeguard measures are fulfilled must be based on the "recent past".[187] In Japan's view, if the competent authorities fail to seek out pertinent information about the recent past, they will be unable to determine whether imports have increased in "such quantities" within the meaning of Article 2.1.[188]

7.156. Ukraine accepts the Appellate Body's approach to the determination of increased imports as set out in *Argentina – Footwear (EC)*.[189] However, relying on the Appellate Body Report in *US – Steel Safeguards*, Ukraine contends that there is no requirement that imports must be increasing at the time of the determination or thereafter.[190] Furthermore, according to Ukraine, the relevant point in time for determining whether the data is recent is the time when the investigation is conducted.[191]

7.157. Japan responds that the use of the present tense in Article 2.1 indicates that it is necessary to examine "recent imports". In Japan's view, whether imports are "recent" needs to be

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[184] Japan's comments on Ukraine's responses to Panel question Nos. 100 and 133.

[185] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

[186] Appellate Body Report, *Argentina – Footwear (EC)*, fn. 130; Japan's response to Panel question Nos. 8 and 47.

[187] Japan's response to Panel question No. 47.

[188] Japan's response to Panel question No. 8.

[189] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 130-131; Ukraine's first written submission, para. 110.

[190] Ukraine cites the following statement of the Appellate Body:

> We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, 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. We also do *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. (emphasis original)

Appellate Body Report, *US – Steel Safeguards*, para. 367. Ukraine's first written submission, para. 111.

[191] Ukraine's first written submission, para. 114.

assessed by reference to the time when a safeguard measure is applied.[192] According to Japan, the increase in imports should be recent enough at the time of the application of a safeguard measure to cause or threaten to cause serious injury or threat thereof. Japan argues that, if at the time a safeguard measure is applied the product is no longer being imported in such increased quantities or the imports are not causing or threatening to cause serious injury, there is nothing that a safeguard measure needs to prevent or remedy.[193] Japan further considers that Ukraine's position would lead to absurd consequences because it would imply that WTO Members could take emergency action even ten years after the end of an investigation period.[194] Japan submits that a significant delay between the end of the period of investigation and the actual application of a safeguard measure requires an update of the data.[195] According to Japan, if there is a significant time gap, the presumption that the conditions for application of a safeguard measure are still fulfilled is no longer reasonable.[196]

7.158. Ukraine counters that the Agreement on Safeguards does not require that the application of the measure must follow the termination of the investigation immediately or within a certain period of time.[197] In Ukraine's view, a delay between the end of the investigation and the imposition of the safeguard measure is not determined by the Agreement on Safeguards and therefore it is for a Member to decide upon the time gap.[198] Furthermore, Ukraine contends that there is no requirement under the Agreement on Safeguards to continue to update the information following the end of the period of investigation and certainly not following the end of the investigation.[199]

7.159. With regard to the present dispute, Japan argues that the increase in imports found by the competent authorities over the period 2008–2010 can hardly be regarded as "recent" considering that the safeguard measure was only applied as of April 2013.[200] In Japan's view, judging by reference to the time when the safeguard measure was applied, the "period of investigation" was certainly not the "recent past".[201]

7.160. Ukraine responds that the data its competent authorities used in their analysis was the most recent data available at the time of investigation. Ukraine recalls that it initiated its investigation in July 2011, covering the three most recent complete years before the initiation of the investigation (2008-2010). Ukraine also points out that the investigation included import data from the beginning of 2011, effectively up to the date of initiation.[202] Ukraine further asserts that the time gap after the completion of the investigation was not based on an arbitrary decision of the competent authorities, but is explained by the need to exchange views with exporting countries, particularly the European Union, Japan, the Russian Federation, and the Republic of Korea.[203] Ukraine points out in this regard that Ukrainian officials and representatives of exporting Members held a number of consultations and meetings to discuss the possible imposition of safeguard measure before the application of the safeguard measure at issue.[204]

7.161. In Japan's view, the two-year gap in the present case between the end of the period of investigation and the actual imposition of the safeguard measure is manifestly excessive. Japan

[192] Japan's opening statement at the first meeting of the Panel, para. 68. However, Japan also stated that, in principle, the relevant date by reference to which a panel should determine whether the period of investigation is in the recent past is the date of determination made by the authorities, provided that the conditions to apply a safeguard measure are met. Nevertheless, according to Japan, because of the emergency nature and purpose of safeguard measures, a determination that the conditions are fulfilled to apply a safeguard measure should lead to their immediate adoption and application. Japan's second written submission, para. 123 and response to Panel question No. 47.

[193] Japan's second written submission, paras. 122 and 124.

[194] Japan's opening statement at the first meeting of the Panel, para. 69.

[195] Japan's second written submission, para. 64; and response to Panel question No. 30.

[196] Japan's second written submission, paras. 64 and 123.

[197] Ukraine's second written submission, para. 13; and response to Panel question No. 3.

[198] Ukraine's second written submission, para. 14.

[199] Ukraine's first written submission, para. 58; and second written submission, para. 12.

[200] Japan's first written submission, para. 218; second written submission, para. 121; and opening statement at the second meeting of the Panel, para. 39.

[201] Japan's first written submission, para. 216; and second written submission, para. 124.

[202] Ukraine's first written submission, para. 114.

[203] Ukraine's second written submission, para. 14; and response to Panel question No. 3.

[204] Ukraine's opening statement at the second meeting of the Panel, paras. 44-45.

maintains that a one-year gap between the conclusion of the investigation and the actual imposition of the safeguard measure is also too long. Japan submits that the increase in imports relied upon by the competent authorities was therefore not recent enough.[205] According to Japan, the measure at issue applied as of April 2013 can hardly be justified to be an "emergency action" within the meaning of Article XIX:1(a) and Article 11.1(a) when the increase in imports which must be demonstrated before such measures may be imposed relates to imports before 2011.[206] Furthermore, Japan contends that even if a significant delay could in principle be justified by good-faith efforts on the part of a WTO Member to conduct negotiations subsequent to the investigation, no such efforts were made in the present case. Japan argues that after providing the Key Findings to certain interested parties, including Japan, the competent authorities did not contact them again, nor did they make any other good faith efforts to settle the case before resorting to the application of a safeguard measure.[207]

7.162. The Panel begins by clarifying certain relevant facts regarding the chronology of events in this case. As will be explained in the section below concerning the requirement to notify the WTO Committee on Safeguards[208], the evidence on record supports the conclusion that the competent authorities in this case made their finding and determination that imports in 2010 had increased relative to domestic production compared to 2008 long before they decided to apply a safeguard measure. Specifically, we explain below that in our view the competent authorities made a determination of threat of serious injury caused by increased imports on 28 April 2012 (which was not published), but only decided to apply a safeguard measure on 14 March 2013.[209] The measure entered into force one month later. There was thus a time gap between the end of the period of investigation in 2010 and the date of the substantive determination in April 2012, and an even longer time gap between the end of the period of investigation and the decision to apply the safeguard measure in March 2013. Japan questions the appropriateness of both time gaps under Article 2.1.

7.163. Under Article 2.1, if a Member has determined that the relevant requirements, which include increased imports, are satisfied, it may apply a safeguard measure. Neither Article 2.1 nor any other provision of the Agreement on Safeguards specifies any maximum permissible time gap between, on the one hand, the end of the period of investigation, and, on the other hand, (i) the date on which the enabling substantive determination is made and (ii) the date of the decision to apply a safeguard measure based on that determination. Nonetheless, Article 2.1 requires that the product concerned "is being imported" in increased quantities. The Appellate Body made the following observation regarding this phrase:

> In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[130] In our view, the phrase "is being imported" implies that the increase in imports must have been sudden and recent.

Footnote 130 reads:

> The Panel ... recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.[210]

[205] Japan's second written submission, para. 124.
[206] Japan's opening statement at the first meeting of the Panel, para. 68.
[207] Japan's second written submission, para. 125.
[208] See paras. 7.484-7.494 below.
[209] The Panel record contains no evidence of any subsequent determination that would have complemented or replaced the determination of 28 April 2012.
[210] Appellate Body Report, *Argentina – Footwear* (*EC*), para. 130 (emphasis original).

7.164. The dispute before us presents the issue whether the increase in imports must have been recent (i) in relation to the date on which the Member concerned determines that all requirements for applying a safeguard measure are met (date of the determination); (ii) in relation to the date on which that Member decides to apply a safeguard measure (date of the decision on application); or (iii) in relation to both these dates.

7.165. It is clear to us from the above-quoted statement by the Appellate Body that the increase in imports must be recent in relation to the date of determination. The Appellate Body refers to the competent authorities' "examination" and "investigation". The present continuous form in the phrase "is being imported" indicates that at the time of determination the increase in imports must have been recent. It is understood, however, that the determination comes at the end of an investigation[211], which in itself requires time, and that this investigation must be based on available import data. There thus will ordinarily be some time gap between the end of the period of investigation and the date of determination. As noted, that gap is explained by the time required to conduct the investigation and the availability of necessary data. In our view, in assessing whether an increase in imports was recent in relation to the date of determination, we must take account of the time required to conduct and complete a proper investigation.

7.166. We now consider whether the increase in imports must also be recent in relation to the date of the decision to apply a safeguard measure. As a contextual matter, we note that the notification requirements in Article 12.1 indicate that the date of determination and the date of the decision on application need not necessarily coincide. They may in the legal systems of some Members, but not in others. Article 12.1 accordingly requires that the importing Member notify the WTO Committee on Safeguards immediately upon (i) making a finding on serious injury or threat thereof caused by increased imports – which is the date of the determination, as we use that term here – and (ii) taking a decision to apply a safeguard measure. To us, Article 12.1 suggests that, depending on the institutional context of a particular Member, the decision to apply a safeguard measure can come after the determination. In those cases, some delay between the date of the determination and the decision on application may, therefore, be justified.[212]

7.167. Ukraine referred to consultations with other Members as a reason for the time gap in this case. According to Article 12.3, Members "proposing to apply a ... safeguard measure" must provide adequate opportunity for "prior consultations". The phrase "proposing to apply" suggests that the requirement to give adequate opportunity for consultations arises once a Member has taken a "decision to apply" a safeguard measure, which may in some Members, be after the date of determination.[213] If a Member chooses to provide an additional opportunity for consultations already after the date of determination, some limited delay may, in our view, be justifiable, if the Member concerned engages in these consultations in good faith and they could still influence the decision to apply a safeguard measure.

7.168. Ukraine's position, however, appears to be that if the relevant conditions and circumstances are met on the date of determination, the relevant Member has the right pursuant to Article 2.1 to apply an appropriate safeguard measure whenever it sees fit thereafter. In its view, apparently, the only question that may arise from a delay in application is whether a measure that is applied following some delay is being applied, as required by Articles 5 and 7 of the Agreement on Safeguards, only to the extent necessary, and for such period as may be necessary, to prevent or remedy serious injury and to facilitate adjustment.[214]

7.169. Ukraine's interpretation of Article 2.1 raises serious concerns, in our view. Under Ukraine's interpretation, a Member could apply a safeguard measure based on data that is not the most recent data available at the time of the application of the measure. Ukraine's interpretation thus raises the possibility that a few years after the end of an investigation and the making of a determination, a Member would proceed to apply a safeguard measure that would not be justified if the Member's substantive determination had been based on more recent available data.

[211] Article 3.1 of the Agreement on Safeguards provides that a Member may apply a safeguard measure "only following an investigation by the competent authorities".

[212] See para. 7.462 below.

[213] See also para. 7.532 below.

[214] For the texts of Articles 5 and 7, see paras. 7.367-7.368 below.

7.170. To us, this is a troubling prospect. The Agreement on Safeguards "permits Members to impose measures against 'fair trade'"[215] and, to that end, gives Members the exceptional right, subject to certain conditions, to withdraw or modify a tariff concession or suspend another obligation under the GATT 1994 in order to take "emergency action on imports" of a particular product.[216] However, the right to apply a safeguard measure, once established, cannot be saved for future use. We therefore consider that the "extraordinary nature of safeguard measures"[217] militates against an interpretation of Article 2.1 under which a safeguard measure could be applied in situations that are not (or are no longer) emergencies.

7.171. Ukraine suggests that the Panel should address these concerns, if at all, under Articles 5 and 7. However, Japan has brought relevant claims under Article 2.1.[218] Even assuming that Articles 5 and 7 could be invoked as bases for similar claims, we must address Japan's claims under Article 2.1.

7.172. In view of the foregoing, an increase in imports must in our view not only be recent in relation to the date of the determination, but also in relation to the date of the decision to apply a safeguard measure. This minimizes the potential of "emergency action" being taken outside emergency situations by ensuring that any time gap between the determination and the application of a safeguard measure remains appropriately limited.

7.173. The question of precisely where the line is to be drawn between time gaps that pass muster and those that do not can in our view be answered only in the context of a case-by-case assessment.[219] We consider that in the absence of an explicit limitation in the text of the Agreement on Safeguards, there is, and properly should be, some flexibility for the importing Member to determine how soon after the date of determination a safeguard measure should be applied. While there is no fixed maximum permissible time gap, it is clear to us that not all time gaps would be acceptable. Indeed, while it may in certain circumstances be permissible to stretch the elastic band that connects the decision to apply a safeguard measure to the facts underlying the substantive determination, that band must not be stretched to a point where it snaps. A delay may remove the date of application of a safeguard measure (and/or the date of the substantive determination on which it is based) so far from the underlying facts that it is no longer possible to maintain, when a Member finally decides to apply a safeguard measure (or makes its substantive determination), that a product "is being imported" in increased quantities. In such circumstances, the continued relevance of the associated determination can reasonably be questioned.

7.174. Turning to the dispute before us, we begin by summarizing the relevant facts. First, there was a time gap of almost 16 months between the end of the period of investigation (2010) and the date of the substantive determination of threat of serious injury caused by increased imports (28 April 2012), and a time gap of more than two years between the end of the period of investigation and the date of the decision to apply the safeguard measure (14 March 2013). Second, the competent authorities initiated their investigation on 2 July 2011 and completed on 28 April 2012.[220] Thus, the investigation, which was extended once through a public notice, took less than ten months, which, we note, is less than the 11-month maximum duration permitted under Ukraine's Safeguards Law.[221] Finally, there was a time gap of ten and a half months

[215] Appellate Body Report, *US – Line Pipe*, para. 109.

[216] Article XIX is entitled "Emergency Action on Imports of Particular Products", and Article 11.1(a) uses the same phrase.

[217] Appellate Body Report, *US – Line Pipe*, para. 81.

[218] Japan also brought a claim under Article 5.1, but has not laid particular emphasis on it. Japan's second written submission, para. 237.

[219] The Appellate Body in a dispute arising from the Anti-Dumping Agreement and concerning an injury determination similarly indicated that "using a remote investigation period is not *per se* a violation of Article 3.1" of the Anti-Dumping Agreement. The Appellate Body then went on to state, however, that subject to an assessment of the particular circumstances surrounding a specific investigation, certain delays following the end of the period of investigation "may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury". See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.

[220] Ukraine's response to Panel question No. 124.

[221] The investigation was extended on 7 March 2012, for a period of 60 days, based on Article 8.3 of Ukraine's Safeguards Law. Article 8.3 provides that the duration of an investigation must not exceed 270 days, unless the competent authorities decide to extend that duration by 60 days in extraordinary circumstances, in which case they must issue a public notice to that effect. The relevant notice indicates that the extension in

between the substantive determination and the decision to apply the measure. Ukraine's Safeguards Law does not appear to require such a delay between the date of determination and the date of a decision to apply a safeguard measure.[222] Indeed, Ukraine does not argue that its Safeguards Law mandated this particular delay. Rather, Ukraine argues that the delay resulted from the need to complete consultations with certain Members exporting passenger cars to Ukraine. We also note that no effort appears to have been made to update the data after the date of the determination and revisit the determination in that light.[223]

7.175. We commence our analysis with the time gap between the end of the period of investigation and the date of determination, which amounted to a little less than 16 months. The initial six months of this time gap resulted from the fact that the competent authorities only initiated the investigation in July 2011 with a period of investigation covering data for the three most recent years for which such data was available at the time of initiation.[224] Japan has not demonstrated that the competent authorities at that time or soon thereafter had access to, and could have evaluated, more recent data, not just for imports, but also for relevant injury and causal factors to be investigated at the same time. Nor has Japan established that using annual data is in itself a questionable practice.[225] In the light of this, we see no reason to question the six-month time gap.

7.176. The duration of the investigation was extended, but still remained below the maximum permitted under the Safeguards Law. We note that the Agreement on Safeguards establishes no requirement or guideline concerning the duration of a safeguard investigation. Japan has not put forward specific arguments to suggest that this investigation took longer than needed. We observe in this respect that Ukraine published a notice specifically on the extension of the investigation. That extension necessarily implied a concomitant delay in the substantive determination, and consequently in the application of any safeguard measure that might be based on the results of the investigation. Furthermore, the record indicates that after, and possibly in response to, consultations held with Japan on 19 April 2012, i.e. prior to the conclusion of the investigation, the competent authorities lowered the proposed duty rate.[226] This suggests that the competent authorities were actively engaged right up to the end of the investigation. In the absence of any arguments from Japan in this respect, there is no basis to find that the investigation in this case should have taken less time than it did.[227]

7.177. For these reasons, we consider that in the particular circumstances of this case the 16-month time gap following the end of the period of investigation did not remove the date of the determination so far from the underlying facts as to call into question the conclusion that there was a "recent" increase in imports as of that date. We therefore find that Japan has not established that the relative increase in imports determined to have existed in this case on the basis of data covering the period 2008-2010 was not recent enough in relation to the date of determination, 28 April 2012.

7.178. We proceed to analyse the time gap of more than two years between the end of the period of investigation in 2010 and the date of the decision to apply the safeguard measure, 14 March 2013. We have already considered the first 16 months of this time gap. All that remains for us to examine, therefore, is whether the additional ten and a half months that followed the

this case occurred in order to allow a more thorough examination and evaluation of "a number of circumstances, which are directly related to the establishment of the required facts". Notice of Extension of Period of the Safeguard Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export, (Exhibit JPN-5).

[222] The relevant provision appears to be Article 16.11, which indicates that, on request from the Commission, the Ministry is to publish the Commission's decision on application of a safeguard measure.

[223] Ukraine indicated that it updated the data relating to the 2008-2010 period of investigation with some more recent information concerning import volumes in relative terms that was available *before* the investigation was concluded. Ukraine's second written submission, paras. 11-12.

[224] Ukraine's first written submission, para. 56. According to Article 8.2 of the Safeguards Law the period of investigation normally covers between one and three years, exceptionally more than three years.

[225] Japan merely pointed out that Ukraine collected additional data for the first half of 2011 that was available, but did not discuss it in the Notice of 14 March 2013. Japan's response to Panel question No. 24.

[226] Exhibits JPN-6 (Revised Version), p. 7, and JPN-2, p. 4.

[227] We note in passing that in the anti-dumping and countervailing duty context, investigations must, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation. See Article 5.10 of the Anti-Dumping Agreement and Article 11.11 of the SCM Agreement.

substantive determination removed the date of the decision to apply the safeguard measure too far from the facts underlying that determination. In our view, an important consideration in this respect is whether, if the competent authorities had proceeded differently, they could have taken the decision to apply the safeguard measure on or around 14 March 2013 taking into account more recent data, although this might have entailed a new investigation. Data for the full year 2012 would probably not have been available in time to allow its consideration in the context of a decision taken in March 2013. But it is clear to us that data for the year 2011 would have been available. Thus, the competent authorities could have updated the data to take into account data for the year 2011, whether by extending the period of investigation or some other mechanism, and taken a decision to apply a safeguard measure on the basis of that more recent information in March 2013. This alternative scenario suggests that if the competent authorities had proceeded differently after they made their determination in 2012, they could have made a decision on whether to apply a safeguard measure on or around 14 March 2013, but based on more recent data that would have included the year 2011.[228]

7.179. It is reasonable to assume that a change in the data being evaluated by the competent authorities could possibly have resulted in a different substantive determination in this case.[229] Indeed, the jurisprudence indicates in this regard that particular importance attaches to developments in the most recent portion of a period of investigation, especially in a threat of serious injury case such as the present one.[230]

7.180. Ukraine contends that the time gap between the date of the determination and the date of the decision to apply the safeguard measure was justified because it engaged in consultations on the measure with various Members. The evidence on record does not permit us to confirm whether various meetings identified by Ukraine with trade representatives of other countries concerned exclusively, or even mainly, the proposed safeguard measure, or whether meaningful efforts were in fact undertaken towards adjusting the proposed measure in response to the representations of other countries. However, Ukraine does not argue that these meetings led to any change in the proposed measure.[231]

7.181. In any event, as mentioned above, we accept that consultations undertaken in good faith with other Members may, in principle, justify some delay in the application of a safeguard measure. We have also explained, however, that a delay, even an otherwise legitimate one, may remove the date of the decision to apply a safeguard measure so far from the facts underlying the substantive determination that it is no longer possible to maintain, on that date, that a product "is being imported" in increased quantities and that justifiable misgivings arise regarding the continued relevance of the existing substantive determination. For the reasons we have just explained, the dispute before us in our view fits within this latter category.

7.182. In our assessment, the time gap between the competent authorities' determination and the decision to apply the safeguard measure was such that, on 14 March 2013, the competent authorities could no longer maintain, based on data from 2008 to 2010 alone, that passenger cars were "being imported" in increased quantities within the meaning of Article 2.1 and that the determination of, *inter alia*, increased imports that they made on 28 April 2012 continued to rest on a sufficient factual basis. We also note that Article 2.1 admits of no exception with regard to the requirement to ensure that a safeguard measure be applied only if a product "is being imported ... in such increased quantities". Thus, even ongoing, good faith consultations would not justify a departure from the requirements of Article 2.1.

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[228] We note that it is not relevant for the purposes of these WTO panel proceedings whether these alternatives were permissible under Ukraine's Safeguards Law.

[229] As it is not for us as an adjudicating body, but the competent Ukrainian authorities, to determine what substantive determination would be supported by data covering a different period of investigation, what matters, in our view, is whether a change in the data that was evaluated could potentially have resulted in a different determination. It is therefore not material whether or not we would have determined, looking at any data before us for the period 2009-2011, that the determination would have been different. We note in this respect that import data provided by Japan indicates that imports increased in 2011 in absolute terms. See para. 7.142 above. However, the competent authorities would of course have to consider also the development of all relevant injury and causal factors for 2011, for which we have not seen the data.

[230] Appellate Body Reports, *US – Steel Safeguards*, para. 388; and *US – Lamb*, paras. 137 and 138.

[231] As stated previously, the proposed measure had already been changed before the final determination, following consultations with Japan.

7.183. This interpretation in our view does not hamper legitimate efforts that an importing Member might undertake with a view to crafting a safeguard measure that takes into account the concerns and interests of affected exporting countries.[232] We recall that before applying a safeguard measure, the importing Member must, pursuant to Article 12.3, provide an opportunity for consultations with Members having a substantial export interest. If an importing Member wishes to engage in additional bilateral discussions with exporting countries following its substantive determination, there would appear to be ways to accomplish this. But we see no provision in the Agreement on Safeguards under which the holding of such additional bilateral discussions would excuse an inconsistency with an express obligation set out in the Agreement.

7.184. For these reasons, we consider that in the particular circumstances of this case the time gap of more than two years following the end of the period of investigation removed the date of the decision to apply the safeguard measure at issue too far from the underlying facts for the competent authorities to be justified in concluding that there was a "recent" increase in imports as of that date. We therefore find that the relative increase in imports, which the competent authorities determined to have existed in this case on the basis of data covering the period 2008-2010, was not recent enough in relation to the date of the decision to apply a safeguard measure, 14 March 2013.

7.185. Having regard to all of the above, we therefore conclude that Ukraine acted inconsistently with Article 2.1, and specifically its requirement that a product "is being imported" in increased quantities, by applying a safeguard measure that was not based on a "recent" increase in imports.

7.3.1.4 "[U]nder such conditions"

7.186. The Panel turns, finally, to Japan's additional contention that Ukraine did not make a proper determination of "increased imports", because it failed to examine the "conditions" under which the increase in imports occurred.

7.187. Japan argues that, pursuant to Article 2.1, the competent authorities must examine the "conditions" under which the imports occur. Relying on a statement of the Appellate Body in *US – Steel Safeguards*, Japan contends that the question whether "increased quantities" of imports will suffice to justify the application of a safeguard measure can be answered only in the light of the "conditions" under which those imports occur. Japan further refers to the panel report in *Argentina – Footwear (EC)*, arguing that the phrase "under such conditions" indicates the need to analyse the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. Thus, Japan considers that the analysis of the conditions under which the imports occur is important in order to properly evaluate whether the increased quantities of imports are such as to qualify as "increased imports" under Article 2.1.[233]

7.188. Regarding the dispute at hand, Japan submits that Ukraine failed to examine the "conditions" under which the increased imports occurred. In Japan's view, it is highly relevant that while imports increased in relative terms, the volume of imports in absolute terms decreased substantially. Japan argues that without an analysis of the relevant "conditions", Ukraine was not in a position to properly evaluate whether the imposition of a safeguard measure was warranted. According to Japan, the Notice of 14 March 2013 identifies the drop in domestic consumption and the decrease of the market share of the domestic producers, but does not identify the "conditions" under which the imports occurred. Japan argues that even if one were to assume that these developments are meant to be "conditions", the Notice of 14 March 2013 does not offer any

[232] We recall that in the present case it is unclear what specific efforts were undertaken in that direction. Moreover, we have not been made aware of any such efforts having resulted in a change to the proposed safeguard measure.

[233] Japan's first written submission, paras. 108–110 and 233; second written submission, paras. 139–141; opening statement at the second meeting of the Panel, para. 43; Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Appellate Body Report, *US – Steel Safeguards*, para. 351.

"reasoned and adequate explanation" as to how these developments constituted "such conditions as to cause or threaten serious injury to domestic producers".[234]

7.189. In response, Ukraine argues that the lack of examination of the "conditions" of the increase in imports is not pertinent to the question whether increased imports were found to exist and concerns the different question of causation.[235]

7.190. The Panel recalls that Article 2.1 contains the phrase "such product is being imported into its territory in such increased quantities … and under such conditions as to cause or threaten to cause serious injury to the domestic industry…". In our view, this phrase identifies two distinct elements. The first element refers to increased quantities of imports, while the second refers to the conditions under which they occur, which must be such as to make it possible for those increased quantities to cause serious injury or threat thereof. The "conditions" under which imports occur in our view have no bearing on whether or not there have been increased quantities of imports. Consequently, we do not consider that an analysis of the "conditions" under which imports occur forms an integral part of the analysis of the quantities in which imports occur. This view is consistent with the finding of the panel in *Argentina – Footwear (EC)*, which stated that "the phrase 'under such conditions' in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b)".[236] The Appellate Body in *US – Wheat Gluten* agreed with the panel's analysis and linked the phrase "under such conditions" to the analysis of causation under Article 4.2(b).[237] We thus agree with Ukraine that the examination of the conditions under which the imports occur is relevant to the question of causation. Accordingly, we will consider whether Ukraine analysed the conditions under which the imports occurred when we address Ukraine's determination of the causal link between increased imports and serious injury or threat thereof to the domestic industry later in our report.[238]

7.3.1.5 Overall conclusion

7.191. In sum, the Panel has found above that:

a. Ukraine has failed to provide an explanation in its published report regarding how intervening trends in imports relative to domestic production supported the competent authorities' determination that there was a relative increase for the period of investigation 2008-2010;

b. Ukraine has failed to demonstrate that the increase in imports was sudden enough, sharp enough, and significant enough;

c. there is no need to make findings regarding whether Ukraine should have provided the amounts of imports;

d. Ukraine has failed to demonstrate that the increase in imports was recent enough; and

e. the issue whether Ukraine analysed the conditions under which the imports occurred is to be addressed in the context of the Panel's analysis of causation.

7.192. Based on these findings, we therefore conclude that the competent authorities' determination of increased imports in this case is inconsistent with Article 2.1.

[234] Japan's first written submission, paras. 234-235; second written submission, para. 141; and opening statement at the second meeting of the Panel, para. 43.
[235] Ukraine's first written submission, para. 125.
[236] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; see also Panel Report, *US – Wheat Gluten*, para. 8.108.
[237] Appellate Body Report, *US – Wheat Gluten*, paras. 76-78.
[238] See para. 7.297 below.

7.3.2 Claims under Articles 3.1, 4.2(a), 4.2(c), and 11.1(a), and Article XIX:1(a)

7.193. The Panel now turns to address the remainder of the group of claims relating to Ukraine's determination of increased imports. We first address, jointly, Japan's claims under Articles 4.2(a)[239], and 11.1(a)[240], and Article XIX:1(a).[241]

7.3.2.1 Claims under Articles 4.2(a) and 11.1(a), and Article XIX:1(a)

7.194. Japan claims that in making its determination on increased imports, Ukraine acted inconsistently also with Articles 4.2(a), and 11.1(a), and Article XIX:1(a). Specifically, Japan argues that: (i) Ukraine failed to demonstrate that the increase in imports was recent enough, sudden enough, sharp enough, and significant enough; (ii) Ukraine failed to make a qualitative analysis of the data on imports taking into account the intervening trends; (iii) Ukraine failed to demonstrate that the increased imports were "unforeseen" or "unexpected"; and (iv) Ukraine failed to examine the "conditions" under which the increase in imports occurred.[242]

7.195. Ukraine considers that Japan's claims are without merit. Ukraine submits that it has clearly established the sudden, recent, and sharp increase in imported products relative to domestic production. Ukraine contends that it has met its obligations under the Agreement on Safeguards by examining all elements related to the increase in imports.[243]

7.196. The Panel has concluded above that the competent authorities' determination of increased imports is inconsistent with Article 2.1. In the light of this, we do not consider it necessary, for the purposes of resolving this dispute, to make additional findings on whether Ukraine, in respect of the same determination, has also acted inconsistently with its obligations under Articles 4.2(a), and 11.1(a), and Article XIX:1(a). We consequently exercise judicial economy and make no findings with regard to these claims.

7.3.2.2 Claims under Article 3.1, last sentence, and Article 4.2(c)

7.197. We turn, finally, to Japan's claim that Ukraine acted inconsistently with Article 3.1, last sentence, and Article 4.2(c) in respect of its determination of the increase in imports.

7.198. Japan submits that, contrary to what is required by Articles 3.1 and 4.2(c), Ukraine failed to provide a "reasoned and adequate explanation" for the determination of "increased imports". Japan, referring to the Appellate Body Report in *US – Steel Safeguards*, argues that both Articles 3.1 and 4.2(c) apply to the determination of increased imports. Japan points out that according to the Appellate Body the condition that there must be "increased imports" constitutes a pertinent issue of fact and law within the meaning of Article 3.1.[244] Japan contends that the published report in this case, i.e. the Notice of 14 March 2013, does not set forth any findings and reasoned conclusions regarding the determination of "increased imports". According to Japan, the Notice merely states that imports of the product concerned increased in 2010 as compared to 2008 relative to domestic production by 37.9% without giving further reasoned explanations and conclusions. Japan notes that, in particular, the Notice does not give any explanation of how the fact that imports decreased in absolute terms by 71% in 2010 compared to 2008, but increased by 38% relative to domestic production, supports the determination that a safeguard measure was warranted.[245]

7.199. In response, Ukraine insists that the Notice of 14 March 2013 and the Key Findings contain a detailed analysis of the case under investigation as well as a demonstration of the relevance of

[239] For the text of Article 4.2(a), see para. 7.202 below.
[240] For the text of Article 11.1(a), see para. 7.106 above.
[241] For the text of Article XIX:1(a), see para. 7.43 above.
[242] Japan's first written submission, paras. 212-213.
[243] Ukraine's first written submission, paras. 108 and 126; opening statement at the first meeting of the Panel, para. 53; second written submission, paras. 48, 49 and 54; and opening statement at the second meeting of the Panel, paras. 40, 42 and 54.
[244] Appellate Body Report, *US – Steel Safeguards*, paras. 289 and 331.
[245] Japan's first written submission, paras. 238-239 and 241-242; second written submission, para. 142; and opening statement at the second meeting of the Panel, para. 38.

the factors examined. Ukraine further argues that a more detailed analysis and its results were presented to the Commission and were the basis for the imposition of the safeguard measure. Ukraine notes, however, that they were confidential and were therefore not disclosed to Japan.[246]

7.200. The Panel has concluded above that the competent authorities' determination of increased imports is inconsistent with Article 2.1. In the light of this, we see no need to make findings on whether, in respect of the same determination, Ukraine has also acted inconsistently with Articles 3.1 and 4.2(c). We consequently exercise judicial economy and make no findings with regard to these claims.

7.4 Claims relating to threat of serious injury

7.201. The Panel now turns to Japan's claims related to the manner in which the competent authorities made their findings regarding the serious injury or threat thereof, under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2 (b), 4.2(c) and 11.1(a), and Article XIX:1(a). We will begin our consideration with the claim under Article 4.2(a), which in our view contains the most specific rules on the injury determination Members must make in a safeguard investigation, that is to say, a determination of whether increased imports cause or threaten to cause serious injury to the domestic industry.

7.4.1 Claim under Article 4.2(a)

7.202. Article 4.2(a) provides as follows:

> 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 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.

7.203. Japan claims that Ukraine acted inconsistently with, *inter alia,* Article 4.2(a) in making its serious injury and/or threat of serious injury determination on a number of bases. Japan argues that the competent authorities failed to evaluate all relevant factors. Japan notes that Article 4.2(a) sets out a non-exhaustive list of injury factors that must be evaluated by the competent authorities during a safeguard investigation. According to Japan, however, the Notice of 14 March 2013 does not even refer to one of these factors, the "share of the domestic market taken by the increased imports". Japan further asserts that, while the competent authorities referred to the rate of the increase in imports, they did not refer to, much less evaluate the "amounts" of such increase.[247] In Japan's view, evaluation is a process of analysis which requires an examination of the data pertaining to each factor individually and of each factor in relation to the other factors examined.[248] Japan submits that, in the Notice, the competent authorities merely listed the rate of increase or decrease for the injury factors without properly evaluating them.[249]

7.204. Japan contends that it is not clear from the Notice whether the competent authorities made a finding of serious injury and/or threat of serious injury.[250] Japan considers that this failure constitutes in itself a violation of the relevant provisions of the Agreement on Safeguards, because Ukraine cannot have provided an adequate and reasoned explanation as to why the facts on the record supported the conclusion it made.[251]

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[246] Ukraine's first written submission, para.124; opening statement at the first meeting of the Panel, para. 52; and second written submission, para. 53.
[247] Japan's first written submission, para. 252.
[248] Ibid. para. 258.
[249] Ibid. para. 255.
[250] Ibid. para. 251.
[251] Japan's opening statement at the first meeting of the Panel, paras. 77 and 78; second written submission, paras. 147 and 148.

7.205. With regard to the competent authorities' determination of threat of serious injury, Japan argues that the determination failed to demonstrate a "significant overall impairment" that is "clearly imminent". Japan argues that the very limited reasoning in the Notice does not show that serious injury was on the very verge of occurring, nor that there was a high degree of likelihood that the anticipated serious injury will materialize in the very near future.[252]

7.206. Finally, Japan argues that the competent authorities failed to make a determination based on the recent past by relying on data for the period between 2008 and 2010 while adopting the safeguard measure in 2012 and applying it in April 2013.[253] Japan refers to the Appellate Body's statement in *US – Lamb* that in making a determination of a threat of serious injury the competent authorities should pay particular attention to the data from the most recent past in this regard.

7.207. Ukraine submits that its competent authorities conducted a proper analysis of the relevant injury factors in making the threat of injury determination.[254] Referring to a chart containing a "public summary" of the injury factors analysed by its competent authorities, Ukraine maintains that it did not exclusively rely on end-point-to-end-point comparisons, but analysed the trend over the entire investigation period as well, including the data for the intervening year of 2009.[255] According to Ukraine, the deterioration of each of the factors from 2008 to 2010 shows a potential for significant injury, with certain factors such as market share providing the factual basis for a finding that serious injury is "clearly imminent".[256] Ukraine adds that, in addition to the worsening condition of the domestic industry, its competent authorities also analysed the capacity for future exports by exporting countries.[257]

7.208. With regard to the amounts of the increase, Ukraine argues that further to a request from the domestic industry, this information was treated as confidential under Article 3.2 of the Agreement on Safeguards and Article 12 of its Safeguard Law.[258]

7.209. According to Ukraine, Japan also fails to give full consideration to the documentation issued by Ukraine. Ukraine maintains that the competent authorities clearly analysed the market share data and stated in the Notice that "the share of domestic production in the domestic market of Ukraine also decreased by 35%".[259]

7.210. In response to Japan's argument that Ukraine failed to make an injury determination on the basis of data from the recent past by applying the measure in 2013 on the basis of data from 2008 to 2010, Ukraine submits that Japan should have brought a claim under Articles 5 or 7 of the Agreement on Safeguards dealing with the application of the safeguard measure. According to Ukraine, there can be no doubt that the right to apply a safeguard measure existed at the time the determination was made.[260]

7.211. Ukraine also argues that there is no need to make a discrete finding of serious injury or threat of serious injury under the Agreement on Safeguards.[261] Ukraine clarifies in this respect that its competent authorities considered that the standards of serious injury were not met incontestably in the present case despite the fact that all relevant factors confirmed the worsening condition of the domestic industry. However, the competent authorities took the view that the standards concerning the threat of serious injury are "remarkably" lower if such threat is shown to be imminent[262], and concluded that the worsening of all the relevant injury factors combined with the significant export potential of the notable exporters of motor cars to Ukraine constituted a threat of serious injury.[263]

[252] Japan's first written submission, para. 262.
[253] Ibid. para. 268.
[254] Ukraine's first written submission, para. 150; second written submission, para. 57.
[255] Ukraine's first written submission, paras. 135 and 145. (Exhibit UKR-3)
[256] Ibid. referring to Appellate Body Report, *US – Lamb*, paras. 136-138.
[257] Ukraine's first written submission, para. 141; second written submission, para. 59.
[258] Ukraine's response to Panel question No. 2.
[259] Ukraine's first written submission, para. 134.
[260] Ibid. para. 149.
[261] Ibid. para. 133, referring to Appellate Body Report, *US – Line Pipe*, paras. 169-172.
[262] Ibid.
[263] Ukraine's response to Panel question Nos. 4 and 20.

7.212. Japan responds that its claim is not that the competent authorities should have made a finding of serious injury only or threat of serious injury only. Rather, Japan claims that the requirement to give an adequate and reasoned explanation as to why the facts on the record support a determination of serious injury and/or threat thereof necessarily implies that the type of determination made must be clearly identified in the published report.[264]

7.4.1.1 The competent authorities' determination

7.213. The Panel will first examine Japan's contention that Ukraine failed to clearly identify in the published report whether the determination was one of serious injury and/or threat of serious injury.

7.214. As before, we base our evaluation on the Notice of 14 March 2013, which we consider is the published report within the meaning of Articles 3.1 and 4.2(c). So far as the injury analysis is concerned, that document contains two sections. Section 2 is headed "Research on existing or likely future export potential of countries of origin or exporting countries, as well as the possibility that such potential will be used for exports of the Product to Ukraine". As indicated by the heading of this section, the competent authorities analysed in this section the existing or likely future export potential of certain key exporting countries of passenger cars, namely Turkey, Korea, Romania, Germany, Japan, and Russia. The conclusion of that section reads as follows:

> Given this, the noted trends in the development of the world automotive industry within the sense of Article 13 § 3(2) of the Law (on Safeguards of Ukraine) confirm that existing or near-future *export potential* in countries of origin or export countries may be used for exporting automobiles to Ukraine.[265]

7.215. The other section on the injury analysis, Section 3, is headed "Examination of trends of Product import to Ukraine affecting the domestic industry and existence of causal link between increased imports of Products to Ukraine and threat of serious injury to the domestic industry".[266] In this section, the competent authorities set out an analysis of the relevant injury factors during the period of investigation, i.e. from 2008 to 2010, including the production volume of the domestic industry, capacity utilisation, sales volumes within the domestic market, operating profit, employment, productivity, the volume of imports, and the share of domestic production in the domestic market. The conclusion of that section reads as follows:

> In light of the increased import volume of the Product to Ukraine and conditions of such import, the domestic industry was driven out of the domestic market within Ukraine, resulting in a worsening of the poor state of the national industry and a *threat of serious injury* to the domestic industry.
>
> ...
>
> According to the findings of the investigation carried out by the Ministry, the increase of motor cars imports into Ukraine regardless of country of origin and export, relative to domestic production and demand, was occurring under such conditions and volumes that the imports *threatened to cause serious injury* to the domestic industry, which were not caused by other factors.[267]

7.216. The heading and conclusion of Section 3 explicitly refer to a finding of "threat of serious injury". Similarly, the analysis of the future export potential of certain exporting countries under Section 2 reflects a forward-looking perspective that is characteristic of a threat of injury analysis. By contrast, nowhere in the injury analysis did the competent authorities make any finding of actual serious injury. In the light of these elements in the Notice, we consider that the competent authorities made a determination of threat of serious injury only. There is no indication in the Notice that they found serious injury, or serious injury and/or a threat of serious injury.

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[264] Japan's second written submission, para. 149.
[265] Notice of Imposition of 14 March 2013, (Exhibit JPN-2), p. 2. (emphasis added)
[266] Ibid. p. 3.
[267] Ibid. p. 3. (emphasis added)

7.217. This is further confirmed by the unpublished Key Findings.[268] Section 3 of the Key Findings is headed "Determination of serious injury or threat thereof". In this section, the competent authorities first analyse the development of the injury factors from 2008 to 2010. The Key Findings then state that:

> Taking into account the unique position of the interested parties to the investigation, namely that the worsening financial and economic condition of the domestic producer in 2010 compared to 2008 was connected with the decrease of consumption level of the Product in the Ukrainian market, the Ministry has estimated *the possibility of injury caused to the domestic industry in the future*, in particular the existing or potential future export potential of the countries of origin or export countries, as well as the possibility of the said potential being used for the export of this product to Ukraine.
>
> In the context of *the threat of serious injury in the future*, it must be noted that data furnished by the International Organization of Motor Vehicle Manufacturers (OICA) show that in 2008 and in 2010 no vehicle producing country reduced its production of motor cars to the extent that Ukraine did (by 79%). Taking into account that certain countries decreased their production, they consequently have considerable spare capacities which can be re-directed to export markets including that of Ukraine.[269]

7.218. This is followed by further detailed analysis of the export potential of certain key exporting countries including Turkey, Korea, Romania, Germany, Japan, and Russia. On this basis, the competent authorities concluded that:

> An analysis of trends in the global development of the automobile industry within the meaning of clause Article 13 § 3(2) of the Law, conducted by the Ministry, showed that the existing or likely future export potential of the countries of origin and export countries, may be possibly utilized for the export of motor cars subject to investigation to Ukraine.
>
> Research results led to the conclusions that the factors defined in Article 13 § 3 of the Law and Article 4 § 1 of the Agreement with regard to *the threat of serious injury* to the domestic industry, were present."[270]

7.219. In our view, such references as "the possibility of injury caused to the domestic industry in the future", and "in the context of the threat of serious injury in the future" indicate that the competent authorities sought to establish a finding of threat of serious injury. Moreover, we note that the last sentence of the Key Findings cited above states that "[r]esearch results led to the conclusions that the factors … with regard to the threat of serious injury to the domestic industry, were present". It is thus clear to us that the conclusion reached is one of threat of serious injury.

7.220. In the light of the above, and in spite of the fact that there might have been some initial ambiguities in this respect resulting from the Notice of Initiation, we find that in the Notice of 14 March 2013 the competent authorities identified sufficiently clearly that they made an affirmative determination of a threat of serious injury. Consequently, we reject Japan's argument that Ukraine acted inconsistently with its obligations under the Agreement on Safeguards because it failed to clearly identify in the published report whether the determination made was one of serious injury and/or threat of serious injury.

7.221. We note that Japan makes arguments concerning both the competent authorities' analysis of serious injury and their analysis of threat of serious injury. As we have found above that the competent authorities made only a finding of a threat of serious injury in the Notice of 14 March 2013, we will address Japan's claim only insofar as it concerns the threat of serious injury determination.

[268] Exhibit JPN-6 (Revised Version).
[269] Exhibit JPN-6 (Revised Version), p. 3.
[270] Ibid. p. 5. (emphasis added)

7.4.1.2 Analysis of threat of serious injury

7.222. Article 4.1(b), which defines "threat of serious injury" and sets out certain requirements for a determination of such threat, reads:

> "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of [Article 4.2]. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

This definition refers to "serious injury" which is defined, in turn, in Article 4.1(a) as follows:

> "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry.

Thus, a competent authority making a determination of threat of injury must establish (i) the clear imminence of (ii) significant overall impairment in the position of a domestic industry.

7.4.1.2.1 "Significant overall impairment"

7.223. We begin our examination with the second element, "significant overall impairment". The parties disagree on whether the standard of injury for a finding of threat of serious injury is lower than or the same as for a finding of actual serious injury. Ukraine considers that it is widely recognized that the standard for a finding of threat of serious injury" is remarkably lower than for a finding of "serious injury", provided that such threat is shown to be imminent.[271] Japan argues that the Appellate Body in *US – Lamb* when addressing the concept of "serious injury" referred to a "very high standard of injury". According to Japan, this very high standard applies equally to serious injury and the threat thereof.[272]

7.224. As an initial matter, we note that Article 4.1(b) defines "threat of serious injury" as "serious injury" that is clearly imminent. It is thus apparent that, definitionally and conceptually speaking, the "serious injury" to be established in a determination of a "threat of serious injury" is not different from the "serious injury" to be established in a determination of "serious injury". In other words, we perceive no difference between the two types of situations in terms of the level or extent of injury that must be shown – in either case it has to be "serious" injury. The difference between the two situations relates to whether "serious injury" has already materialized – "yes" in the case of a finding of serious injury, "not yet" in the case of a finding of threat of serious injury.

7.225. Regarding the concept of "serious injury", the Appellate Body has on several occasions underscored the very high standard of injury embodied by the concept of serious injury. In *US – Wheat Gluten*, the Appellate Body referred to that standard as "exacting".[273] In *US – Lamb*, the Appellate Body reaffirmed this high standard in the context of "threat of serious injury", observing that:

> [T]he word "injury" is qualified by the adjective "serious", which, in our view, 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.
>
> We are fortified in our view that the standard of "serious injury" in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of "material injury" envisaged under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and the GATT 1994. We believe that the word "serious" connotes a much higher standard of injury than the word "material". Moreover, we submit that it accords with the object and purpose of the Agreement on Safeguards that the injury standard for the application of a

[271] Ukraine's response to Panel question Nos. 4 and 20; first written submission, para. 133.
[272] Japan's first written submission, para. 126 (referring to Appellate Body Report, *US – Lamb*, para. 126.); second written submission, para. 160.
[273] Appellate Body Report, *US – Wheat Gluten*, para. 149.

> safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures ….[274]

The Appellate Body in the same dispute further stated that:

> [I]n making a determination on either the existence of "serious injury" or on a "threat" thereof, panels must always be mindful of the very high standard of injury implied by these terms.[275]

7.226. Having clarified that in common with the concept of "serious injury" the concept of "threat of serious injury" reflects a very high level of injury to be established, it is necessary to look in more detail at the difference between these two concepts. In *US – Line Pipe*, the Appellate Body underscored that the respective definitions of "serious injury" and "threat of serious injury" must be given independent meaning and stated that:

> [T]hese two definitions reflect the reality of how injury occurs to a domestic industry. In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the Agreement on Safeguards, the precise point where a "threat of serious injury" becomes "serious injury" may sometimes be difficult to discern. But, clearly, "serious injury" is something beyond a "threat of serious injury".
>
> In our view, defining "threat of serious injury" separately from "serious injury" serves the purpose of *setting a lower threshold for establishing the right to apply a safeguard measure*. Our reading of the balance struck in the Agreement on Safeguards leads us to conclude that this was done by the Members in concluding the Agreement so that an importing Member may act sooner to take preventive action when increased imports pose a "threat" of "serious injury" to a domestic industry, but have not yet caused "serious injury". And, since a "threat" of "serious injury" is defined as "serious injury" that is "clearly imminent", it logically follows, to us, that "serious injury" is a condition that is above that lower threshold of a "threat". A "serious injury" is beyond a "threat", and, therefore, is above the threshold of a "threat" that is required to establish a right to apply a safeguard measure. [276] (Emphasis added; original emphasis omitted)

7.227. In our view, the Appellate Body's reference to a "lower threshold for establishing the right to apply a safeguard measure" is in respect of the fact that, by definition, a finding of a "threat" of serious injury allows a Member to apply a safeguard measure even though there is not yet any observable serious injury, although such serious injury is clearly imminent, or "just around the corner", as it were. The Agreement on Safeguards reserves this right to Members so that they may take protective action to *prevent* imminent serious injury rather than wait for serious injury to materialize and then remedy it afterwards. It is in this sense of enabling such preventative action even though there is no actual serious injury that we understand the Appellate Body to have referred to the Agreement setting a lower threshold.

7.228. Significantly, however, neither the Agreement nor logic suggests that merely because the Agreement allows application of a safeguard measure even before serious injury has actually occurred, the relevant degree of injury should be easier to demonstrate in such cases. Indeed, this would have the perverse consequence of making it more difficult for a Member whose domestic industry is already suffering actual serious injury to apply a safeguard measure than it would be for the same Member in a case where the same domestic industry is facing a threat of serious

[274] Appellate Body Report, *US – Lamb*, para. 124.
[275] Ibid. para. 126.
[276] Appellate Body Report, *US – Line Pipe*, paras. 168 and 169.

injury, but not yet experiencing such injury. We also find relevant Article 4.1(b), which states that a "determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility". In our view, this requirement confirms that a threat of serious injury determination must be grounded in facts, just like a finding of serious injury.

7.229. Moreover, we note that Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement specifically indicate that "special care" should be taken when deciding to apply anti-dumping or countervailing measures in threat of material injury cases.[277] In our view, "special care" is warranted because a determination of a threat of material injury requires no demonstration of actual, or present, material injury, and there always remains the possibility that the threatened injury would not actually materialize for reasons that were not foreseen at the time of the determination. The same possibility logically exists in the context of a determination of a threat of serious injury in a safeguard investigation. We recognize that neither Article 4.2(a) nor any other provision of the Safeguard Agreement contains the phrase "special care". Nonetheless, the similarities between the definitions and analysis of material injury and threat thereof in the Anti-Dumping Agreement and the SCM Agreement, and those of serious injury and threat thereof in the Agreement on Safeguards underscore and support our concern about Ukraine's view that it should be easier to establish a threat of serious injury than actual serious injury.

7.230. In sum, we agree that the concept of "threat of serious injury" implies a lower threshold for establishing the *right to apply* a safeguard measure, in the sense that it allows a Member to apply a safeguard measure even in the absence of demonstrated serious injury. But, for the reasons explained above, we are unable to agree that the Agreement on Safeguards makes threat of serious injury easier to establish than actual serious injury, such that it would be easier to justify the application of a measure in situations where no actual serious injury has arisen, but a threat thereof exists. In our view, the nature and extent of "serious injury" is the same in both cases – only the timing of that injury is different in the two contexts. Thus, we consider that in both contexts a Member must be able to demonstrate the same elements regarding serious injury. In the threat context, it must be demonstrated in addition that such injury is "clearly imminent". And, like a determination of present serious injury, a determination of threat must be based on facts. In that regard, of course, it must be kept in mind that by its nature, a finding of a threat of serious injury is a forward-looking predictive finding based on facts concerning the present state of the domestic industry.

7.4.1.2.2 "Clearly imminent"

7.231. Regarding the other element of the definition of the concept of "threat of serious injury", which is that serious injury must be "clearly imminent", we recall that the Appellate Body found in *US – Lamb* that:

> The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated "serious injury" must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or remote possibility.' To us, the word 'clearly' relates also to the factual demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.[278]

7.232. Thus, in making a determination of a threat of serious injury the competent authorities need to demonstrate, on the basis of facts rather than conjecture, that serious injury is highly likely to occur in the very near future, unless protective action is taken. In our view, this specific

[277] Article 3.8 of the Anti-Dumping Agreement provides that "[w]ith respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care".

[278] Appellate Body Report, *US – Lamb*, para. 125.

inquiry involves not only an assessment of historical and existing facts but also involves making fact-based projections concerning future developments in the domestic industry's condition.

7.4.1.2.3 Evaluation of relevant factors in a threat of serious injury determination

7.233. Before examining the competent authorities' determination of threat of serious injury in the investigation at issue, we wish to highlight one further element. Article 4.2(a) provides as follows:

> 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 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.[279]

7.234. Thus, in making a determination of a threat of serious injury, the competent authorities must evaluate all relevant injury factors. These include the same mandatory factors identified in Article 4.2(a) that the competent authorities must evaluate when making a determination of serious injury. In the specific case of an analysis of threat of serious injury, the competent authorities must evaluate all relevant factors with a view to determining whether as a whole, they support a finding that "serious injury" is "clearly imminent". This notably requires a fact-based assessment of likely developments in the very near future with respect to all the relevant factors.[280]

7.235. In this context, we consider that data pertaining to the latter part of the period of investigation are of particular relevance to assessing the likely immediate future developments in the injury factors for an analysis of a threat of serious injury.[281]

7.4.1.3 The competent authorities' analysis of threat of serious injury

7.236. With the above considerations in mind, we now go on to examine whether the competent authorities' determination of a threat of serious injury in the present case satisfies the requirements of Article 4.2(a).

7.237. Japan argues that the competent authorities failed to examine all relevant factors, in particular the "amounts" of the increase in imports and the "share of the domestic market taken by increased imports".[282] Regarding the amounts of the increase, Japan submits that both the amounts and rate of increase are relevant factors to be evaluated. Japan submits that, depending on the amounts, the relative increase in the present case may not be significant.[283]

7.238. Furthermore, Japan submits that Ukraine failed to evaluate the injury factors, especially the intervening trends over the period of investigation. Japan asserts that the competent authorities' injury analysis in the Notice of 14 March 2013 consists of merely reporting the rate of change between 2008 and 2010, which in Japan's view does not amount to an "evaluation". In Japan's view, an "evaluation" implies (i) an assessment of the role, relevance and relative weight of each factor, and (ii) an analysis of data through placing it in context in terms of the particular

[279] Emphasis added.

[280] For instance, since one of the relevant factors expressly identified in Article 4.2(a) is "the rate and amount of increase in imports of the product concerned", the competent authorities would need to make a projection on the basis of available facts as to the likely rate and amount of increase in imports in the very near future.

[281] We note the view expressed by the Appellate Body in *US – Lamb* that a focus on available recent data pertaining to the end of an investigation period is appropriate in view of the future-oriented nature of an analysis of threat of serious injury. See Appellate Body Report, *US – Lamb*, para. 137.

[282] Japan's second written submission, para. 152.

[283] Ibid.

evolution of the data pertaining to each factor individually, as well as in relation to other factors.[284] Japan argues in particular that an examination of the intervening trend during the period of investigation is indispensable in making a determination of serious injury or threat of serious injury.[285]

7.239. Japan also argues that Ukraine failed to demonstrate, on the basis of data from the recent past, that a significant overall impairment was clearly imminent. In this connection, Japan observes that neither the Notice nor the Key Findings contain any analysis of the data for 2010 in comparison to 2009.[286] According to Japan, an analysis of that information was particularly important in view of the positive trend in certain of the injury factors at the end of the period of investigation. Furthermore, Japan argues that the Notice and the Key Findings do not contain a prospective analysis as to why the future evolution of injury factors indicates a high degree of likelihood that serious injury is on the verge of occurring.[287] Japan notes that the Notice contains a section on the export potential of certain exporting countries, but provides no explanation as to why that potential would be used for exports to Ukraine, and how the domestic industry would be affected by such future exports, as reflected in the injury factors, so as to justify the conclusion that serious injury was clearly imminent.[288] Finally, Japan argues that Ukraine failed to base its measure on a finding of a threat of serious injury based on data from the recent past, since it applied the measure from 2013 on the basis of data relating to the period 2008-2010.[289]

7.240. Ukraine responds that its competent authorities made a proper determination of threat of serious injury and that all relevant factors were examined, based on the facts on the record, in making this determination. With regard to the amounts of the increase in imports, Ukraine contends that it treated this information as confidential, based on the request of the domestic industry, but provided an indexed, non-confidential summary.[290] Concerning the "share of the domestic market taken by the increased imports", Ukraine argues that Japan fails to give full consideration to the documentation issued by Ukraine, in which it clearly analysed the market share indicator and stated that "the share of domestic production in the domestic market of Ukraine also decreased by 35%".[291]

7.241. Ukraine further argues that its competent authorities did not exclusively rely on end-point-to-end-point comparisons.[292] Ukraine maintains that its competent authorities conducted a proper analysis of the data trend, as evidenced by its public summary of the evolution of all injury factors, which it provided to Japan during the course of the consultations preceding the establishment of the Panel.[293] Ukraine considers that the deterioration of each of the factors from 2008 to 2010 shows a potential for significant injury.[294] In particular, Ukraine points out that the smallest decrease from 2008 to 2010 was the decrease in market share of 35.45%. According to Ukraine, certain factors in particular (including market share) provide the factual basis justifying the finding that serious injury was 'clearly imminent'.[295] Finally, Ukraine argues that, in addition to the worsening condition of the domestic industry, its competent authorities also analysed the export capacity in the exporting countries.[296]

7.242. In response, Japan notes that the public summary referred to by Ukraine and the related explanation in Ukraine's first written submission were not included in the Notice or the Key Findings, and are consequently irrelevant for the Panel's assessment.[297]

[284] Japan's first written submission, para. 258; second written submission, para. 156.
[285] Japan's second written submission, para. 157 (referring to Panel Report, *Argentina – Footwear*, para. 8.217).
[286] Japan's second written submission, paras. 162 and 163.
[287] Japan's second written submission, paras. 164 and 165.
[288] Japan's second written submission, para. 167.
[289] Japan's second written submission, para. 170.
[290] Ukraine's response to Panel question No. 2.
[291] Ukraine's first written submission, para. 134.
[292] Ibid. para. 145.
[293] Ibid. para. 135. (Exhibit UKR-3)
[294] Ibid. para. 136.
[295] Ibid. referring to Appellate Body Report, *US – Lamb*, paras. 136-138.
[296] Ukraine's first written submission, para. 141.
[297] Japan's second written submission, para. 154.

7.243. The Panel will start by examining the relevant sections of the Notice of 14 March 2013. As mentioned above in paragraph 7.214, the competent authorities' injury analysis is contained in two separate sections of the Notice. Section 2 analyses the existing or likely future export potential of certain key countries exporting passenger cars to Ukraine, namely Turkey, Korea, Romania, Germany, Japan and Russia.[298] The competent authorities started from the premise that these countries had reduced their production during the period of investigation and consequently had considerable spare capacity that could be re-directed to export markets, including Ukraine. For each of these exporting countries, the Notice then analyses the production and export development from 2008 to 2010. In addition, for Turkey and Korea, the Notice infers from their increased share in total imports into Ukraine that the Ukrainian market was attractive to them. For Romania, the Notice infers from the increased share of exports in its total production that Romania's car industry was export-oriented. Further details regarding the analysis of the competent authorities are summarized in the table below.

Exporting Country[299]	Analysis in the Notice of Imposition of 14 March 2013
Turkey	- Production dropped from 622,000 in 2008 to 603,000 cars in 2010; - In the meantime, exports dropped from 526,000 (85% of total production) to 440,000 cars (73% of total production); - Share of Turkish cars in the total imports into Ukraine increased by 17% from 2008 to 2010, showing the attractiveness of the Ukrainian market for Turkish exporters.
Korea, Republic of	- Production increased from 3,450,000 in 2008 to 3,866,000 cars in 2010; - In the meantime, exports increased from 2,509,000 (73% of total production) to 2,611,000 cars (68% of total production). - Share of Korean cars in the total imports into Ukraine increased by 79% from 2008 to 2010, showing the attractiveness of the Ukrainian market for Korean exporters.
Romania	- Production increased from 231,000 in 2008 to 324,000 in 2010; - In the meantime, exports increased from 154,000 cars (67% of total production) to 290,000 cars (90% of total production). - The increase of the share of exports shows the export-oriented nature of the Romanian industry. - The share of Romanian cars in the total imports into Ukraine increased by 33% from 2008 to 2010.
Germany	- Production increased from 5,532,000 cars in 2008 to 5,552,000 cars in 2010; - In the meantime, exports increased from 4,132,000 cars (75% of total production) to 4,239,000 cars (76% of total production); - The share of German cars in the total imports into Ukraine increased by 197%, reaching 12%.
Japan	- Production decreased from 9,916,000 cars in 2008 to 8,307,000 cars in 2010; - In the meantime, exports decreased from 5,915,000 cars (60% of total production) to 4,272,000 cars (51% of total production). - The share of Japanese cars in the total imports into Ukraine was 15% in 2010. The numbers show that Japanese producers are able to increase production and, possibly, use existing capacity to export to foreign markets, including Ukraine.

[298] Section 2 is headed "Research on existing or likely future export potential of countries of origin or exporting countries, as well as the possibility that such potential will be used for exports of the Product to Ukraine".

[299] The exporting countries are listed here as they appear in the Notice of 14 March 2013.

Exporting Country[299]	Analysis in the Notice of Imposition of 14 March 2013
Russian Federation	- Production decreased from 1,470,000 cars in 2008 to 1,210,000 cars in 2010. - Exports to Ukraine were 17,000 cars in 2010. - Production capacity was 1,979,600 in 2009 and is planned to increase to 3,150,000 in 2020 according to the "Development Strategy for the Automotive Industry in the Russian Federation by 2020". Approximately 8% of the total production (252,000 cars) is planned for export, mainly to CIS countries. - Existing trends in the development of the Russian automotive industry suggest that Russia's production capacity will likely be used for export of automobiles, inter alia, to Ukraine.

7.244. In Section 3 of the Notice[300], the competent authorities analysed the development of the relevant injury factors during the period of investigation, i.e. 2008-2010. That analysis reads as follows:

> The following indicators in 2010 as compared to 2008 provide evidence of the negative impact of imports of the Product to Ukraine on the domestic industry:
>
> - Production volume of the domestic industry decreased by 78.9%;
>
> - Capacity utilization decreased by 74.86%;
>
> - Sales volumes within the domestic market decreased by 86.33%;
>
> - Operating profit decreased by 89.9%;
>
> - Employment decreased by 51.56%;
>
> - Productivity numbers fell by 46.3%.
>
> At the same time, the volume of imports of motor cars to Ukraine in absolute terms in 2010 compared to 2008 decreased by 71%, but increased by 38% in relation to domestic production within Ukraine. The demand for the Product within Ukraine's domestic market fell by 78.8% between 2008 and 2010, while the share of domestic production in the domestic market of Ukraine also decreased by 35%.
>
> In light of the increased import volume of the Product to Ukraine and conditions of such import, the domestic industry was driven out of the domestic market within Ukraine, resulting in a worsening of the poor state of the national industry and a threat of serious injury to the domestic industry.[301]

7.245. In considering the above analysis, it is important to note that it compares the situation of the domestic industry in 2010 to its situation in 2008, but does not contain any data or analysis regarding the intervening period, nor any trends.

7.246. Examining Sections 2 and 3 of the Notice together, we note that the competent authorities' determination of a threat of serious injury in the present case rests on two findings: one regarding the situation of the domestic industry, which had seen a deterioration in all relevant injury factors from 2008 to 2010; and the other regarding the export potential of certain exporting countries, primarily on the basis of the development of their production and exports between 2008 and 2010. The Notice concludes from these two findings that the worsening of the situation of the domestic industry coupled with the export potential of certain exporting countries supports a finding of a threat of serious injury.

[300] Notice of 14 March 2013 (Exhibit JPN-2), p. 3. Section 3 is headed "Examination of trends of Product import to Ukraine affecting the domestic industry and existence of causal link between increased imports of Products to Ukraine and threat of serious injury to the domestic industry.

[301] Notice of Imposition of 14 March 2013 (Exhibit JPN-2).

7.247. As the parties have also made reference to the Key Findings, we observe that they follow essentially the same structure and have essentially the same content as the Notice with regard to the injury analysis.[302]

7.248. We now turn to examine whether the determination of a threat of injury in the Notice meets the requirements of Article 4.2(a).[303] In *US – Lamb*, the Appellate Body articulated the standard of review to be applied by panels in reviewing the competent authorities' determination of serious injury or threat thereof under Article 4.2(a):

> [A]n "objective assessment" of a claim under Article 4.2(a) of the Agreement on Safeguards has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors". The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.[304]

7.4.1.3.1 The share of the domestic market taken by increased imports

7.249. Among the mandatory injury factors that competent authorities must evaluate are the share of the domestic market taken by increased imports, and the rate and amount of the increase in imports of the product concerned in absolute and relative terms. Regarding the share of the domestic market taken by increased imports, the Notice states only that "the share of domestic production in the domestic market of Ukraine also decreased by 35%". However, this does not describe "the share of the domestic market taken by increased imports" as contemplated by Article 4.2(a). The text requires consideration of the market share of increased imports, not the percentage change in the domestic industry's market share. In any event, the fact that domestic market share was 35% lower in 2010 than in 2008 does not necessarily mean that imports picked up the market share that the domestic industry lost. Where, as in the present case, not all domestic producers (or production) are part of the domestic industry as defined by the competent authorities[305], it is possible that the domestic industry as defined lost market share to other domestic producers (or domestic production) not part of the domestic industry, in addition to losing market share to imports Finally and significantly, the Notice provides no analysis or projection as to the likely development of the import market share in the very near future.

7.250. Ukraine states that its domestic industry requested confidential treatment of "the domestic industry's production and sales in Ukraine, as well as other [sensitive] information concerning the domestic industry".[306] However, this statement about information relating to the domestic industry does not suggest to us that the share of the domestic market taken by increased imports was covered by the domestic industry's request. Ukraine further asserts that "the specific market shares are confidential pursuant to Article 3.2 of the Agreement [on Safeguards] and Article 12 of the [Safeguards] Law".[307] In the absence of any explanation by Ukraine, we also fail to see how the import market share in this case could be considered to be "by nature confidential" within the

[302] Apart from the fact that in the Key Findings, the analysis of the injury factors precedes the analysis regarding the export potential of the key exporting countries.

[303] Japan's claims under Articles 2.1 and 4.2(a) and under Articles 3.1 and 4.2(c) are similar, in that Japan argues in support of all these claims that Ukraine failed to provide a reasoned and adequate explanation of how the facts support its determination of a threat of serious injury. Japan clarified that these claims are linked, with the former claims focusing on the substantive aspects of the competent authorities' investigation and the latter concerning the deficiencies of the published report. See Japan's response to Panel question No. 102.

[304] Appellate Body Report, *US - Lamb*, para. 103. (emphasis original; original footnote omitted)

[305] The Notice of 14 March 2013 indicates that three companies were determined to constitute a proper "domestic industry" for purposes of the investigation at issue: "Public Joint-Stock Company with Foreign Investments 'Zaporizhia Automobile Building Plant', Private Joint-Stock Company 'Eurocar', [and] Subsidiary Company 'Avtoskladalny Zavod [Autoassembly Plant]' No. 2 of Public Joint-Stock Company 'Bogdan Motors' Automotive Company'". Exhibit JPN-2, p. 6. Moreover, Exhibit UKR-1 suggests, at pages 12 and 13, that those companies do not account for the entire domestic production of passenger cars.

[306] Ukraine's response to Panel question No. 2.

[307] Ukraine's response to Panel question No. 133.

meaning of Article 3.2. And even if it could be considered confidential in some cases, the import market share is one of the injury factors that is identified in Article 4.2(a) and that must be evaluated by the competent authorities, whether on the basis of confidential or public information. That evaluation must then be published under Article 4.2(c), which may be constrained by the need to protect confidential information, but must nonetheless be complied with. In any event, we note that Ukraine itself submitted a private-sector publication from 2012 that contains market share data of individual producers of passenger cars for 2010 and 2011, including for imported brands, and even gives the production volumes in units of domestic producers.[308]

7.251. Ukraine also argues that if its competent authorities had provided the absolute figures of any "relevant factors having a bearing on the situation of [the domestic] industry", confidential data of the domestic industry would be "vulnerable to a simple numerical analysis".[309] However, it is not apparent to us how the disclosure of the import market share in the present dispute could reveal the market share of the domestic industry, since the domestic market in the present dispute comprises (i) the domestic industry as defined in the Notice of Imposition (composed of three producers, namely ZAZ CJSC, Eurocar CJSC, and a subsidiary of Bogdan Motors[310]), (ii) domestic producers or production not forming part of the domestic industry as defined in the Notice of Imposition[311], and (iii) imports. In such a situation, to derive the market share of the domestic industry that requested confidential treatment of its data, one would need to know both the import market share and the market share of the domestic producers (or domestic production) not forming part of the domestic industry as defined in the Notice of Imposition.

7.252. For all these reasons, we find that the competent authorities have failed to properly evaluate, and give a reasoned explanation of, the likely development of the import market share and its likely effect on the situation of the domestic industry in the very near future.

7.4.1.3.2 The rate and amount of the increase in imports

7.253. Regarding the rate and amount of the increase in imports, our analysis will focus on the rate of the increase, because Ukraine provided no information on the amount of the increase, following a request from the domestic industry to treat such information as confidential.[312] Concerning the rate of the increase in imports, we note that the only reference in the Notice to this factor is that imports decreased by 71% in absolute terms in 2010 compared to 2008, but increased by 38% relative to the production of the domestic industry. The Notice contains no analysis or projections of the likely imminent future development of imports, either in absolute terms, or relative to domestic production.

7.254. In our view, the rate and amount of an increase in imports during the period of investigation may indicate a likelihood of increased importation into the domestic market in the very near future. We therefore consider that the rate and amount of an increase in imports are relevant also to an analysis of threat of serious injury.[313] Thus, in a situation where imports have increased relative to domestic production during the period of investigation, there may be a basis for concluding that the trend will continue in the very near future. As we have noted, however, there is no such conclusion in the Notice. We express no opinion as to whether a conclusion that imports were likely to continue to increase relative to domestic production (or in absolute terms)

[308] Exhibit UKR-1, pp. 10 and 11.
[309] Ukraine's response to Panel question No. 100.
[310] Exhibit JPN-2, p. 6.
[311] Exhibit UKR-1, pp. 12 and 13.
[312] See para. 7.128 above.
[313] Although the Agreement on Safeguards does not contain any analogous provision, it is relevant in this context to call attention to Article 3.7 of the Anti-Dumping Agreement, which provides that:

> In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation.

We also note that Article 3.7 of the Anti-Dumping Agreement provides that:

> [n]o one of these factors [including the factor identified in subparagraph (i)] by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

Article 15.7(ii) of the SCM Agreement contains similarly worded provisions.

could have been made in the present case. Even if such a conclusion could have been drawn, it is not sufficient for the competent authorities to have merely noted the percentage of the relative increase without explaining what inferences were drawn from it with regard to the likely development of imports in the imminent future. As the Appellate Body has pointed out, "[a] panel must not be left to *wonder* why a safeguard measure has been applied".[314]

7.255. Therefore, we find that the competent authorities have failed to properly evaluate and give a reasoned explanation of, the likely development of imports, either in absolute terms or relative to domestic production, and their likely effect on the situation of the domestic industry in the very near future.

7.4.1.3.3 Capacity of key exporting countries to generate exports

7.256. The Notice discusses the capacity of key exporting countries to generate exports. In our view, this information is relevant to consideration of the likelihood of further increased imports in the future, and thus is a "relevant factor" within the meaning of Article 4.2(a) that has a bearing on the likely future situation of the domestic industry. Clearly, the current or imminent capacity of exporting countries to export will affect the likelihood of substantially increased exports to the importing Member's market, and thus is relevant to the question of threat of serious injury. As Article 4.2(a) requires competent authorities to consider "all" relevant factors, it does not matter that this is not a factor explicitly identified in Article 4.2(a).[315]

7.257. Nonetheless, there is an important caveat. A demonstration that exporting countries have or soon will have capacity to produce and/or export is not sufficient by itself to show that imports to the Member considering whether to impose a safeguard measure are likely to continue at an increased level or to increase further. This is because the export potential of exporting countries will not necessarily give rise to an increase in imports to the importing Member considering imposing a safeguard measure, since there may be other markets which together or alone can absorb all additional exports. In our view, this is a consideration that would also be relevant in the context of a safeguard investigation such as is at issue in this dispute.

7.258. Turning to the dispute before us, the Notice provides information on the development of the production and exports of certain exporting countries. Japan and Russia showed a decrease in production and exports during the period of investigation, and the Notice implies that existing spare capacity in these two countries could be re-directed to export markets, including that of Ukraine. There is no analysis of spare or future additional export capacity of the other exporting countries considered, i.e. Turkey, Korea, Romania and Germany.[316]

7.259. The Notice refers to the attractiveness of Ukraine as an export market in addressing Turkey's and Korea's export potential, referring to the increase of Turkey's and Korea's shares in total imports into Ukraine as evidence of the attractiveness of the Ukrainian market to producers in these two countries. However, changes in their share of total imports into Ukraine do not necessarily indicate the attractiveness of Ukraine as an export market for Turkish or Korean

[314] Appellate Body Report, *US – Steel Safeguards*, para. 298 (original emphasis).

[315] In this regard, we recall Article 3.7 of the Anti-Dumping Agreement, which reflects a similar approach, and reinforces our view concerning the relevance of this factor in the context of an analysis of a threat of serious injury. Article 3.7 provides that:

> In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
>
> ...
>
> (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports.

We recall that, as quoted above (footnote 299) the last clause of this provision indicates that this factor by itself does not necessarily give decisive guidance regarding the existence of a threat of serious injury. We also note that Article 15.7(ii) of the SCM Agreement identifies the same factor as Article 3.7(ii).

[316] Exhibit JPN-2, p. 4.

producers. Their increased shares might merely reflect a redistribution of import shares among the key exporting countries.[317]

7.260. In any event, even if Ukraine's market were particularly attractive to Turkey and Korea, it does not follow that the same would be true for Japan and Russia. Yet it was those countries that the competent authorities determined to have the capacity to increase exports, which could, of course, be directed to any export markets, and not only to Ukraine. However, there is no discussion in the Notice of the availability or attractiveness of other export markets as compared to the Ukrainian market. Other markets could be as attractive as Ukraine's (or more so), such that additional exports from Japan and/or Russia might be directed to those markets.

7.261. Finally, in the overall conclusion, the Notice refers to existing or near-future export potential of exporting countries that "may be" used for exporting passenger cars to Ukraine.[318] Thus, the Notice concluded that there was a possibility, or a potential, to export, but does not reach a conclusion on the likelihood of a future increase in exports to Ukraine's market arising from that export potential.[319] Thus this section of the Notice does not demonstrate, in terms of the Appellate Body's decision in *US – Lamb*, that there is "a high degree of likelihood" that an increase in exports of passenger cars to Ukraine "will materialize in the very near future".[320]

7.262. In sum, the Notice determines that there was capacity in certain exporting countries (namely Japan and Russia) to export more, but fails to consider whether any increased exports were likely to enter Ukraine's market, for instance by addressing the availability of other export markets to absorb additional exports from these countries. With respect to other exporting countries, the Notice does not address, at all, whether they might have the capacity to export increased quantities to Ukraine, noting only that Ukraine's market was "attractive" to Korean and Turkish producers – a conclusion that is open to question, as discussed above. The Notice therefore fails to properly assess the likelihood of a future increase in exports to Ukraine's market, and in fact reaches no conclusion in this respect.

7.263. In our view, the failure of the competent authorities to assess (i) whether the facts before them indicated a current, and/or projected, increase in capacity to export on the part of relevant exporting countries; and (ii) whether other export markets are available that could absorb additional exports from these countries, rather than or in addition to the Ukrainian market, leaves unclear how the information on export capacity in exporting countries was considered in the determination of threat of serious injury.

7.264. For all these reasons, we find that the competent authorities have failed to properly evaluate, and give a reasoned explanation of, the increase in the very near future in exports to Ukraine's market, anticipated to arise from current or imminent capacity of exporting countries to export.

7.4.1.3.4 Injury factors pertaining directly to the situation of the domestic industry

7.265. We will now consider the competent authorities' evaluation of the factors that relate directly to the situation of the domestic industry, specifically, production volume, capacity utilization, domestic unit sales, operating profit, employment, and labour productivity. The analysis of these injury factors in the Notice consists of a simple end-point-to-end-point comparison of the data for 2008 and 2010, and the implication that the direction and extent of the change in these factors are evidence of a negative impact of imports on the domestic industry. The Notice notably provides no projections as to likely developments in these factors in the very near future. Thus, the Notice fails to evaluate and give a reasoned explanation of the likely developments in these factors and their likely effect on the situation of the domestic industry in the very near future.

[317] Without any information on the amount of the increase in imports, the significance of the increased shares is difficult to understand.

[318] Exhibit JPN-2, p. 3.

[319] We note that Ukraine's Safeguards Law, in Article 13.3(2), indicates that there is a conceptual difference between "export potential" and "probability of utilization of such potential for the export … to Ukraine".

[320] Appellate Body Report, *US – Lamb*, para. 125.

7.266. The absence of such an evaluation assumes particular significance in view of information that Ukraine has submitted to the Panel in the present proceedings. That information shows that, from 2009-2010 - towards the end of the period of investigation - the condition of the Ukrainian industry was improving with regard to several of the relevant factors identified, namely production, capacity utilization, labour productivity, and operating profit (income from operational activity), as shown in the following table:[321]

Indicator	2008	2009	2010
Production, units	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-81.3*	*-78.9*
Capacity utilization, %	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-79.30*	*-74.86*
Domestic sales, units	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-83.76*	*-86.33*
Employment	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-37.63*	*-51.56*
Labour productivity, units per employed	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-71.1*	*-46.3*
Income from operational activity, USD	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-116.2*	*-89.9*
Market share, %	[ ]	[ ]	[ ]
Change compared to 2008, %	-	*-2.16*	*-35.45*

7.267. However, there is no recognition or discussion of these improvements in the Notice. As we discussed above, the more recent data from the period of investigation are of particular relevance to an analysis of a threat of serious injury. In these circumstances, the competent authorities should have provided some explanation in the published report as to why, despite positive developments in respect of several injury factors towards the end of the period of investigation, they concluded that it was likely that the situation of the domestic industry would deteriorate in the imminent future to a condition of serious injury.

7.268. In this context, we find relevant the following observation by the Appellate Body in *US – Lamb*:

> [D]ata relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.
>
> However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading.[322]

7.269. Applying this observation to the dispute at hand, we note that without any analysis of the intervening trends in the Notice, it is not clear whether the position of the domestic industry was improving or deteriorating towards the end of the period of investigation. As confirmed by the Appellate Body, data from the most recent past has special importance in the context of the future-oriented analysis that is required to establish a threat of serious injury.

7.270. For these reasons, we find that the competent authorities have failed to properly evaluate, and give a reasoned explanation of, the likely developments in the injury factors relating directly

[321] Ukraine's first written submission, para. 135. (Exhibit UKR-3)
[322] Appellate Body Report, *US – Lamb*, paras. 137 and 138.

to the situation of the domestic industry and the likely effect of these developments on the situation of the domestic industry in the very near future.

7.4.1.3.5 Overall conclusion

7.271. Overall, we thus find that the competent authorities have failed to properly evaluate and give a reasoned explanation of their conclusions regarding: the likely future development of imports relative to domestic production; the import market share; the examined injury factors that relate directly to the position of the domestic industry; and their bearing on the likely situation of the domestic industry in the very near future. Consequently, we agree with Japan that the competent authorities did not properly evaluate all relevant factors; did not evaluate the intervening trends for relevant injury factors in circumstances where it was appropriate to do so; and did not properly demonstrate a significant overall impairment in the position of the domestic industry that was clearly imminent. We therefore conclude that Ukraine has acted inconsistently with Article 4.2(a).

7.272. Having concluded that the competent authorities have acted inconsistently with Article 4.2(a), we see no need to make additional findings regarding whether the competent authorities have also acted inconsistently with Article 4.2(a) by failing to base their finding of a threat of serious injury on data from the recent past.

7.4.2 Claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(b), 4.2(c), 11.1(a) and Article XIX:1(a)

7.273. The Panel now turns to the remainder of the claims relating to Ukraine's determination of a threat of serious injury. We first address, jointly, Japan's claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(b), 4.2(c) and 11.1(a), and Article XIX:1(a).

7.4.2.1 Articles 2.1, 4.1(a), 4.1(b), 4.2(b), 11.1(a) and Article XIX:1(a)

7.274. Japan also argues that Ukraine acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(b), and 11.1(a) and Article XIX:1(a) in its determination of serious injury or threat thereof.[323]

7.275. Ukraine responds that it acted in conformity with the requirements of each of those provisions.[324]

7.276. The Panel notes that it found that Ukraine has acted inconsistently with its obligations under Article 4.2(a) because, *inter alia*, it has not demonstrated a significant overall impairment in the position of the domestic industry that is clearly imminent. In the light of this, we see no need, for the purposes of resolving this dispute, to offer additional findings regarding whether Ukraine has also acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(b), 11.1(a) and Article XIX:1(a) in relation to its threat of serious injury determination. We therefore exercise judicial economy and decline to make findings with respect to these claims.

7.4.2.2 Articles 3.1 and 4.2(c)

7.277. The Panel turns, finally, to Japan's claims under Article 3.1, last sentence, and Article 4.2(c).

7.278. Japan claims that Ukraine acted inconsistently with Articles 3.1 and 4.2 (c) by failing to provide a reasoned and adequate explanation as to how the facts support a determination of a threat of serious injury in its published report.[325] Japan puts forward three arguments in support of this claim. The first is that the published report contained only the changes in indicators by reference to the changes in percentages between 2008 and 2010, and that no data were provided for 2009. Japan's second argument is that data provided by Ukraine in its first written submission regarding 2009 reveal that this data could and should have been provided in the published

[323] Japan's first written submission, section 6.5; second written submission, section 3.5.
[324] Ukraine's first written submission, para. 150; second written submission, para. 63.
[325] Japan's second written submission, para. 172.

report.[326] Japan's final argument is that Ukraine failed to provide any absolute figures even in aggregate form.

7.279. Ukraine argues that the information stated above was treated as confidential information under the Agreement on Safeguards and the Ukrainian Safeguards Law, following a request from the domestic industry. Ukraine submits that such information could not have been disclosed without the permission from the domestic industry.[327] According to Ukraine, the non-confidential figures regarding the domestic production of passenger cars published by the State Statistics Service of Ukraine and the association of car manufacturers represent the aggregate data.[328]

7.280. In response, Japan argues that protection of confidential information cannot be a justification not to comply with the requirements laid down in Articles 3.1 and 4.2(c).[329]

7.281. The Panel recalls that it found above that Ukraine has not demonstrated, through reasoned and adequate explanations, a significant overall impairment in the position of the domestic industry that is clearly imminent. In the light of this, we see no need, for the purposes of resolving this dispute, to make additional findings regarding whether Ukraine also acted inconsistently with Articles 3.1 and 4.2(c) in relation to the account it gave of the aforementioned determination in its published report. We therefore exercise judicial economy and decline to make findings with respect to these claims.

7.5 Claims relating to causation

7.282. The Panel now turns to Japan's claims relating to the competent authorities' determination of the causal link between increased imports and the threat of serious injury to the domestic industry. While it is true that, as the Appellate Body noted in *Argentina – Footwear (EC)*, "[i]t would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist"[330], unlike the panel in that case, here, we have not determined that there were no increased imports of passenger cars into Ukraine. Nor have we determined that there was no threat of serious injury to the Ukrainian industry. What we have concluded, *inter alia*, is that Ukraine's competent authorities failed to fully examine the facts and provide adequate explanations in support of their determinations of increased imports and threat of serious injury. In these circumstances, we consider it useful to go on to consider the determination of causation, in the interest of effective dispute resolution, for the benefit of eventual implementation of any DSB recommendations and rulings in this case by the competent authorities. We therefore proceed to an analysis of Japan's claims relating to causation.

7.283. Japan claims that Ukraine acted inconsistently with its obligations under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 11.1(a) and Article XIX:1(a) regarding the determination of the causal link between the increased imports and the threat of serious injury because (i) it failed to demonstrate the existence of a causal link between the increased imports and the threat of serious injury, in particular, by not examining the conditions of competition between the domestic and imported products; and (ii) it failed to ensure that injury caused, or threatened to be caused, by factors other than the increased imports was not attributed to the increased imports. Japan also claims that Ukraine acted inconsistently with Articles 3.1 and 4.2(c) by failing to provide reasoned and adequate explanations in its published report.[331]

7.284. Ukraine responds that, first, there was a clear correlation between the increase in imports and the threat of serious injury to the domestic industry producing a directly competitive product and, second, it ensured that any injury caused by other factors was not attributed to the increased imports. Consequently, Ukraine requests the Panel to reject Japan's claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) and Article XIX:1(a).[332]

[326] Ibid. para. 176.
[327] Ukraine's response to Panel question No. 64.
[328] Ibid.
[329] Japan's second written submission, para. 178.
[330] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[331] Japan's second written submission, para. 180.
[332] Ukraine's first written submission, para. 173.

7.285. The Panel will begin its analysis by examining Japan's claims under Article 4.2(b), since it sets forth specific obligations relating to the required determination of causation.

7.5.1 Claims under Article 4.2(b)

7.286. Article 4.2(b) provides as follows:

> The determination referred to in subparagraph (a) [of Article 4] shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

7.287. Thus, Article 4.2(b) establishes two distinct legal requirements that competent authorities must fulfil before deciding to apply a safeguard measure. First, they must demonstrate the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". Second, when factors other than increased imports are causing injury to the domestic industry at the same time, the competent authorities must not attribute injury caused by these other factors to increased imports.[333]

7.288. We will first address Japan's claim regarding the existence of a causal link and will then consider Japan's claim regarding Ukraine's failure to conduct a proper non-attribution analysis.

7.5.1.1 Demonstration of the existence of a causal link

7.289. Japan asserts that Ukraine has failed to demonstrate the existence of "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury",[334] as required by Articles 2.1, 4.2(a) and 4.2(b). Japan identifies two main bases for its claim. First, Japan submits that there was no analysis in the published report of the conditions of competition in the domestic market for the product in question that explains the interaction of the imports with the domestic product and that consequently, there is an incomplete analysis of the causal link.[335] Second, Japan argues that the required coincidence in time between the increase in imports and the deterioration of the domestic industry's performance was absent.[336] Japan maintains that the analysis set out in the Notice of 14 March 2013 is not sufficient to comply with the requirements of Article 4.2(b) because the statements in the Notice of 14 March 2013 constitute mere assertions that offer no reasoned and adequate explanation to support a finding that the increased imports caused or threatened to cause serious injury. Since the Notice contains no reasoned or adequate explanations as to why the competent authorities came to the conclusion that there was a causal link between increased imports and threat of serious injury, Ukraine failed to demonstrate the existence of such causal link.[337]

7.290. Japan also argues that the threat of serious injury must be the result of an increase in imports, which in turn must come as a result of unforeseen developments that change the conditions of competition between the imported and domestic products. Japan submits that since Ukraine failed to demonstrate the existence of unforeseen developments and a change in the competitive relationship between the domestic and imported products, it could not correctly perform the causation analysis.[338]

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[333] Appellate Body Report, *US – Line Pipe*, para. 208; Appellate Body Reports, *US – Steel Safeguard*, para. 485.

[334] Japan's second written submission, para. 183 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 67); opening statement at the second meeting of the Panel, para. 48 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 67).

[335] Japan's opening statement at the first meeting of the Panel, para. 93; second written submission, para. 189; and opening statement at the second meeting of the Panel, para. 49.

[336] Japan's first written submission, para. 282; second written submission, paras. 190-192; and opening statement at the second meeting of the Panel, para. 51.

[337] Japan's first written submission, paras. 283-284.

[338] Japan's second written submission, para. 185.

7.291. Ukraine submits that imports of passenger cars increased in 2010 by 38% relative to Ukrainian domestic passenger car production compared to 2008, although imports decreased by 71% in absolute terms.[339] Ukraine argues that this relative increase in imports coincided in time with the significant overall impairment of the domestic industry. According to Ukraine, WTO jurisprudence confirms that such coincidence amounts to a *prima facie* demonstration of causation. Ukraine submits that it is for Japan to demonstrate that despite this correlation in time, Ukraine's causation analysis was in any way "wanting".[340]

7.292. As regards Japan's arguments regarding the analysis of the conditions of competition, Ukraine responds that the conditions in this case were such that there cannot be any doubt about the direct effect in terms of sales and prices between imported and domestic products. Ukraine submits that there exists a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition, such that if products are narrowly defined, as they were in this case, not much analysis of the conditions of competition is required.[341]

7.293. Japan responds to Ukraine's arguments regarding the "clear coincidence" in time between the increase in imports and the impairment of the domestic industry by stating that such a coincidence by itself cannot prove causation, and that its absence may be of importance because it creates "serious doubts as to the existence of a causal link".[342] Japan submits that Ukraine ignores the fact that although there was an increase in imports in relation to domestic production and consumption, there was at the same time a substantial decrease in imports in absolute terms. Japan considers that the competent authorities did not make any analysis as to the relevance of this decrease, either in the Notice of 14 March 2013 or the Key Findings.[343]

7.294. Japan argues that this failure is compounded by the fact that between 2008 and 2009, imports actually decreased even in relative terms. Japan also points out that while the injury indicators deteriorated between 2008 and 2009, most of them actually improved between 2009 and 2010. Therefore Japan submits that there is no clear coincidence in time between the movements in imports and the movements in the injury factors. For Japan, this "disconnect" would have required a compelling explanation as to why a causal link existed in a situation where imports increased relative to domestic production during 2010, when most of the injury factors were actually improving. Japan submits that Ukraine failed to give such a "compelling explanation".[344]

7.295. Japan responds, finally, that neither the Notice of 14 March 2013 nor the Key Findings contain any analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imports with the domestic product is explained. Japan argues that mere *ex post* assertion of an existence of a causal link cannot cure the lack of a proper analysis of the conditions of competition in the published report of the competent authorities.[345]

7.296. The Panel recalls that according to the Appellate Body, what the competent authorities are required by Article 4.2(b), first sentence, to establish is a "genuine and substantial relationship of cause and effect".[346] The Appellate Body further clarified that a causal link implies "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or

[339] Ukraine's first written submission, paras. 167-168; opening statement at the first meeting of the Panel, para. 63; second written submission, para. 65; and opening statement at the second meeting of the Panel, paras. 68-69.

[340] Ukraine's first written submission, para. 170; opening statement at the first meeting of the Panel, para. 65; second written submission, para. 65; and opening statement at the second meeting of the Panel, paras. 68-69 (referring to Appellate Body Report, *Argentina– Footwear (EC)*, para. 67).

[341] Ukraine's first written submission, paras. 160, 167 (referring to Appellate Body Report, *Argentina – Footwear (EC)*); opening statement at the first meeting of the Panel, para. 65; second written submission, para. 66; and opening statement at the second meeting of the Panel, paras. 66, 71-72.

[342] Japan's second written submission, para. 190 (referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.238); and opening statement at the second meeting of the Panel, para. 50.

[343] Japan's second written submission, paras. 191-192; and opening statement at the second meeting of the Panel, paras. 50-52.

[344] Japan's second written submission, paras. 191-192; and opening statement at the second meeting of the Panel, paras. 50-52.

[345] Japan's second written submission, paras. 186-189.

[346] Appellate Body Report, *US – Lamb*, para. 179; Appellate Body Report, *US – Steel Safeguards*, para. 488.

'inducing' the serious injury".[347] As noted in previous panel reports, neither Article 4.2(b) nor other provisions of the Agreement on Safeguards establish how the existence of the causal link should be demonstrated.[348]

7.297. Nonetheless, the Appellate Body has given some guidance in this respect, stating that the relationship between the movements in imports and the movements in injury factors is central to a causation analysis and determination.[349] Previous panels have followed this guidance in evaluating determinations of a causal link under Article 4.2(b), considering, among other things, whether upward trends in imports coincided with downward (i.e. worsening) trends in the injury factors, and if not, whether an adequate explanation was provided as to why the data nevertheless show causation. Panels have also considered whether the analysis by the competent authorities of the conditions of competition between the imported and domestic product supported the authorities' conclusion regarding the existence of a causal link between the increased imports and injury to the domestic industry.[350]

7.298. Regarding the coincidence in movements, we agree with the panel in *US – Steel Safeguards* that upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to be indicative of a causal link.[351] However, this coincidence, by itself and without explanation, is not sufficient to establish a causal link between increased imports and serious injury or threat thereof.[352] A worsening in the condition of a domestic industry may be wholly unconnected to increased imports and may instead be caused by one or more other developments, occurring at the same time as increased imports, such as declining consumption, inefficient production methodologies, increased costs, etc. Indeed, Article 4.2(b), second sentence, confirms that factors other than increased imports may be causing injury at the same time as increased imports. By requiring that injury caused by such factors not be attributed to increased imports, this provision seeks to ensure that safeguard measures are only applied in appropriate circumstances, that is, when increased imports are causing or threatening to cause serious injury. We therefore reject Ukraine's view that a coincidence between increased imports and the worsening in the injury factors is sufficient in itself to raise a presumption that a causal link exists between these two developments. For completeness, we also note that the absence of coincidence does not necessarily rule out the existence of a causal link.[353] In a finding upheld by the Appellate Body, the panel in *Argentina – Footwear (EC)* stated:

> While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[354]

7.299. Regarding the conditions of competition, we recall that we stated earlier in section 7.3.1.4 that the conditions under which increased imports occurred is an element to be considered as part of the causation analysis. We also note that the panels in *Argentina – Footwear (EC)* and in *US – Wheat Gluten* assessed the competent authorities' consideration of the conditions of competition when assessing their determinations of the existence of a causal link[355] within the meaning of

[347] Appellate Body Report, *US – Wheat Gluten*, para. 67. Appellate Body Report, *US – Line Pipe*, para. 209.

[348] Panel Reports, *US – Steel Safeguards*, paras. 10.294 and 10.296. Panel Report, *Korea – Dairy*, para. 7.96.

[349] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[350] See Panel Report, *Argentina – Footwear (EC)*, para. 8.229; Appellate Body Report on *Argentina – Footwear (EC)*, para.145; Panel Report, *US – Wheat Gluten*, para. 8.91; Panel Report, *US – Lamb*, para. 7.232; Panel Reports, *US – Steel Safeguard*, paras. 10.313-10.321.

[351] Panel Reports, *US – Steel Safeguards*, para. 10.299.

[352] Downward movements in injury factors may coincide with upward movements in imports, but the downward movements may be caused by other factors.

[353] An example where the absence of coincidence would not rule out causation would be a case where there is a time lag between the increase in imports and the movement of injury factors due to the structure of the market, the industry or the particularities of the case at hand. See Panel Reports, *US – Steel Safeguards*, paras. 10.299, 10.309-10.312.

[354] Panel Report, *Argentina – Footwear (EC)*, para. 8.238 (Original emphasis); Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[355] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Panel Report, *US – Wheat Gluten*, para. 8.108.

Article 4.2(b). In this regard, we recall that the Appellate Body in the first case expressly approved the panel's conclusion that the determination was not consistent with the requirements of Article 4.2(b), in part because the conditions of competition had not been adequately analysed by the competent authorities in that case.[356]

7.300. Turning to the facts of this dispute, the Notice of 14 March 2013 addresses the issue of whether a causal link existed between increased imports and the threat of serious injury as follows:

> The following indicators in 2010 as compared to 2008 provide evidence of the negative impact of imports of the Product to Ukraine on the domestic industry:
>
> - Production volume of the domestic industry decreased by 78.9%;
> - Capacity utilization decreased by 74.86%;
> - Sales volumes within the domestic market decreased by 86.33%;
> - Operating profit decreased by 89.9%;
> - Employment decreased by 51.56%;
> - Productivity numbers fell by 46.3%.
>
> *At the same time*, the volume of imports of motor cars to Ukraine in absolute terms in 2010 compared to 2008 decreased by 71%, but increased by 38% in relation to domestic production within Ukraine.
>
> The demand for the Product within Ukraine's domestic market fell by 78.8% between 2008 and 2010, while the share of domestic production in the domestic market of Ukraine also decreased by 35%. *In light of the increased import volume of the Product to Ukraine and conditions of such import, the domestic industry was driven out of the domestic market within Ukraine, resulting in a worsening of the poor state of the national industry and a threat of serious injury to the domestic industry*.[357]

7.301. This assessment of the causal link is divided into three parts. The first part states that some indicators of the situation of the industry decreased in 2010 compared to 2008. The second part states, *inter alia*, that the volume of imports of passenger cars increased in 2010 relative to domestic production compared to 2008, despite an absolute decrease in imports. The third part concludes from the previous two parts that the domestic industry was driven out of the domestic market in Ukraine and that this resulted in a worsening of its poor state and a threat of serious injury. Thus, in the first two parts, the Notice of 14 March 2013 points to a coincidence ("at the same time") between increased imports and the poor state of the domestic industry that is based on an end-point-to-end-point comparison, comparing data for 2010 to data for 2008. In the third part, the Notice of 14 March 2013 goes on to conclude from this coincidence that there is a causal link ("resulting in") between increased imports and a threat of serious injury to the domestic industry.

7.302. In considering the explanation provided in the Notice of 14 March 2013, we recall as an initial matter that coincidence between two developments does not necessarily imply a causal link between the two. As mentioned above, although a coincidence between upward movements in imports and downward movements in injury factors might support a finding of the existence of a causal link between increased imports and a threat of serious injury, it is not sufficient by itself and without explanation to make such a finding. Moreover, we note in this regard that evidence submitted to us by Ukraine shows that between 2008 and 2009, imports decreased in absolute and relative terms and injury factors showed a deterioration, while between 2009 and 2010, imports increased in relative terms as compared to 2008, but some injury factors actually improved, as compared to 2008.[358] We are not concluding from these trends that no coincidence in movements of imports and injury factors existed in this case. However, in view of the fact that

[356] The Appellate Body stated that "we agree with the Panel's conclusions that 'the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)'". Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

[357] Exhibit JPN-2, p. 8. (emphasis added)

[358] The following factors showed improvement in 2010, as compared to 2008: production units, capacity utilization, labour productivity and income from operational activities. Exhibit UKR-3.

injury factors worsened when there was a relative decrease in imports and began to improve even as there was a relative increase in imports, the Notice of 14 March 2013 should have addressed these movements, which seem counter to findings of coincidence and causation, and given reasoned and adequate explanations as to why a causal link nevertheless existed.

7.303. The only explanation we find in the Notice of 14 March 2013 is the statement that the relative increase in imports drove the domestic industry out of the Ukrainian market. However, the Notice of 14 March 2013 provides no further elaboration as to how this happened. We note that the Key Findings also state that the domestic industry was driven out of the domestic market by increased imports. The Key Findings further state as follows:

> The rate of decrease of domestic production and sale exceeded the rate of decrease of import of the Product subject to investigation to Ukraine in terms of absolute values. As a result of the disproportionate reduction in the import of investigated Products to Ukraine and the domestic manufacturers' sale of the Products on the internal market, the structure of domestic market share was changed in favour of the imported products, which affected the position and development of the domestic car industry.[359]

7.304. While this paragraph states that the domestic industry lost market share to imports because domestic production decreased more significantly than imports, which also decreased, it contains no explanation as to how the lesser decrease in imports contributed to bringing about a threat of serious injury. In particular, it fails to explain how imports could take market share from the domestic industry in a contracting market. The domestic industry could have been losing market share for reasons unrelated to the relative increase in imports. Thus, the Key Findings shed no additional light on the content of the Notice of 14 March 2013. We therefore maintain our view that the Notice of 14 March 2013 fails to adequately explain the determination in this regard.

7.305. We observe, finally, that the relevant section of the Notice of 14 March 2013 contains no forward-looking analysis of the existence of a causal link.[360] We recall that the Notice of 14 March 2013 finds that the domestic industry faced a threat of serious injury. Article 4.1(b) defines "threat of serious injury" as serious injury that is "clearly imminent". We have stated earlier that the term "clearly imminent" indicates that the competent authorities not only have to perform an assessment of historical facts, but must also make fact-based projections concerning future developments affecting the domestic industry's position.[361] In our view, this reasoning must logically also extend to the analysis of the causal link in threat of serious injury cases. We thus consider that in such cases the competent authorities must likewise make fact-based projections with a view to ascertaining whether there is a high degree of likelihood that a causal link will exist in the very near future, when serious injury is expected to materialize.[362] Indeed, it is at least conceivable that a current causal link established based on the data for the period of investigation will no longer exist in the very near future. We consider that the competent authorities should have considered this scenario and explained in the Notice of 14 March 2013 whether there was a high degree of likelihood that a causal link would still exist in the very near future.

7.306. We thus conclude that the competent authorities did not undertake a proper analysis of the relationship between movements in imports and movements in injury factors. Having reached this conclusion, we see no need to go on to examine whether in the circumstances of the present dispute the competent authorities were also required to and, if so, did examine the conditions of competition between the imported and domestic product in order to meet the requirements of Article 4.2(b), first sentence. We, accordingly, do not address this issue further.

[359] Exhibit JPN-6 (Revised Version), p. 18.

[360] We note that in the section on increased imports, the Notice of 14 March 2013 mentions, without further analysis, that in the first half of 2011, compared to 2010, imports increased by 28% relative to domestic production (Exhibit JPN-6 (Revised Version), p. 2).

[361] See para. 7.232 above.

[362] We recall that in *US – Lamb*, the Appellate Body indicated that for there to be a threat of serious injury there must be "a high degree of likelihood that the anticipated serious injury will materialize in the very near future". Appellate Body Report, *US – Lamb*, para. 125.

7.307. In the light of the foregoing, we find that the competent authorities have not demonstrated, through reasoned and adequate explanations, how the developments identified in the Notice of 14 March 2013 support their determination that a relative increase in imports contributed to bringing about a threat of serious injury. We thus conclude that Ukraine has acted inconsistently with its obligations under Article 4.2(b), first sentence.

7.5.1.2 Non-attribution analysis

7.308. According to Japan, it is an "uncontested fact" that the competent authorities acknowledged that other factors were having injurious effects on the domestic industry, since the Key Findings expressly stated that "special attention was given to the influence of other factors". Japan considers that having identified that other factors were causing injury to the domestic industry, the competent authorities were required to carry out a proper non-attribution analysis. In Japan's view, Ukraine failed to do so.[363]

7.309. Japan claims that while the competent authorities noted in the Notice of 14 March 2013 that some interested parties had claimed that the negative situation of the domestic industry "was due to, among other things, other factors", Ukraine failed to identify those "other factors", and *a fortiori* failed to identify and examine the nature and extent of the injurious effects of these other factors. Japan argues that the competent authorities merely stated that serious injury to the domestic industry had not been caused by other factors, without providing an analysis of what those other factors are and what their effects were. In Japan's view, this demonstrates that Ukraine failed to carry out a non-attribution analysis as required by Article 4.2(b).[364]

7.310. Japan notes that only the Key Findings identify four other factors which had a bearing on the domestic industry at the same time as the increased imports: (i) the global financial and economic crisis, (ii) the non-competitiveness of the domestic products, (iii) the 13% percent additional duty rate, and (iv) the end of the government support that was granted to the automobile industry between 1997 and 2008. Japan argues that the Notice of 14 March 2013, which is the relevant document for purposes of the Panel's examination, is silent on this issue since it does not contain any analysis of these "other factors". Japan therefore considers that Ukraine has failed to ensure non-attribution.[365]

7.311. Ukraine submits that the Key Findings gave special attention to the influence of the four other factors referred to by Japan. Regarding the global financial and economic crisis, Ukraine argues that although it influenced the position of the domestic manufacturers of passenger cars, the competent authorities found that no company was immune from the effects of the global crisis, including producers of passenger cars in foreign markets. In Ukraine's view, the global financial and economic crisis could not, therefore, have caused the worsening of the domestic producers' position, while at the same time allowing for an increase in imports of passenger cars relative to domestic production. Ukraine infers from this that the global crisis was not a factor that could break the causal link between increased imports and the threat of serious injury.[366]

7.312. Ukraine states that the government support that the Ukrainian car industry enjoyed was granted from 1997 to 2008. Ukraine explains that, since the government support ended on 1 January 2008, no analysis of its effects was conducted because it was not appropriate to consider the trends in the passenger car industry during the ten-year period preceding the investigation period, 2008 to 2010.[367]

7.313. As concerns the lack of competitiveness of the domestic products, Ukraine notes that, as stated in the Key Findings, this factor could cause a deterioration in the situation of the domestic

[363] Japan's first written submission, para. 291; and second written submission, para. 198.
[364] Japan's first written submission, paras. 291-292; and second written submission, para. 200.
[365] Japan's second written submission, paras. 199-201.
[366] Ukraine's first written submission, para. 164; opening statement at the first meeting of the Panel, para. 66; second written submission, para. 67; and opening statement at the second meeting of the Panel, para. 74.
[367] Ukraine's first written submission, para. 165; opening statement at the first meeting of the Panel, para. 67; second written submission, para. 68; and opening statement at the second meeting of the Panel, para. 75.

industry, but could not explain the coinciding increase in imports. Ukraine further argues that a deterioration in the situation of the domestic industry could be attributed to the sudden lack of competitiveness caused by the abolition of government support, if the investigation period had included the year 2007. But, in Ukraine's view, the claim that it could influence the domestic industry negatively 3 years later is "presumptuous".[368]

7.314. Ukraine submits, finally, that the additional 13% surcharge imposed on imports of passenger cars could have influenced the extent of injury caused to the domestic industry only in a limited way, as it was in force for only a short period, from March until September 2009. According to Ukraine, the trends in 2008 and 2010 could not therefore be attributed to the temporary surcharge.[369]

7.315. Japan responds that the Key Findings contain no assessment of the injurious effects of these other factors, and that such an analysis has been provided only in Ukraine's submissions to the Panel. Japan submits that such "*ex post* justifications" are irrelevant for the Panel's analysis.[370]

7.316. The Panel starts by recalling that, to satisfy the requirements of Article 4.2(b) the competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors causing injury to the domestic industry at the same time.[371] According to the Appellate Body, this notably means that the competent authorities must "identify" the nature and extent of the injurious effects of the known factors other than increased imports, as well as "explain" satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of increased imports.[372]

7.317. Regarding the required explanation, the Appellate Body has stated that the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. Such "explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms".[373]

7.318. As recognized by the Appellate Body in *US – Lamb*, the "method and approach" Members choose to carry out the process of separating the effects of increased imports and the effects of other causal factors is not established in the Agreement on Safeguards. However, Members are required to explain the particular method and process they have used to separate and distinguish other causal factors, and how they have ensured that injurious effects arising from other causal factors were not included in the assessment of the injury ascribed to increased imports.[374]

7.319. Regardless of the method used by the competent authorities when performing a non-attribution analysis, cases involving a threat of serious injury to the domestic industry should, in our view, include a forward-looking assessment of whether other factors currently causing injury to the domestic industry will continue to do so in the very near future.

7.320. Turning now to the facts of the present dispute, we note that the published report, i.e. the Notice of 14 March 2013, provides the following statement regarding other causal factors:

> Within the framework of the present investigation *some interested parties claimed that a significant deterioration of the production, trade and financial situation of the domestic industry was due to, among other things, other factors*, and serious injury caused by these other factors should not be attributed to losses due to increased imports.

[368] Ukraine's opening statement at the second meeting of the Panel, para. 75.
[369] Ukraine's opening statement at the second meeting of the Panel, para. 76.
[370] Japan's second written submission, paras. 206, 208-219; and opening statement at the second meeting of the Panel, paras. 55-58.
[371] Appellate Body Report, *US – Wheat Gluten*, para. 68.
[372] Appellate Body Report, *US – Line Pipe*, para. 215.
[373] Ibid. para. 217.
[374] Appellate Body Report, *US – Lamb*, paras. 181, 184-185.

> According to the findings of the investigation carried out by the Ministry, the increase of motor cars imports into Ukraine regardless of country of origin and export, relative to domestic production and demand, was occurring under such conditions and volumes that the imports threatened to cause serious injury to the domestic industry, *which were not caused by other factors*. (emphasis added)

7.321. We note that the Notice of 14 March 2013 refers to, but does not identify, causal factors other than increased imports that were causing injury to the domestic industry at the same time.

7.322. In addition to a reference to the views presented by interested parties on the subject, there is only one other statement in the relevant section of the Notice of 14 March 2013 that refers to "other factors". The Notice of 14 March 2013 states that "the increase of motor cars imports into Ukraine regardless of country of origin and export, relative to domestic production and demand, was occurring under such conditions and volumes that the imports threatened to cause serious injury to the domestic industry, *which were not caused by other factors*."[375]

7.323. This sentence is somewhat opaque. In the light of its structure and the use of the plural "were", it could be understood to suggest that the increased imports were not caused by other factors. At the same time, the clause referring to other factors immediately follows a reference to the threat of serious injury, which could suggest that threat of serious injury is not caused by the other factors referred to. Contextually, the statement appears intended to respond to the arguments of certain interested parties that other factors were causing injury. These two different possible understandings to us suggest that the plural "were" may reflect a typographical or translation error and should be read as "was", and the sentence should be understood as a statement that the threat of serious injury was not caused by other factors. It strikes us as implausible that the competent authorities, in the statement at issue, were referring to a determination of the causes of the increased imports rather than the causes of the threat of serious injury, which is the subject of this portion of the Notice of 14 March 2013. However, this still leaves open the question whether the competent authorities determined (i) that other factors were not threatening serious injury to the domestic industry at the same time as increased imports or (ii) that other factors were threatening serious injury at the same time, but that some of the threat of serious injury was caused by increased imports alone. Ukraine's notification to the WTO of its decision to apply a safeguard measure seven days after publishing the Notice of 14 March 2013 does not shed any useful light on this issue.[376]

7.324. As regards the alternative interpretations, given the lack of clarity of the Notice of 14 March 2013, we find it appropriate to look to the record of the investigation, and specifically the Key Findings, in order to see whether they assist in elucidating the relevant statement in the Notice of 14 March 2013.

7.325. The Key Findings address the issue of other factors causing injury as follows:

> *Special attention was also given to the influence of other factors*; *the injury caused by these factors cannot be considered as injury caused as a result of the increase in and the conditions of the import*. In particular, the negative impact of the global financial and economic crisis resulted in decreased consumption, non-competitiveness of the domestic products, and the 13-percent additional duty rate that was valid in 2009.
>
> The Ministry also considered the position of interested parties that the Ukrainian car industry had enjoyed specific government support between 1997 and 2008 in the form of Ukrainian car manufacturers' exemption from paying import duties, VAT and land tax, and enjoyed a preferential rate on income taxes, under the Ukrainian Car Manufacturer Stimulation Law. At the same time, WTO accession of Ukraine and its

[375] Exhibit JPN-2, p. 8. (Emphasis added)

[376] The relevant passage states as follows:

> [T]he investigation conducted by the Ministry of Economic Development and Trade has proved that exactly the increase of imports of motor cars (regardless of country of origin and export) relative to production of domestic industry and domestic consumption has occurred under such conditions and in volumes that threaten causing serious injury to domestic industry *but has not been caused by effect of other factors* (Exhibit JPN-7, p. 3; emphasis added).

> commitments to reduce the import duty from 25% to 10% as well as the abolition of government support could have negatively impacted the domestic car industry's financial condition, rather than this being a consequence of growing import of cars to Ukraine. However, 2008 was the beginning of the period of the safeguard investigation, and therefore it was not considered as appropriate to consider the trends in the car industry in the preceding ten-year period.
>
> The results of the global crisis are objective causes of their influence on the position of any companies, including the manufacturers of the Product concerned.
>
> As for the 13-percent additional duty rate that was valid in 2009, it is worth noting that the said rate was valid in 2009 and did not rule out the import of the Product subject to investigation to Ukraine. In addition, the 13-percent additional duty rate did not apply to the import of the Product to Ukraine if they originated from countries that were parties to free trade agreements.
>
> Given the foregoing and results of analysis of information obtained in the course of the safeguard investigation, the Ministry concludes that there is sufficient evidence and grounds for having the Commission to review the proposals concerning application of safeguard measures regarding the import of motor cars to Ukraine regardless of the country of origin and export, for a three-year period.[377]

7.326. Thus, the Key Findings identify three factors that might be causing or explaining the observed worsening in the position of the domestic industry: (i) the global financial and economic crisis with its negative impact on domestic consumption; (ii) the non-competitiveness of the domestic products, which appears to be considered a possible result of, on the one hand, the lifting of government support that the Ukrainian car industry received from 1997 to 2008, and, on the other hand, the commitment undertaken by Ukraine to reduce import duties from 25% to 10% upon accession to the WTO in May 2008; and (iii) the removal of the 13% additional duty, that was in effect for six months beginning 7 March 2009.[378]

7.327. In relation to these three factors, the Key Findings state that "the injury caused by these factors cannot be considered as injury caused as a result of the increase in and the conditions of the import".[379] It is unclear to us whether this summarizes a conclusion reached by the competent authorities or merely recalls the legal standard to be followed when establishing the causal link. The Key Findings also do not explicitly state whether the three factors were causing or threatening to cause serious injury at the same time as the increased imports.

7.328. Regarding non-competitiveness of the domestic product, the Key Findings indicate that the reduction in the tariff rate following Ukraine's WTO accession and the lifting of government support[380] "could" have negatively affected the domestic industry's financial condition, but then note that the government support ended before the start of the investigation period and was therefore not taken into account. Thus, non-competitiveness resulting from the lifting of government support was not treated as a factor that was causing injury at the same time as increased imports. The Key Findings do not state whether the reduction in the tariff rate following Ukraine's WTO accession was considered in the investigation, or whether it had an impact on the domestic industry. Regarding the 13% additional duty, the Key Findings merely state that it was in effect in 2009 and note that it did not stop imports and also did not apply to imports from countries with whom Ukraine had free trade agreements. This may imply that the removal of the temporary duty would have had some impact on the domestic industry, but the Key Findings suggest that any such impact should not be overestimated.[381]

[377] Exhibit JPN-6 (Revised Version), p. 18. (emphasis added)

[378] Exhibit JPN-28. Ukraine's responses to Panel question Nos. 18 and 60. Japan's responses to Panel question Nos. 18 and 60.

[379] Exhibit JPN-6 (Revised Version), p. 18.

[380] The government support ended on 31 of December 2007, as clarified by Ukraine in its response to Panel question No. 19.

[381] The Key Findings also state that prices of the imported product subject to the investigation were lower than the prices of the domestic product of one of the enterprise that represented the domestic industry.

7.329. Finally, as concerns the global crisis, the Key Findings are less than clear. The relevant sentence reads: "The results of the global crisis are objective causes of their influence on the position of any companies, including the manufacturers of the Product concerned".[382] According to Ukraine, this means that no company was immune from the effects of the global financial crisis and that the global financial and economic crisis could not have caused the worsening of the position of domestic producers of passenger cars, while at the same time allowing an increase in imports of passenger cars relative to domestic production.[383] Subsequently, Ukraine also observed that the decrease in consumption due to the global financial crisis "counts as 'other factor'".[384] We consider that the point made in the Key Findings can be reasonably understood as meaning that the global crisis had an impact on all sectors of the economy, including the manufacturers of passenger cars. Hence, the Key Findings appear to acknowledge that the global crisis had some negative impact on the domestic industry, though they do not use the term "injury".

7.330. Based on the above, it appears to us that the Key Findings support the view that the competent authorities agreed that there were at least two other factors – the global financial and economic crisis and the 13% additional duty – that had a negative impact on the domestic industry at the same time as increased imports. But the Key Findings are not explicit in this respect. What seems reasonably clear, though, from the Key Findings is that the competent authorities were of the view that increased imports were an independent cause of a threat of serious injury, and that there was an imminent negative impact on the position of the domestic industry that could be attributed only to increased imports.

7.331. Having reviewed the Key Findings, we are of the view that it is reasonable to understand the Notice of 14 March 2013 as making a determination that increased imports were causing the threat of serious injury, along with other factors. On that basis, we therefore find that:

a. the Notice of 14 March 2013 fails to identify any other factors causing injury at the same time, even though (i) the Notice itself points out that such factors had been raised for discussion by the registered interested parties and (ii) the Key Findings specifically identify such factors;

b. the Notice of 14 March 2013 does not identify the nature and extent of the injurious effects of any factors other than increased imports;

c. the Notice of 14 March 2013 does not explain the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of increased imports; and

d. the Notice of 14 March 2013 does not explain the particular method and process that was used by the competent authorities to separate and distinguish other causal factors.

7.332. It is clear, as discussed at paragraphs 7.316 to 7.319above, that the competent authorities should have identified and explained in the published report, in clear and unambiguous terms, the nature and extent of the injurious effects of those other factors as distinguished from injurious effects of increased imports, as well as the particular method used to separate and distinguish other causal factors. As the Notice of 14 March 2013 does not meet any of these requirements, we conclude that Ukraine has acted inconsistently with its obligations under the second sentence of Article 4.2(b).

7.333. Since the Key Findings address other factors in more detail than the Notice of 14 March 2013, we emphasize that our conclusion on this claim does not depend on an analysis of

Exhibit JPN-6 (Revised Version), p. 14. To us, this would appear to suggest that in relation to the products of the other two enterprises that were identified in the Key Findings as making up the domestic industry, imported products were more expensive. If so, this would imply that part of the domestic industry was losing market share to higher-priced products, thus possibly indicating problems with the competitiveness of the domestic product in the domestic market. At a minimum, this possibility should have been analysed in the Notice of 14 March 2013.

[382] Exhibit JPN-6(Revised Version), p. 18.

[383] Ukraine's first written submission, para. 164.

[384] Ukraine's response to Panel question No. 18.

the Key Findings. We referred to the Key Findings in order to better understand the Notice of 14 March 2013, which is the relevant document, and which we have found to be deficient. In any event, while the Key Findings identify other factors, they do not address the "extent" of the injurious effects of those other factors as distinguished from the injurious effects of increased imports, and also do not describe the method used to separate and distinguish other causal factors.

7.334. We further observe that pursuant to Article 4.2(b), second sentence, the competent authorities need to conduct a non-attribution analysis "when" factors other than increased imports are causing injury to the domestic industry at the same time. Thus if the competent authorities determine that other factors are not causing injury at the same as increased imports, there is no need to conduct a non-attribution analysis. As we have stated above, it is not entirely clear, even after considering the Key Findings, whether the competent authorities found that there were other factors causing injury at the same time as increased imports, although in our view, that is the most reasonable interpretation of the Notice of 14 March 2013. But even assuming that our understanding of the Notice of 14 March 2013 was incorrect, this would not detract from our ultimate conclusion that Ukraine has acted inconsistently with the second sentence of Article 4.2(b). When the competent authorities determine that there are no other factors causing injury at the same time as increased imports, or that factors argued to be causing injury are not, in fact, doing so, this, too, must be stated explicitly in the published report, accompanied by a clear, explicit, and adequate explanation.[385] Otherwise, it would be impossible to determine whether the imposing Member has properly considered whether factors other than imports are causing injury to the domestic industry, and if so, whether that Member has ensured that such injury is not attributed to the increased imports.

7.5.2 Claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(c), 11.1(a), and Article XIX:1(a)

7.335. The Panel now turns to address the remainder of Japan's claims relating to Ukraine's determination of the causal link.

7.5.2.1 Claims under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 11.1(a) and Article XIX:1(a)

7.336. The Panel first addresses, jointly, Japan's claims under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 11.1(a) and Article XIX:1(a).

7.337. Japan claims that as a consequence of the competent authorities' failure (i) to determine the existence of the causal link between increased imports of the product concerned and the threat of serious injury and (ii) to carry out a proper non-attribution analysis, Ukraine has also acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 11.1(a) and Article XIX:1(a).[386]

7.338. Regarding the analysis of the conditions of competition in the domestic market, Japan argues that as part of a causation analysis, the competent authorities must also carry out an assessment of the conditions of competition between imported products and like or directly competitive domestic products. Japan submits that among other elements, the evaluation of the prices is an important factor as far as conditions of competitions are concerned. Japan claims there was no such analysis and therefore there is an incomplete analysis of the causal link.[387]

7.339. Ukraine responds to Japan's claim mainly with the same arguments already outlined in sections 7.5.1.1 above. Regarding the analysis of the conditions of competition, Ukraine argues

[385] See para. 7.315 above.

[386] Japan's first written submission, paras. 288, 292-293; second written submission, para. 226; and response to Panel question No. 105.

[387] Japan's first written submission, paras. 286; opening statement at the first meeting of the Panel, para. 93; second written submission, paras. 186-189; and opening statement at the second meeting of the Panel, para. 49.

that the conditions in this case were such that there cannot be any doubt about the direct effect in terms of sales and prices between the two types of products.[388]

7.340. The Panel notes that it found that Ukraine has acted inconsistently with its obligations under Article 4.2(b) since it has failed to demonstrate the existence of the causal link between increased imports and the injury or threat thereof suffered by the domestic industry and to conduct a proper non-attribution analysis. In the light of this, we see no need, for the purposes of resolving this dispute, to make additional findings regarding whether Ukraine has also acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 11.1(a) and Article XIX:1(a), including regarding whether the competent authorities have properly analysed as part of their causation analysis whether imported products were being imports "under such conditions" as to cause or threaten to cause serious injury, in relation to the account it gave of the aforementioned determination in its published report. We therefore exercise judicial economy and decline to make findings with respect to these claims.

7.5.2.2 Claims under Articles 3.1 and 4.2(c)

7.341. The Panel turns, finally, to Japan's claims under Articles 3.1, last sentence, and Article 4.2(c).

7.342. Japan asserts that since the Notice of 14 March 2013, i.e. the published report, does not contain reasoned and adequate explanations regarding the existence of a causal link between the increased imports and the alleged serious injury or threat of serious injury, nor includes a proper non-attribution analysis, and therefore Ukraine acted inconsistently with Articles 3.1 and 4.2(c).[389]

7.343. Ukraine does not specifically address Japan's claims under Articles 3.1 and 4.2(c) in the context of causation.

7.344. The Panel recalls that it found above that Ukraine has not demonstrated, through reasoned and adequate explanations, the existence of a causal link between increased imports and the threat of serious injury and has also not conducted a proper non-attribution analysis. In the light of this, we see no need, for the purposes of resolving this dispute, to make additional findings regarding whether Ukraine has also acted inconsistently with Articles 3.1 and 4.2(c) in relation to the account it gave of the aforementioned determination in its published report. We therefore exercise judicial economy and decline to make findings with respect to these claims.

7.6 Claims relating to the application, duration, and liberalization of the safeguard measure at issue

7.345. The Panel now turns to Japan's claims under Articles 3.1, 4.2(c), 5.1, 7.1, 7.4, and 11.1(a) and Article XIX:1(a) relating to the application, duration, and liberalization of the safeguard measure at issue.

7.346. Japan claims that Ukraine has acted inconsistently with Articles 3.1, 4.2(c), 5.1, 7.1, 7.4, and 11.1(a) and Article XIX:1(a) because Ukraine failed to (i) apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury"; (ii) apply the safeguard measure "only to the extent necessary to facilitate adjustment"; (iii) progressively liberalize the safeguard measure; and (iv) provide reasoned and adequate explanations and conclusions in its published report.[390]

7.347. Ukraine submits that Japan's claim that it has acted inconsistently with Articles 3.1, 4.2(c), 5.1, 7.1, 7.4, and 11.1(a) and Article XIX:1(a) in relation to its imposition of the measure to the extent necessary to prevent or remedy serious injury and to facilitate adjustment is without merit. Ukraine contends that it has acted in accordance with Articles 5.1, 7.1, 7.4 and 11.1(a) and Article XIX:1(a) by (i) applying the safeguard measure only to the extent necessary to prevent the

[388] Ukraine's first written submission, paras. 160 and 167; opening statement at the first meeting of the Panel, para. 65; second written submission, para. 66; and opening statement at the second meeting of the Panel, paras. 66, 71-72.

[389] Japan's first written submission, para. 294; and second written submission, para. 224.

[390] Japan's first written submission, paras. 297 and 312; and second written submission, para. 227.

threat of serious injury since the duty level and the length of the application were appropriate; (ii) applying the safeguard measure to facilitate adjustment; and (iii) implementing a plan of progressive liberalization. Further, in Ukraine's view, by taking into account all of these factors, its investigation and determination are in line with Articles 3.1 and 4.2(a).[391]

7.348. The Panel begins its analysis with Japan's claim under Article 7.4, first sentence. This claim concerns a substantive requirement – the requirement of progressive liberalization of a safeguard measure at regular intervals – that is different in nature from those imposed by Articles 5.1 and 7.1, which concern the appropriateness of the particular safeguard measure chosen in terms of its nature and duration.

7.6.1 Claim under Article 7.4, first sentence

7.349. Article 7.4, first sentence, provides as follows:

> In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application.

7.350. Article 12.2 sets forth a procedural requirement related to this substantive requirement. Pursuant to Article 12.2, in making the mandatory notifications to the WTO Committee on Safeguards under Article 12.1[392], the Member proposing to apply a safeguard measure must, *inter alia*:

> [P]rovide the Committee on Safeguards with all pertinent information, which shall include ... [a] timetable for progressive liberalization.

7.351. Japan submits that Ukraine acted inconsistently with Article 7.4 because it failed to progressively liberalize the safeguard measure. According to Japan, Article 7.4, first sentence, contemplates progressive liberalization as a means to achieve the purpose of facilitating adjustment. In Japan's view, progressive liberalization is a mandatory requirement, which must be provided for together with the safeguard measure during its application. Japan further contends that the requirement to provide for progressive liberalization, by submitting a relevant timetable, has to be satisfied before a safeguard measure is applied. According to Japan, the text of Article 12.2 confirms this understanding. Japan maintains that the requirements of Articles 7.4 and 12.2 are intrinsically linked, and that Article 12.2 provides the necessary context for the correct interpretation of the scope of the obligation in Article 7.4, in particular for the purpose of determining "when" that obligation must be complied with.[393]

7.352. As regards the safeguard measure at issue, Japan asserts that Ukraine introduced the measure for a period of three years, but did not provide for its progressive liberalization when it imposed the safeguard measure through the Notice of 14 March 2013. Japan acknowledges that Ukraine's competent authorities provided for progressive liberalization of the safeguard measure through the Commission decision of 12 February 2014.[394] In Japan's view, such an *a posteriori* decision does not render the safeguard measure at issue consistent with Article 7.4. Thus, Japan

[391] Ukraine's first written submission, paras. 198 and 199; opening statement at the first meeting of the Panel, para. 75; second written submission, paras. 75 and 76.

[392] For the text of Article 12.1, see para. 7.454 below.

[393] Japan's first written submission, paras. 296 and 304-305; and second written submission, paras. 239, 241 and 244.

[394] Notice of Liberalization of Safeguard Measures on Import to Ukraine of Motor Cars Regardless of Country of Origin and Export, (Exhibit JPN-8); WTO document G/SG/N/8/UKR/3/Suppl.1-G/SG/N/10/UKR/3/Suppl.2-G/SG/N/11/UKR/3/Suppl.1, Notification under Article 12.1 (b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports; Notification pursuant to Article 12.1(c) of the Agreement on Safeguards on Taking a Decision to Apply a Safeguard Measure; Notification pursuant to Article 9, Footnote 2 of the Agreement of Safeguards, (Exhibit JPN-9).

claims that Ukraine acted inconsistently with Article 7.4 by failing to progressively liberalize its safeguard measure.[395]

7.353. Ukraine acknowledges that Article 7.4 requires the Member concerned to progressively liberalize a safeguard measure imposed for more than one year. Ukraine considers Japan's reference to Article 12 irrelevant to this particular claim, since Article 7.4 imposes a substantive obligation to liberalize a measure at regular intervals, whereas Article 12 sets forth notification requirements. According to Ukraine, the obligations under Articles 7.4 and 12.2, although related, are different because the substantive obligation to liberalize a safeguard measure requires only that a plan be put in place and then implemented, whereas the timing for notification of the timetable is an obligation that must be addressed separately under Article 12.2.[396]

7.354. Ukraine contends that it satisfied the requirement of Article 7.4 by implementing a plan of progressive liberalization. According to Ukraine, its Decision on Liberalization was published and immediately notified to the WTO Committee on Safeguards on 28 March 2014, and the notified plan provided for a phased reduction in the duty level after 12 months of implementation and then again after 24 months. Ukraine maintains that by devising, implementing and notifying this plan, it has satisfied its obligation under Article 7.4.[397]

7.355. The Panel recalls that, under Article 7.4, the requirement to progressively liberalize at regular intervals extends to safeguard measures with an expected duration of more than a year. In the case of the safeguard measure at issue, Ukraine notified an expected duration of three years.[398] Accordingly, it is clear that the progressive liberalization requirement applies to the safeguard measure in question.

7.356. Japan claims that Ukraine was in breach of Article 7.4 when the DSB established this Panel on 26 March 2014. The record indicates that Ukraine's competent authorities published and notified a liberalization schedule for the first time two days later, on 28 March 2014.[399] The liberalization schedule provides for a reduction in the applicable duty rates in two steps. The initial reduction was to go into effect within 12 months from the date of introduction of the safeguard measure (14 April 2013), i.e. in mid-April 2014;[400] a further reduction was to enter into force one year later, i.e. in mid-April 2015. Thus, on the date of establishment of this panel, a liberalization of the safeguard measure had neither occurred nor been publicly announced or notified to the WTO, although these steps were taken shortly afterwards.

7.357. The first issue presented by Japan's claim is whether Ukraine has acted inconsistently with Article 7.4 because it did not provide a timetable for its progressive liberalization before applying its safeguard measure. Japan argues that the obligation to progressively liberalize a safeguard measure can only be met if a timetable for progressive liberalization has been provided in advance of the measure being applied. Ukraine, however, considers that the obligation to notify a timetable for progressive liberalization is separate from the substantive obligation under Article 7.4 to progressively liberalize a safeguard measure.[401]

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[395] Japan's first written submission, para. 305; opening statement at the first meeting of the Panel, para. 97; and second written submission, paras. 242, 243 and 244.

[396] Ukraine's first written submission, paras. 188, 189; opening statement at the first meeting of the Panel, para. 73; second written submission, para. 74; opening statement at the second meeting of the Panel, para. 88.

[397] Ukraine's first written submission, paras. 178, 179 and 194; opening statement at the first meeting of the Panel, para. 73; second written submission, para. 74; and opening statement at the second meeting of the Panel, para. 89.

[398] WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/3, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports; Notification pursuant to Article 12.1(c) of the Agreement on Safeguards; Notification pursuant to Article 9, Footnote 2 of the Agreement on Safeguards, (Exhibit JPN-7), p. 4.

[399] The liberalization schedule entered into force on the date of publication. We also note that although the schedule was adopted on 12 February 2014, it was not published until 28 March 2014, i.e. after the establishment of this Panel.

[400] Ukraine's response to Panel question No. 98.

[401] The United States considers that Articles 7.4 and 12.2 contain distinct obligations, and that a breach of Article 12.2 does not necessarily result in a consequential breach of Article 7.4. However, the European Union considers that if the notification under Article 12.2 does not include a timetable for progressive

7.358. The first clause of Article 7.4, first sentence, refers to situations "where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year". Thus, it contains a reference to the notification under Article 12.1. However, we consider that the term "as notified" in this phrase relates to "the expected duration" of a safeguard measure, and does not refer to the notification of a timetable for progressive liberalization. As we have explained, the quoted phrase limits application of the liberalization obligation of Article 7.4 to safeguard measures with an expected duration of over one year. It further clarifies, in our view, that the "expected duration" to be used for determining whether Article 7.4 applies is the duration that has been "notified" to the WTO Committee on Safeguards. Thus, we consider that the reference to the notification under Article 12.1 must be seen in this context. Indeed, it is noteworthy that the second clause of the first sentence of Article 7.4 refers to the obligation of progressive liberalization at regular intervals, and there is no similar reference to the notification under Article 12.1 in that clause. The second clause of the first sentence does not say that a safeguard measure must be progressively liberalized at regular intervals "as notified under the provisions of paragraph 1 of Article 12". In our view, the conspicuous absence of a reference in the second clause of the first sentence of Article 7.4 to a notification under Article 12.1, particularly in the light of the reference in the first clause, suggests that failure to notify a timetable for progressive liberalization in advance of the application of a safeguard measure does not necessarily result in an inconsistency with Article 7.4. Nor do we see any reason to conclude that a breach of Article 7.4 would necessarily occur if a timetable has not been made available otherwise than through a notification under Article 12.1.

7.359. We certainly agree that a timetable made available in advance would greatly assist exporting Members in monitoring compliance with Article 7.4 by the importing Member, since they would know when they should expect to see progressive liberalization occurring, and what that progressive liberalization would consist of. It would also allow them to raise any concerns at an early stage, and even give them the possibility, in the consultations mandated under Article 12.3[402], to seek a change to the timetable, where it has been duly notified pursuant to Article 12.1. A timetable provided in advance would also provide security and predictability for exporters regarding the future market access terms of the Member applying a safeguard measure.

7.360. Significantly, however, a Member can, in our view, comply with its obligation in Article 7.4 even if it has not previously provided a timetable for progressive liberalization. Article 7.4 is a substantive provision that requires actual liberalization of the measure. The mere fact that a Member has failed to provide a timetable for such liberalization does not preclude that Member from taking the required liberalization steps regardless. We see nothing in Article 7.4 that prohibits a Member from taking liberalization steps pursuant to a decision that post-dates the decision to apply a safeguard measure.[403] Moreover, as we discuss below[404], our conclusion does not render Article 7.4 inoperative, as it remains possible, even in the absence of a timetable provided in advance, for a complaining party to demonstrate and a panel to determine whether a Member has acted inconsistently with Article 7.4, by failing to actually progressively liberalize its safeguard measure.

7.361. Based on the foregoing, we reject Japan's argument that failure to provide a timetable before a safeguard measure is applied establishes, by itself, that a Member has acted inconsistently with Article 7.4.

7.362. The second issue raised by Japan's claim is whether Ukraine has acted inconsistently with Article 7.4 because, as of the date of establishment of this panel, it had failed to liberalize the

liberalization, and the safeguard measure at issue is silent, the evidence would support the view that no progressive liberalisation is provided for, has occurred, or is occurring. See European Union's third-party response to Panel question No. 24; and United States' third-party response to Panel question No. 24.

[402] For the text of Article 12.3, see para. 7.524 below.

[403] The European Union and the United States likewise appear to disagree with Japan's argument about Ukraine's "*a posteriori* decision". Both the United States and the European Union agree that nothing in Article 7.4 precludes liberalization through a decision post-dating the initial decision to impose a safeguard measure. See European Union's third-party response to Panel question No. 24; and United States' third-party response to Panel question No. 24.

[404] See para. 7.362.

safeguard measure.[405] We recall that the relevant requirement is to liberalize "at regular intervals during the period of application". The word "regular" is defined as "recurring or repeated at fixed times, recurring at short uniform intervals".[406] Applying this definition in the specific context of Article 7.4, we consider that regular intervals of liberalization are uniform intervals, that is to say, intervals that are equally separated in time. We find further support for this view from the reference in Article 7.4 itself to the purpose of the requirement in question, which is to "facilitate adjustment". Progressive liberalization that proceeds at equal intervals over the period of application facilitates the adjustment of the domestic industry by exposing it to greater foreign competition following a pattern that allows – and forces – the industry to adjust to each stage of that liberalization, and prepare itself for the next one, at equal time intervals. The requirement of progressive liberalization also and notably precludes the importing Member from back-loading liberalization, i.e. not taking any liberalization steps until a late stage in the period of application of a safeguard measure. Delaying liberalization in this way could create a disincentive for the domestic industry to undertake appropriate efforts at adjustment from the outset of the period of application, thus providing increased protection and diminishing the impetus to adjust to competition from imports.

7.363. Article 7.4 does not establish any requirements or guidelines as to how long the regular intervals should be. The only constraint it imposes is that the intervals be such as will "facilitate adjustment" of the domestic industry. In this case, Ukraine decided to progressively liberalize the measure that was to apply for three years after 12 and 24 months, that is, at regular intervals of 12 months.[407] In our view, for a safeguard measure with an expected duration of 36 months, liberalization at the 12- and 24-month marks does not seem unreasonable.[408] Such two-step liberalization ensures liberalization that is not only regular as well as progressive, but also apt to facilitate adjustment of the domestic industry by increasing its exposure to foreign competition.

7.364. Moreover, as there is nothing in the Agreement on Safeguards that required Ukraine to have begun the progressive liberalization of its safeguard measure at any given point in time, the lack of any liberalization as of the date of establishment of this Panel does not of itself require the conclusion that Ukraine failed to liberalize its safeguard measure at regular intervals.

7.365. For all the reasons cited above, we thus conclude that, as of the date of establishment of this Panel, Ukraine had not acted inconsistently with Article 7.4, first sentence, by failing to progressively liberalize the safeguard measure at issue.

7.6.2 Claims under Articles 3.1, 4.2(c), 5.1, 7.1, and 11.1(a), and Article XIX:1(a)

7.366. The Panel now turns to address the remainder of this group of claims. We begin with the claims under Articles 5.1 and 7.1, and then move to the claims under Article 11.1(a) and Article XIX:1(a), before turning to Japan's claims under Articles 3.1 and 4.2(c).

7.6.2.1 Claims under Articles 5.1 and 7.1

7.367. The Panel notes that Japan makes two distinct claims under Articles 5.1 and 7.1. The first claim is based on both provisions, and relates to whether Ukraine's safeguard measure is applied to "the extent necessary to facilitate adjustment"; the second claim is based on Article 5.1 only and relates to whether the safeguard measure is applied to "the extent necessary to prevent or remedy serious injury". We will address these claims in turn.

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[405] Japan recognizes that Ukraine subsequently notified a liberalization timetable, which it submitted as Exhibits JPN-8 and JPN-9. We recall that we must assess the situation as it existed on the date of establishment of the panel. See, e.g. Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – US),* para. 273; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.144.

[406] The *Shorter Oxford Dictionary* (2007), Vol. 2, p. 2514.

[407] We do not understand Japan to argue, in relation to the safeguard measure at issue, that the intervals chosen by Ukraine were unduly long. In any event, Japan has not explained why 12-month intervals should be viewed as too long in this case.

[408] In safeguard disputes to date, for safeguard measures with a similar duration progressive liberalization at regular intervals of 12 months has not been challenged. See, e.g., Panel Reports, *Argentina – Preserved Peaches* (concerning a safeguard measure with a duration of three years); and *US – Steel Safeguards* (concerning safeguard measures with a duration of three years plus one day).

7.368. Before proceeding further, we note that in its second written submission, Japan appears to state that to the extent that the duration of Ukraine's safeguard measure had been set taking into account "the entirety of the serious injury", the duration of the measure exceeds what is permitted under Article 7.1.[409] However, Japan did not make specific reference to Article 7.1, let alone claim a violation of Article 7.1, in the conclusion of the relevant section of the second written submission or any other submission. We therefore consider that Japan has failed to properly state a claim under Article 7.1 relating to "the extent necessary to prevent or remedy serious injury".

7.6.2.1.1 Claims under Articles 5.1 and 7.1 concerning "the extent necessary to facilitate adjustment"

7.369. The Panel recalls that Article 5.1, first sentence, provides that:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.370. Article 7.1, for its part, provides that:

> A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

7.371. Japan notes that Articles 5.1 and 7.1 expressly provide that a safeguard measure shall be applied only "to the extent necessary to facilitate adjustment". Japan claims that Ukraine acted inconsistently with these provisions because it failed to provide for a progressive liberalization of the safeguard measure in the Notice of 14 March 2013, which is necessary "to facilitate adjustment". According to Japan, Article 7.4 contemplates progressive liberalization as a means of facilitating adjustment. In Japan's view, progressive liberalization is a mandatory requirement to facilitate adjustment, which must be provided for together with the safeguard measures during their application.[410]

7.372. Ukraine submits that in its investigation and determination it acted consistently with Articles 5.1 and 7.1 because it applied the safeguard measure to facilitate adjustment in every relevant aspect: the level of the duty, the duration of the measure, and the scheduled progressive liberalization. Ukraine argues that the duty level, the duration of the measure, and the liberalization of the measure are designed to facilitate adjustment of the domestic industry in that the safeguard measure eases the process of economic adjustment to foreign competition.[411]

7.373. The Panel notes that Japan bases its claims with respect to "the extent necessary to facilitate adjustment" on its separate claim that Ukraine acted inconsistently with Article 7.4 because it failed to progressively liberalize the safeguard measure. We have found in the immediately preceding section that when this Panel was established, Ukraine was not acting inconsistently with Article 7.4, first sentence. We also note that Ukraine's competent authorities published and notified a liberalization schedule on 28 March 2014.

7.374. In examining the claims under Articles 5.1 and 7.1, we note that the reasons we have developed in the preceding section in support of our interpretation of Article 7.4 also apply, *mutatis mutandis*, to Articles 5.1 and 7.1.[412] Accordingly, we do not accept Japan's argument that failure to provide a timetable before a safeguard measure is applied establishes, by itself, that a Member has acted inconsistently with Articles 5.1 and 7.1. We also do not consider that Ukraine has acted inconsistently with Articles 5.1 and 7.1 because it had not yet progressively liberalized the safeguard measure at issue as of the date of establishment of this Panel. As discussed above, there is nothing that requires Ukraine to have begun that liberalization at any given point in

[409] Japan's second written submission, para. 234.
[410] Japan's first written submission, para. 309; opening statement at the first meeting of the Panel, para. 97; second written submission, para. 244.
[411] Ukraine's first written submission, paras. 195 and 196; opening statement at the first meeting of the Panel, para. 74; second written submission, paras. 75 and 76; and opening statement at the second meeting of the Panel, paras. 90 and 91.
[412] See para. 7.356 above.

time.[413] Finally, we observe that it is in any event unclear to us how a failure to provide for progressive liberalization would give rise to a breach of Article 7.1. As we understand it, the requirement in Article 7.4, first sentence, to progressively liberalize a safeguard measure only applies to measures whose duration, as notified under Article 12.1, is over one year. Thus, Article 7.4, first sentence, takes as a given that the duration of a safeguard measure has been notified, and is over one year. The fact that a Member fails to provide for progressive liberalization of a notified measure does not demonstrate that the duration of the measure is excessive and that the Member concerned is therefore not complying with its obligation to apply its safeguard measure only for such period of time as is necessary to facilitate adjustment.

7.375. Based on the above considerations, we conclude that Japan has failed to establish that Ukraine has acted inconsistently with Articles 5.1 and 7.1 because it failed to provide for progressive liberalization of the safeguard measure.

7.6.2.1.2 Claim under Article 5.1 concerning necessity "to prevent or remedy serious injury"

7.376. The Panel now turns to examine Japan's claim under Article 5.1 that the safeguard measures must only be applied to the extent necessary to prevent or remedy serious injury.

7.377. Japan claims that Ukraine has acted inconsistently with Article 5.1 because it failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury". First, Japan argues that Ukraine failed in its causation and non-attribution analysis by setting the rate of duty and the duration of the safeguard measure in such a manner that it also addresses injury attributed to factors other than increased imports. Relying on the findings of the Appellate Body in *US – Line Pipe*, Japan argues that the "non-attribution" requirement of Article 4.2(b) provides the necessary context for the application of Article 5.1 and establishes a benchmark against which the competent authorities should determine the permissible extent of their safeguard measures. Japan contends that the rate of duty applied by Ukraine must be found to exceed the extent necessary to prevent or remedy serious injury to the domestic industry. In Japan's view, to the extent that the applied rate of duty was "sufficient to remedy the entirety of the serious injury", Ukraine has acted inconsistently with Article 5.1 because Ukraine itself acknowledged in its Key Findings that at least part of the injury had been caused by other factors.[414]

7.378. Japan further submits that Ukraine did not clarify why and how its tariff concession prevented it from taking measures to offset the change generated by the unforeseen development and therefore failed to establish that the safeguard measure was applied only to the extent necessary to prevent or remedy such serious injury. Finally, Japan maintains that the safeguard measure cannot be regarded as having been applied "only to the extent necessary to prevent or remedy serious injury" because Ukraine applied the measure only in April 2013 on the basis of an analysis of imports and of the situation of the industry concerning the period prior to 2011.[415]

7.379. Ukraine counters that it acted in accordance with Article 5.1 because its safeguard measure was imposed strictly to the extent necessary to prevent the threat of serious injury. In addition, as regards Japan's first argument, Ukraine submits that it took into account the level of causal impact of the increase in imports on the serious injury to the domestic industry when it set the level of the duty. Ukraine maintains that it was appropriate to apply a rate of duty sufficient to remedy the entirety of the serious injury that was threatened to be caused by the increased imports.[416]

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[413] See paras. 7.361-7.363 above.

[414] Japan's first written submission, paras.146-147 and 300; opening statement at the first meeting of the Panel, para. 95; second written submission, paras. 229-233, and 235; opening statement at the second meeting of the Panel, paras. 64 and 65; and Appellate Body Report, *US – Line Pipe*, paras. 253 and 260.

[415] Japan's first written submission, paras. 148 and 301; opening statement at the first meeting of the Panel, para. 96; second written submission, paras. 236-237; opening statement at the second meeting of the Panel, para. 66.

[416] Ukraine's first written submission, paras. 192 and 194; opening statement at the first meeting of the Panel, paras. 71-72; second written submission, paras. 71-73; and opening statement at the second meeting of the Panel, para. 80.

7.380. The Panel notes that Japan's claim under Article 5.1 relates to the particular nature and level of the safeguard measure Ukraine chose to apply as well as to the timing of its application. In the light of our findings above that Ukraine's safeguard measure is inconsistent with Articles 2 and 4, and that Ukraine therefore lacked a legal basis for applying its safeguard measure, we do not consider it necessary, for the purposes of resolving this dispute, to make additional findings on whether, by applying the measure at issue, Ukraine has also acted inconsistently with its obligations under Article 5.1. We consequently exercise judicial economy and make no findings with regard to this claim.

7.6.2.2 Claims under Article 11.1(a) and Article XIX:1(a)

7.381. Japan also raised claims under Article 11.1(a)[417] and Article XIX:1(a)[418] relating to the application and duration of the safeguard measure at issue. Japan submits that Ukraine failed to apply its safeguard measure "only to the extent necessary to prevent or remedy serious injury" and has thereby acted inconsistently with Article 11.1(a) and Article XIX:1(a).[419]

7.382. Ukraine responds that Japan's claims under Article 11.1(a) and Article XIX:1(a), insofar as they relate to the application of its safeguard measure at the selected level and for the expected duration must fail because Ukraine took into account the level of causal impact of the increase in imports on the threat of serious injury to the domestic industry when it set the level of duty, the duration of the measure, and the scheme for progressive liberalization of the measure. Accordingly, Ukraine requests the Panel to reject these claims.[420]

7.383. The Panel recalls its findings above that Ukraine's safeguard measure is inconsistent with Articles 2 and 4, and that Ukraine therefore lacks a legal basis for applying its safeguard measure. In the light of this, we do not consider it necessary, for the purposes of resolving this dispute, to make additional findings on whether, by applying the safeguard measure at issue, Ukraine has also acted inconsistently with its obligations under Article 11.1(a) and Article XIX:1(a). We consequently exercise judicial economy and make no findings with regard to these claims.

7.6.2.3 Claims under Article 3.1, last sentence, and Article 4.2(c)

7.384. The Panel now turns to Japan's claims under Article 3.1, last sentence, and Article 4.2(c).

7.385. Japan submits that Ukraine acted inconsistently with Articles 3.1 and 4.2(c) as its Notice of 14 March 2013 failed to provide (i) a timetable for progressive liberalization and (ii) reasoned and adequate explanations as to why its safeguard measure is "necessary to prevent or remedy serious injury".[421] Regarding the failure to provide a timetable for progressive liberalization, Japan submits that a timetable of progressive liberalization constitutes a "pertinent issue of fact and law" within the meaning of Article 3.1 and therefore should be part of the report published by the competent authorities. Japan considers that, likewise, the lack of a timetable for progressive liberalization also constitutes a breach of Article 4.2(c), which requires the publication of a detailed analysis of the case and a demonstration of the relevance of the factors examined.[422]

7.386. Ukraine submits that it has not acted inconsistently with Articles 3.1 and 4.2(c) because the Notice of 14 March 2013 took into account all of the relevant factors.[423]

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[417] See para. 7.106 for the text of Article 11.1(a).

[418] To recall, Article XIX:1(a) provides in relevant part that "the [Member] shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession".

[419] Japan's first written submission, para. 302; and second written submission, para. 238.

[420] Ukraine's first written submission, paras. 191 and 199; opening statement at the first meeting of the Panel, paras. 70 and 75; second written submission, paras. 71 and 76; and opening statement at the second meeting of the Panel, paras. 79 and 91.

[421] Japan's first written submission, para. 311; and second written submission, para. 245.

[422] Japan's second written submission, para. 245.

[423] Ukraine's first written submission, para. 198; opening statement at the first meeting of the Panel, para. 75; second written submission, para. 76; and opening statement at the second meeting of the Panel, para. 91.

7.387. The Panel notes that the first asserted basis for Japan's claim concerns Ukraine's undisputed failure to provide a timetable for progressive liberalization in its Notice of 14 March 2013. Japan argues in this respect that a timetable for progressive liberalization constitutes a "pertinent issue of fact and law" within the meaning of Article 3.1 and, as such, should figure in the published report. In considering this issue, we recall at the outset that Article 3.1 requires publication of a report "setting forth [the competent authorities'] findings and reasoned conclusions reached on all pertinent issues of fact and law". Thus, the report must cover pertinent issues in respect of which the competent authorities reach findings and reasoned conclusions. We further observe that Article 3 is entitled "Investigation". Article 4.2(a) clarifies that safeguard investigations serve "to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of [the] Agreement".[424] The word "determine" confirms that the competent authorities are required to make determinations, or reach "findings" and "reasoned conclusions", on the issues to be investigated. These issues – whether there has been an increase in imports, serious injury or threat thereof, and causation– all go to whether there is a legal basis for applying a safeguard measure, and if so, what kind of measure. In contrast, the establishment of a timetable for progressive liberalization at regular intervals is not an issue that by its nature requires an "investigation" that culminates in "findings" and "reasoned conclusions". Also, the issue of liberalization is not directly linked to whether there is a sufficient legal and factual basis for applying a particular safeguard measure. Nor is the competent authorities' decision on this issue governed by the findings and conclusions on the issues that must be investigated.

7.388. Consideration of Article 4.2(c) leads to similar misgivings about Japan's claim. It requires publication of a "detailed analysis of the case under investigation" and a "demonstration" of the relevance of the "factors examined". As we have explained, how and when to liberalize a safeguard measure are not issues to be considered and decided in the investigation underlying the decision to impose a safeguard measure, but rather come afterwards, and are subject to different governing provisions of the Agreement on Safeguards.

7.389. We recognize that Article 12.2 identifies the timetable for progressive liberalization as "pertinent information" that must be notified under Article 12.1(c) upon taking a decision to apply a safeguard measure. This confirms that the timetable is pertinent "information" for Members to receive.[425] It does not demonstrate, however, that the timetable is a "pertinent issue of fact and law" that must first be investigated by the competent authorities and on which they must reach "findings" and "reasoned conclusions" or provide a detailed analysis and demonstration.

7.390. In the light of the above, we see no basis for interpreting Article 3.1, last sentence, or Article 4.2(c), as requiring that the published report, or analysis and demonstration, contain a timetable for the progressive liberalization of the measure at regular intervals. We consequently conclude that Ukraine did not act inconsistently with Article 3.1, last sentence, or Article 4.2(c) by failing to provide a timetable for progressive liberalization in its Notice of 14 March 2013.

7.391. Next, we turn to the second asserted basis for Japan's claim. According to Japan, Ukraine's Notice of 14 March 2013, contrary to Articles 3.1 and 4.2(c), fails to provide reasoned and adequate explanations as to why the safeguard measure at issue is "necessary to prevent or remedy serious injury". We understand this quotation to refer to Japan's claim under Article 5.1. Since we have found above that Ukraine's safeguard measure is inconsistent with Articles 2 and 4 and that Ukraine therefore lacked a legal basis for applying its safeguard measure, and since we made no findings on Japan's substantive claims under Article 5.1, we do not consider it necessary, for the purposes of resolving this dispute, to make findings on Japan's claims under Articles 3.1 and 4.2(c). In the light of this, we also exercise judicial economy with respect to these claims and make no findings regarding them, insofar as they concern the explanations provided in the Notice of 14 March 2013 as to why the safeguard measure is necessary to prevent or remedy serious injury.

[424] For the full text of Article 4.2(a), see para. 7.202 above.

[425] As we have explained above, providing the timetable *inter alia* gives Members the possibility to seek a change to the pace of liberalization in the context of consultations under Article 12.3 and also assists with monitoring of compliance with Article 7.4, first sentence.

7.7 Claims under Article II:1(b) of the GATT 1994

7.392. The Panel now turns to Japan's claims under Article II:1(b) of the GATT 1994, which provides:

> 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.

7.393. Japan claims that Ukraine acted inconsistently with its obligations under Article II:1(b) because Ukraine imposes duties that are in excess of those set forth in its schedule through the unlawful safeguard measure at issue.[426]

7.394. Ukraine responds that Japan's claim under Article II:1(b) is a consequential claim. It argues that its safeguard measure was lawfully implemented in accordance with Article XIX and the Agreement on Safeguards, and was permitted as "emergency action on imports of particular products". Accordingly, Ukraine concludes that Japan's claim must fail.[427]

7.395. The Panel found above that Ukraine (i) acted inconsistently with its obligations under Article XIX:1(a) by failing to make a proper determination regarding the existence of unforeseen developments and the effect of GATT 1994 obligations; (ii) acted inconsistently with its obligations under Article 2.1 by failing to make a proper determination regarding increased imports; (iii) acted inconsistently with its obligations under Article 4.2(a) by failing to make a proper determination regarding threat of serious injury to the domestic industry; and (iv) acted inconsistently with its obligations under Article 4.2(b) by failing to conduct a proper causation analysis. In the light of this, we see no need, for the purpose of resolving this dispute, to make additional findings regarding whether Ukraine has also acted inconsistently with its obligations under Article II:1(b). We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.8 Claims relating to the conduct of the investigation and the investigation report

7.396. The Panel notes that Japan put forward three different claims under Article 3. The first claim is based on Article 3.1, second sentence, concerning reasonable public notice and public hearings or other appropriate means to present evidence and views, including an opportunity to respond to the presentations of others. The second claim is based on Article 3.1, first sentence, which concerns the obligation to make a proper investigation. The third claim is based on Article 3.1, last sentence, and Article 4.2(c), concerning the obligation to publish a report. We will address these claims in turn.

7.8.1 Claim under Article 3.1, second sentence

7.397. Article 3.1, second sentence, provides as follows:

> This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.

[426] Japan's first written submission, para. 313; second written submission, para. 248.
[427] Ukraine's first written submission, paras. 200-201; second written submission, para. 77.

7.398. Japan claims that Ukraine acted inconsistently with Article 3.1, second sentence, because Ukraine failed to provide (i) reasonable public notice and (ii) appropriate means through which Japan as an interested party could present evidence and its views, including the opportunity to respond to the presentations of other parties. Japan argues that although registered as an interested party, it received very little information from the authorities and few submissions or presentations made by the other parties, and that this prevented it from presenting its views in a meaningful way.[428]

7.399. Ukraine submits that Japan's claim is not supported by the facts on the record. Ukraine observes that it involved Japan and other interested parties in the course of the investigation and provided appropriate means for the defence of their interests, as required by Article 3.1. In this regard, Ukraine recalls that it sent several letters to the Embassy of Japan and provided Japan with an opportunity to participate in the hearing organised in March 2012. Ukraine considers that in doing so the competent authorities adequately discharged their obligations under Article 3.1.[429]

7.400. As concerns the obligations set forth in the second sentence of Article 3.1, Japan submits that the second sentence elaborates on the specific content of the term "investigation". It provides certain procedural guarantees, namely the requirements of reasonable public notice and public hearings or other appropriate means in which interested parties could present evidence and their views.[430]

7.401. Ukraine responds that Article 3.1 contains only very limited procedural obligations that Members must comply with when conducting a safeguard investigation and that this due process provision is of a general nature and does not specify how the various due process obligations listed therein are to be complied with. Nevertheless, Ukraine acknowledges that Article 3.1 obliges the competent authorities of a Member to provide reasonable public notice to all interested parties and to provide all such parties with the opportunity to present evidence and their views and to respond to the presentations of other parties.[431]

7.402. The Panel notes that both parties agree that Article 3.1, second sentence, provides certain procedural guarantees to interested parties, notably "reasonable public notice" and "public hearings or other appropriate means … [to] present evidence and their views including the opportunity to respond to the presentations of other parties".[432] This was also confirmed by the Appellate Body in *US – Wheat Gluten*:

> The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'.[433]

7.403. We note that Article 3, second sentence, does not define the term "interested parties". Nevertheless, it makes clear that the term "interested parties" at a minimum includes importers and exporters. In addition, it refers to "other interested parties", without qualification. In our view, therefore, the term "interested parties" also includes Members such as Japan whose interest in the proceeding is self-evident, as its exporters would be affected by the imposition of a safeguard measure. We find relevant in this regard that the importing Member must, under Article 12.1 of the Agreement on Safeguards, notify the WTO Committee on Safeguards immediately on initiating a safeguard investigation. One of the reasons why Article 12.1 requires immediate notification in

[428] Japan's first written submission, para. 163; second written submission, paras. 67-68; and opening statement at the second meeting of the Panel, para. 60.

[429] Ukraine's first written submission, paras. 61 and 66; opening statement at the first meeting of the Panel, para. 31; second written submission, para. 16; and opening statement at the second meeting of the Panel, para. 16.

[430] Japan's first written submission, para. 153 (referring to Panel Reports, *US – Steel Safeguard*s, para. 10.61); and second written submission, para. 53.

[431] Ukraine's first written submission, paras. 50 and 52; and second written submission, para. 19.

[432] See also Panel Reports, *US – Steel Safeguards*, para. 10.61 (stating that "Article 3.1 of the Agreement on Safeguards provides certain procedural guarantees to interested parties, such as 'reasonable public notice' and 'public hearings or other appropriate means [to] present evidence and their views'").

[433] Appellate Body Report, *US – Wheat Gluten*, para. 54.

our view is to ensure that potentially affected exporting Members do not miss the opportunity to present their views to the competent authorities as interested parties.

7.404. In the investigation at issue in this dispute, Ukraine in fact registered as interested parties not only importers and foreign producers, but also eight authorities of foreign countries, including the Embassy of Japan in Ukraine, and international organizations.[434] We thus proceed on the same basis as the parties – that an exporting Member such as Japan can properly be viewed as an "interested party" within the meaning of Article 3.1, second sentence. More specifically, we consider that Japan falls within the category of "other interested parties".

7.405. Turning now to Japan's claim, and having regard to the text of Article 3.1, second sentence, we consider that Japan, in order to sustain its claim under that provision, must establish that Ukraine:

a. failed to provide reasonable public notice; or

b. failed to provide public hearings or other appropriate means through which Japan as an interested party could present evidence and its views, including the opportunity to respond to the presentations of other parties.

7.8.1.1 Reasonable public notice

7.406. The Panel will begin its analysis with an examination of Japan's contention that Ukraine has failed to provide reasonable public notice.

7.407. Japan argues that Article 3.1 provides certain procedural guarantees to interested parties such as "reasonable public notice".[435] Further, according to Japan, although registered as an interested party in the investigation, it received very little information from the competent authorities. Japan argues that Exhibit JPN-13 demonstrates Ukraine's failure to comply with the procedural requirements of Article 3.1. Japan submits that only six letters and two verbal notes were communicated to Japan during the investigation, and that these communications were merely procedural and did not contain any substantive information.[436]

7.408. Ukraine responds that Japan's claim is contradicted by the facts on the record. Ukraine argues that there is no express provision guaranteeing interested parties access to the file, apart from the very general requirement to provide "reasonable public notice to all interested parties," and that the Agreement on Safeguards does not contain any disclosure obligations as set forth in, for example, Articles 6.4 and 6.9 of the Anti-Dumping Agreement. Furthermore, in Ukraine's view, Exhibit JPN-13, which indicates that Ukraine sent six letters to the Embassy of Japan during the investigation and contacted the Embassy of Japan via telephone on two additional occasions, makes it clear that Ukraine gave Japan reasonable public notice. Ukraine asserts that the index of Exhibit JPN-13 also indicates that Japan had notice of the 22 March 2012 hearing. Ukraine also points out that in the Notice on Initiation the interested parties were also provided with a 45-day period to send their comments and views to the Ministry for consideration.[437]

7.409. The Panel notes that while the parties disagree whether Ukraine gave reasonable public notice to all interested parties, neither party has been specific about what constitutes reasonable public notice within the meaning of Article 3.1. In our view, in interpreting the phrase "reasonable public notice", it is necessary to bear in mind that interested parties play a central role in safeguard investigations and that they are a primary source of information for the competent authorities.[438] In the light of this, we consider that the competent authorities must certainly notify

[434] List of the interested parties of the safeguard investigation, (Exhibit JPN-12); Letter sent on 25 August 2011 regarding "the list of the interested parties of the investigation", and their rights and obligations, (Exhibit UKR-2).

[435] Panel Reports, *US – Steel Safeguard*s, para. 10.61.

[436] Japan's first written submission, paras. 153 and 163; and second written submission, paras. 68–69.

[437] Ukraine's first written submission, para. 61; opening statement at the second meeting of the Panel, para. 22 and response to Panel question No. 29.

[438] In *US – Wheat Gluten*, the Appellate Body highlighted the special role of interested parties in safeguard investigations. See Appellate Body Report, *US – Wheat Gluten*, para. 54 (stating with regard to

interested parties of a decision or action, such as the initiation of an investigation, that impacts on whether or how interested parties can discharge their role as providers of evidence and views. As we mentioned above, the Appellate Body in *US – Wheat Gluten* also stated that interested parties must be notified of an investigation.

7.410. Furthermore, absent further elaboration in Article 3.1, we consider that the adjective "reasonable" when used in conjunction with "public notice" is susceptible of being interpreted to relate to several relevant aspects, including the timing of the public notice, the manner of publication of the notice, and its content. Here as well, a determination of whether public notice is "reasonable" in terms of its timing, manner of publication and content may, in our view, affect the ability of interested parties to perform their role in the investigative process.

7.411. With these considerations in mind, we now turn to the safeguard investigation at issue in this dispute. Ukraine issued three public notices in connection with the investigation at issue: (i) the Notice of Initiation (Exhibit JPN-3), (ii) the Notice of Extension (Exhibit JPN-5), and (iii) the Notice of Imposition (Exhibit JPN-2).

7.412. Japan has not addressed the latter two notices in its arguments pertaining to its claim under the second sentence of Article 3.1. We therefore do not consider them further. As regards the Notice of Initiation, Japan has not specifically identified in what way the Notice in its view was not "reasonable" in terms of its timing, manner of publication or content. We note that it was published in the *Uryadovyi Kuryer*, the official government gazette of Ukraine, on 2 July 2011. The Notice indicates that the competent authorities would register the interested parties within 30 days of publication of the Notice; that they would review requests for hearings within the same timeframe; and that they would review written comments and information within 45 days of publication.[439] As regards the content of the Notice, it sets forth: (i) the date of initiation of the investigation; (ii) the products subject to the investigation; (iii) the reasons for the initiation of investigation; and (iv) deadlines and procedures applicable to interested parties. In view of these elements, we see no basis on which to conclude that the public notice given by Ukraine of the initiation of the investigation at issue was not reasonable in terms of its timing, manner of publication or content.

7.413. As regards Japan's argument that it received very little substantive information from the competent authorities during the investigation, we see nothing in Article 3.1 that would require the competent authorities to provide substantive information beyond what is necessary to provide reasonable public notice.[440] We have just found that Japan has failed to establish that the Notice of 2 July 2011 falls short in this respect. Also, we observe that Japan has not been specific about what additional information Ukraine should have provided. For all these reasons, we reject Japan's argument that it received too little substantive information from Ukraine's competent authorities.

7.414. In the light of the foregoing considerations, we conclude that Japan has not demonstrated that Ukraine acted inconsistently with Article 3.1, second sentence, because the investigation did not include reasonable public notice to all interested parties.

7.8.1.2 Public hearings or other appropriate means to present evidence and views, including an opportunity to respond to the presentations of others

7.415. The Panel now turns to Japan's claim that Ukraine acted inconsistently with Article 3.1, second sentence, because it failed to provide an appropriate means through which Japan as an interested party could present evidence and its views, including the opportunity to respond to the presentations of other parties.

Article 3.1, second sentence, that "[t]he Agreement on Safeguards, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities").

[439] Exhibit JPN-12 indicates that the competent authorities registered 38 interested parties. See also Exhibit UKR-2 and Ukraine's first written submission, para. 23. Ukraine pointed out that many interested parties sent written comments. Ukraine's second written submission, para. 16.

[440] Pursuant to Article 3.1, second sentence, the competent authorities must also give interested parties access to presentations of other parties.

7.416. Japan argues that the competent authorities are responsible for providing "appropriate means" to ensure meaningful opportunities for the interested parties to present evidence and their views as well as to respond to the presentations of other parties. Japan contends that these "appropriate means" must, among other things, include specific rules for the distribution of relevant documents, in order to ensure such meaningful opportunities. In Japan's view, this requirement flows from the competent authorities' duty to carry out an "investigation" which precludes "them from remaining passive".[441] Japan maintains that the competent authorities must ensure that all interested parties receive the relevant documents submitted by the other parties.[442]

7.417. Japan submits that it was prevented from effectively presenting its views in a meaningful way in the investigation at issue, as it did not have adequate opportunity to respond to the few submissions and presentations made by the other interested parties that it received. Japan asserts that it sent the competent authorities two sets of written comments during the investigation that were limited to brief general observations, due to the very limited information that had been provided to it. According to Japan, Ukraine's assertion that the competent authorities are not obliged by the Safeguards Law[443] to provide such information to the interested parties, unless the authorities received a written request, must be rejected, because Ukraine cannot justify its failure to respect the requirements of Article 3.1 on the basis of its domestic legislation.[444]

7.418. Japan further contends that, while it could and did participate in the public hearing of March 2012, it cannot be said that it was provided with a meaningful opportunity to present evidence and its views, given the very limited information concerning the elements of the investigation that had been provided to Japan prior to the hearing, and in view of the time constraints of the hearing. Moreover, Japan argues that the Ukrainian authorities did not ensure the appropriate means for the interested parties to familiarize themselves with the other parties' evidence and views. According to Japan, in view of the unclear and ambiguous wording of Article 9.6 of Ukraine's Safeguards Law[445], Ukraine did not provide an appropriate means of ensuring communication between, and participation of, the interested parties in this investigation. Japan maintains that the requirements of Article 9.6 are contradictory and ambiguous and that it remains unclear who and under what conditions should supply the relevant information.[446]

7.419. Ukraine submits that Japan's claim is not supported by the facts on the record because Ukraine involved the interested parties in the course of the investigation and provided appropriate means for the defence of their interests, in accordance with the procedural obligation of Article 3.1. Ukraine argues that, under Article 3.1, second sentence, the competent authorities are obliged to provide an opportunity for participation, but obviously cannot force the interested parties to present their interests. Relying on a statement by the panel in *US – Steel Safeguards*, Ukraine maintains that "inviting comments in response to the questionnaires, and addressing the issue during its public hearings" is enough for a Member to comply with the obligation under Article 3.1 to provide "appropriate means in which importers, exporters and other interested parties [can] present evidence and their views".[447]

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[441] Appellate Body Report, *US – Wheat Gluten*, para. 55.

[442] Japan's response to Panel question No. 89.

[443] Exhibit JPN-1.

[444] Japan's first written submission, para. 163; second written submission, para. 67; opening statement at the second meeting of the Panel, para. 60; and response to Panel question Nos. 9, 89 and 110.

[445] Article 9.6 of the Ukraine's Safeguards Law provides, in relevant part, that:

> The interested parties may on written request, see all information provided by another interested party …. if such information: [1. relates to protection of their interests; 2. is not confidential pursuant to Article 12 of the Law; 3. is used for the purposes of a safeguard investigation].
>
> ...
>
> The information and evidences supplied to the Ministry by one of the interested parties in the course of a safeguard investigation shall be also supplied to all other interested parties involved. Where the information and evidences haven't been provided to the Ministry or to other interested parties, or provided information and evidences could not be verified, such information and evidences shall be disregarded by the Ministry in the course of a safeguard investigation.

[446] Japan's second written submission, para. 69; response to Panel question Nos. 9, 28 and 89; and comments on Ukraine's response to Panel question No. 115.

[447] Ukraine's first written submission, para. 61; opening statement at the first meeting of the Panel, para. 31; Ukraine's second written submission, paras. 16 and 19; and opening statement at the second meeting of the Panel, paras. 16, 18 and 19 (referring to Panel Reports, *US – Steel Safeguards*, para. 10.64).

7.420. According to Ukraine, its competent authorities provided the interested parties with a mechanism to actively participate in the investigation according to its Safeguards Law and the Notice on Initiation. Ukraine points out that interested parties were provided with a 45-day period to send comments and information to the Ministry. Ukraine considers that Exhibit JPN-13 also makes clear that it gave Japan the opportunity to present evidence and its views at the March 2012 public hearing. Ukraine notes that Japan had a possibility to meet all other interested parties as well as to present its views at the hearings and send a written version of its views to the Ministry. Ukraine considers that Japan could have participated much more actively in the investigation, as other interested parties did, and that Japan did not fully exercise its rights. Thus, Ukraine does not consider that Japan's lack of participation was the fault of the Ministry.[448]

7.421. Ukraine further argues that Japan did not request access to the application by the domestic industry or the information provided by other interested parties, and did not complain about not being provided such information by these parties automatically. Ukraine contends that according to its Safeguards Law, registered interested parties are to provide all other interested parties with the evidence and information they submit to the Ministry, and that the Ministry is not obliged under the Safeguards Law to provide such information to the interested parties, unless they submit a written request to that effect. Ukraine notes that the Ministry sent a letter to the Embassy of Japan in Ukraine, and to all the other registered interested parties, with a summary of their rights and obligations, which included providing all the information supplied to the Ministry directly to other interested parties. Ukraine observes that many interested parties, but not the Embassy of Japan in Ukraine, sent the Ministry appropriate information.[449]

7.422. The Panel begins by observing that the second sentence of Article 3.1 requires that the competent authorities hold public hearings "or" provide other appropriate means for interested parties to present evidence and views, including responses to presentations of other parties. The word "or" makes clear that when public hearings are held, there is no obligation to provide, in addition, any "other appropriate means" of giving input.

7.423. As regards access to substantive information on the investigation at issue, nothing in the text of the second sentence of Article 3.1, or any other provision of the Agreement on Safeguards cited by Japan, indicates that the importing Member must provide substantive information in advance of any public hearings to the interested parties. While Article 3.1 refers to an opportunity to "respond" to presentations of other parties, this is in the context of the public hearings or other appropriate means which must be provided for all interested parties to present evidence and their views.

7.424. We now turn to examine the facts of the present dispute. The evidence on record indicates that Ukraine's competent authorities undertook relevant steps as indicated in the following table:

[448] Ukraine's second written submission, para. 16; opening statement at the second meeting of the Panel, paras. 18 and 20; and response to Panel question No. 28.

[449] Ukraine's second written submission, para. 18; and opening statement at the second meeting of the Panel, paras. 20–21.

Date	Step	Description
2 July 2011	Publication of the Notice of Initiation (Exhibit JPN-3)	The Ministry of Economy informed the public about the deadline for requesting registration as interested party (within 30 days after publication of the Notice), reviewing requests for hearings (within 30 days after publication of the Notice), and submitting written comments and other information (within 45 days after publication date of the Notice).
25 August 2011	Letter from Ministry of Economic Development and Trade of Ukraine to the interested parties (Exhibit UKR-2)	The Ministry provided a list of registered interested parties, informed registered interested parties that Ukraine's Safeguards Law established the rights and obligations of interested parties and provided an annotated list of selected provisions of the Safeguards Law. The Ministry also informed interested parties that they were required to send their written comments and other information directly to all other interested parties within five days of submitting them to the competent authorities; and that they could submit a request to the competent authorities to see all information submitted to them by another interested party, subject to certain conditions.
18 January 2012	Letter from Ministry of Economic Development and Trade of Ukraine to Embassy of Japan in Ukraine (Exhibit UKR-2)	The Ministry informed about the date of the public hearing to be held – 7 February 2012 – and the agenda for the hearing. The agenda indicates that for each item of the agenda, the complainant would make a presentation, followed by presentations of the interested parties and, lastly, debate.
3 February 2012	Letter from Ministry of Economic Development and Trade of Ukraine to interested parties (Exhibit UKR-2)	The Ministry postponed the public hearing date until further notice.
7 March 2012	Letter from Ministry of Economic Development and Trade of Ukraine to interested parties (Exhibit UKR-2)	The Ministry fixed 22 March 2012 as the new hearing date and informed the interested parties that information provided by interested parties orally during the hearing would be considered in the Minister's special investigation only if it was submitted in writing no later than 27 March 2012.
22 March 2012	Public hearing, Ministry of Economic Development and Trade of Ukraine, Kiev (Exhibit UKR-2)	The public hearing took place.

7.425. As is apparent from the table, the competent authorities in the investigation at issue:

a. informed all interested parties of the procedure for registration and subsequently of the identities of the interested parties that were registered;

b. informed interested parties of the date of the public hearing and the agenda[450];

c. gave interested parties an opportunity to (i) submit written comments and other information within 45 days after publication of the Notice; and (ii) make oral

[450] Japan has stated that it participated in the public hearing of 22 March 2012. Japan's response to Panel question No. 28.

presentations at the public hearing, to be considered by the competent authorities subject to submission of a written version after the public hearing[451];

d. informed interested parties (i) of the obligation to send their written comments and other information directly to all other interested parties within five days of submitting them to the competent authorities; and (ii) that they could submit a request to the competent authorities to see all information submitted to them by another party, subject to certain conditions[452]; and

e. gave interested parties an opportunity at the public hearing, either as part of their own presentations or during the subsequent debate, to respond to written comments and other information submitted by other parties in advance of the hearing.

7.426. Furthermore, the competent authorities informed interested parties that its investigation would be conducted in accordance with the Safeguards Law of Ukraine. Article 9.5 of the Safeguards Law provides that interested parties participating in a public hearing on an investigation may supply additional information in the course of such hearings, to be considered by the competent authorities subject to submission of a written version after the public hearing. Article 9.6 further provides that interested parties may comment on all information submitted by another interested party, and that comments must be considered by the competent authorities if they are "well grounded" and submitted within the deadline set by the competent authorities.[453] Thus, Ukraine's domestic legislation establishes specific opportunities and means for interested parties to participate in the investigation and provide information.[454]

7.427. Particularly in the light of the additional opportunities for participation and access to information provided for under Ukrainian law, the interested parties in this investigation could "present evidence and their [own] views", both in writing and orally at the public hearing. They also had an "opportunity to respond to the presentations of other parties" – that is to say, presentations of evidence or views submitted by other parties. Interested parties could do so either orally at the public hearing (and provide a written version of their responses after the hearing by 27 March 2012[455]) or, in the case of new presentations of other parties at the public hearing, after the public hearing pursuant to Article 9.6 of the Safeguards Law.[456] Regarding the time constraints at the public hearing to which Japan has referred, the initial agenda for the public hearing communicated to Japan on 18 January 2012 suggests that the time set aside for the public hearing permitted only brief responses to presentations by other parties. However, there is no evidence, and Japan does not contend, that it or any other interested party sought and was denied additional time to respond to other parties' presentations.[457]

7.428. Japan observes that it received little substantive information from the competent authorities. As already mentioned, however, Article 3.1 imposes no obligation on the competent authorities to provide interested parties with substantive information over and above that needed to satisfy the requirement to give "reasonable public notice" of an investigation.

[451] Letter sent on 7 March 2012 regarding exact date and time of the hearings, (Exhibit UKR-2).

[452] Letter sent on 25 August 2011 regarding the list of the interested parties of the investigation, their rights and obligations, (Exhibit UKR-2); see also Article 9.6 of the Safeguards Law.

[453] We note in passing that the Safeguards Law also indicates, in Article 17.2, that interested parties could submit their views to the competent authorities regarding whether application of a safeguard measures would be in the "national interest".

[454] European Union's third-party response to Panel question Nos. 9-10.

[455] Letter sent on 7 March 2012 regarding the exact date and time of the hearings, (Exhibit UKR-2).

[456] The evidence before the Panel does not indicate whether any interested party submitted additional information during the public hearing and a deadline was set for other interested parties to comment on such information. We note, however, that the European Union has stated that interested parties were given an opportunity by the competent authorities to respond to presentations of other parties also in writing after the public hearing. It further stated that it submitted written comments on 23 March 2012 that took into account arguments raised by other interested parties during the public hearing; see European Union's third-party response to Panel question No. 10.

[457] We note in this respect that the letter of 18 January 2012 appears to have specifically invited Japan to put forward any "proposals for the agenda" of the public hearing. See Letter of 18 January 2012 regarding notification and agenda of hearings, (Exhibit UKR-2).

7.429. Japan further maintains that it received few submissions made by other parties, and that the competent authorities failed to ensure that interested parties had an opportunity to respond to the presentations of other parties. We have already observed that, first, Article 3.1, second sentence, requires public hearings "or" other appropriate means in which interested parties could present evidence, views, and responses to others' evidence and views, and that, secondly, in the investigation at issue there was an opportunity for interested parties to make their own presentations in the course of the public hearing and to respond to other parties' presentations during the public hearing. As identified above, Ukraine's Safeguards Law provides additional opportunities for participation, including the opportunity to submit written comments within 45 days after publication of the Notice. Japan asserts that, despite what is provided for in the Safeguards Law[458], it did not receive all written submissions directly from the other parties.[459] We note, however, that Article 9.5 of the Safeguards Law affords the possibility to interested parties to request access to all information submitted to the competent authorities by another interested party. There is no evidence on record to show that Japan made inquiries with the competent authorities to satisfy itself that it had received all submissions of other parties. Ukraine has stated that it received no such request from Japan. Having opted for the public hearings route to provide opportunities for participation, we do not agree that Ukraine was required under Article 3.1 to do more than it did to ensure access to such written submissions.

7.430. In sum, for the reasons cited above, we are unable to accept Japan's contention that it was prevented from presenting evidence and views in a meaningful way, and that the investigation did not include appropriate means through which Japan and other interested parties "could present evidence and their views, including the opportunity to respond to the presentations of other parties", as required by Article 3.1, second sentence.

7.8.1.3 Conclusion

7.431. In the light of the above, we conclude that Japan has failed to establish that Ukraine acted inconsistently with Article 3.1, second sentence, by failing to provide reasonable public notice or not providing public hearings or other appropriate means to present evidence and views, including an opportunity to respond to the presentations of others.

7.8.2 Claims under Article 3.1, last sentence, and Article 4.2(c)

7.432. The Panel now turns to Japan's claims under Article 3.1, last sentence, and Article 4.2(c).[460]

7.433. Japan claims that Ukraine acted inconsistently with Articles 3.1 and 4.2(c). First, Japan argues that Ukraine's Notice of 14 March 2013, i.e. the "published report", does not set forth the competent authorities' findings and reasoned conclusions reached on all pertinent issues of fact and law and does not contain a detailed analysis of the case as well as a demonstration of the relevance of the factors examined with respect to various issues, including the unforeseen developments, the effect of the obligations incurred under the GATT 1994, the increase in imports, the serious injury or threat of serious injury, causation, etc. Japan contends that Ukraine cannot remedy its failure with its claim of confidentiality. Japan argues that what is confidential pursuant to Article 3.2 is the information and not certain categories of reports, documents or analysis. In Japan's view, a party cannot invoke Article 3.2 in relation to entire reports, documents or analysis solely because they were issued by the authorities or designated as confidential by the government. Referring to the panel reports in *US – Steel Safeguards,* Japan argues that, in any event, neither the protection of confidential information nor Ukraine's domestic law, notably Article 12.3 thereof, can excuse the authorities' failure to comply with the obligation to provide a

[458] Article 9.6 of the Safeguards Law places a legal obligation on interested parties to distribute their submissions directly to other interested parties, and a sanction attaches to any omission to do so. Specifically, the competent authorities are required to disregard submissions not supplied to other interested parties.

[459] The European Union has stated that it received the written comments provided by other interested parties. European Union's third-party response to Panel question No. 10.

[460] For the text of Articles 3.1 and 4.2(c), see para. 7.110 above.

reasoned and adequate explanation of how the facts support their conclusions in a published report.[461]

7.434. Japan further claims that Ukraine acted inconsistently with Articles 3.1 and 4.2(c) because it failed to publish its report and detailed analysis "promptly". Japan considers that the temporal parameter regulating the publication obligation in Article 3.1 is the term "promptly" in Article 4.2(c). In Japan's view, whether a publication has been made "promptly" is to be determined by reference to the date of the conclusion of the investigation, i.e. the date of the determination. Japan maintains in this respect that the determination was made in the present case on 28 April 2012. Japan thus concludes that publication of the competent authorities' report in the form of a Notice one year later cannot be viewed as "prompt".[462]

7.435. Ukraine contends that Japan's claims under Articles 3.1 and 4.2 (c) are not well founded. According to Ukraine, Japan did not substantiate its claim that the Notice of 14 March 2013 was insufficient to satisfy the requirements of the Agreement on Safeguards. Ukraine contends that it published a sufficiently detailed report. In Ukraine's view, the Key Findings, Notice of 14 March 2013, and its WTO notification contain a non-confidential summary of findings and reasoned conclusions reached on all pertinent issues of fact and law concerning the application of the safeguard measure, consistently with Articles 3.1 and 4.2(c).[463]

7.436. As regards the second basis for Japan's claim, Ukraine submits that it published its detailed analysis of the investigation promptly upon adoption of the decision on a measure. Ukraine argues that Article 3.1 does not prescribe any deadline for the publication requirement. As regards Article 4.2(c), Ukraine relies on the express textual link to Article 3 to argue that the obligation to publish the report promptly under Article 4.2(c) arises only at the time of adoption of a safeguard measure, and not before that time. Ukraine contends that the record shows that it published its detailed analysis "promptly" upon having decided to adopt the measure in March 2013 and before the measure was actually applied.[464]

7.437. The Panel notes that Japan submits two separate bases in support of its claims that Ukraine acted inconsistently with Articles 3.1 and 4.2(c). Specifically, Japan argues that these Articles have been breached because (i) Ukraine did not publish a report setting forth the competent authorities' findings and reasoned conclusions, as well as a detailed analysis of the case; and (ii) Ukraine failed to publish its report and its detailed analysis "promptly". We recall that Japan argues that the "published report" within the meaning of Articles 3.1 and 4.2(c) is the Notice of 14 March 2013.[465]

7.438. Regarding the first of the two bases asserted by Japan, we note that Japan has discussed this extensively in the context of its other claims concerning (i) the various determinations made by Ukraine's competent authorities, that is to say, the competent authorities' determinations on unforeseen developments and the effect of GATT 1994 obligations, increased imports, the threat of serious injury and causation and (ii) the application and duration of the safeguard measure at issue. We have, likewise, addressed this first basis for Japan's claims in the sections of our Findings addressing those other claims, as appropriate.[466] Japan has presented no different or additional arguments in support of this aspect of its claim that would require separate consideration in this section. Consequently, we do not further address this aspect of Japan's claim here.

7.439. We therefore turn to the second basis asserted by Japan in support of its claims, namely Japan's contention that Ukraine has failed to publish its report and its detailed analysis "promptly". We begin our analysis by noting that Article 3.1, last sentence, refers to a requirement to "publish" a report setting forth the competent authorities' findings and reasoned conclusions. But it

[461] Japan's first written submission, para.165; second written submission, paras. 43–45; opening statement at the second meeting of the Panel, para 36; and response to Panel question No. 87 (referring to Panel Reports, *US – Steel Safeguards*, para. 10.275).

[462] Japan's second written submission, para. 49; and response to Panel question No. 31.

[463] Ukraine's first written submission, para. 47; second written submission, para. 9; and response to Panel question Nos. 10 and 27.

[464] Ukraine's first written submission, para. 63; and second written submission, para. 21.

[465] Japan's second written submission, para. 24.

[466] See sections 7.2.3, 7.3.2, 7.4.2, 7.5.2, 7.6.2.

establishes no requirements with respect to the timing of such publication. In contrast, Article 4.2(c) contains an express requirement to "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". Also, whereas Article 4.2(c) thus includes an explicit cross-reference to Article 3, the converse is not true. In our view, the cross-reference in Article 4.2(c) to Article 3 makes it clear that the analysis and demonstration to be promptly published under Article 4.2(c) are to be published in the form of a report, as contemplated by Article 3.1. Thus, we conclude that Article 4.2(c) requires "prompt" publication of the report required by Article 3.1.

7.440. Article 3.1 does not explicitly require the competent authorities to publish their report "promptly". As the wording of Article 4.2(c) is different from that of Article 3.1 also in other respects, it is reasonable to assume that the difference in the wording of Article 4.2(c) was intended to produce at least some different effects, including with regard to certain aspects of the publication requirement.[467] It therefore strikes us as improper to read a word – "promptly" – into the text of Article 3.1 that would add to, and amplify, the basic publication requirement that is imposed in Article 3.1. As emphasized by the Appellate Body in *India – Patents* (US), the principles of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[468] We, thus, do not agree with Japan that Article 3.1 imposes an obligation on competent authorities to publish their report "promptly". Accordingly, we conclude that Japan has failed to establish that Ukraine acted inconsistently with its obligations under Article 3.1, last sentence, because its competent authorities did not publish their report "promptly".

7.441. Turning to Japan's identical claim under Article 4.2(c), we begin by considering the triggering event that will enable us to determine whether the competent authorities published their report, or analysis and demonstration, promptly. Article 4 is entitled "Determination of Serious Injury or Threat Thereof", whereas Article 3, to which Article 4.2(c) refers, is entitled "Investigation". Moreover, Article 4.2(a) indicates that an "investigation" in the sense of Article 3 serves to "determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry …". Thus, unless terminated or suspended, the investigation culminates in a determination of whether serious injury or threat thereof has been caused by increased imports.

7.442. As noted, Article 4.2(c) refers to the requirement in Article 3.1, last sentence, that the competent authorities publish a report that provides the findings and reasoned conclusions reached on "all pertinent issues of fact and law". Since Article 3 is entitled "Investigation", the phrase "all pertinent issues of fact and law" in our view includes all issues of fact and law that are pertinent to the investigation undertaken by the competent authorities. This unquestionably includes those issues that the competent authorities must address to arrive at the determination referred to in Article 4.2(a).

7.443. If the competent authorities determine that the relevant conditions and circumstances are satisfied, they may decide to apply a safeguard measure. If they decide to apply a safeguard measure, they need to establish parameters such as the date of introduction of the measure, its form and level (i.e. the rate of duty in the event the measure takes the form of a duty, as in the present dispute), and its expected duration. Articles 5.1 and 7.1 of the Agreement on Safeguards stipulate in this regard that the competent authorities may apply a safeguard measure only to the extent and for such period of time as may be "necessary" to prevent or remedy serious injury and to facilitate adjustment. The question arises whether the rate of duty and the expected duration are issues on which the competent authorities' report must include findings and reasoned conclusions, or a detailed analysis and demonstration. We find instructive in this context the following observations of the Appellate Body in *US – Line Pipe*:

[467] We consider that this view that Article 4.2(c) adds to rather than simply restates Article 3.1, last sentence, is consistent with the statement of the Appellate Body to the effect that Article 4.2(c) is an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report. See Appellate Body Report, *US – Steel Safeguards*, para. 289.

[468] Appellate Body Report, *India – Patents (US)*, para. 45.

> It is clear, therefore, that, apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary". The exception we identified in *Korea – Dairy* lies in the second sentence of Article 5.1. That exception concerns safeguard measures in the form of quantitative restrictions, which reduce the quantity of imports below the average of imports in the last three representative years. That exception does not apply to the line pipe measure.
>
> ...
>
> This does not imply, as Korea seems to assert, that the measure may be devoid of justification or that the multilateral verification of the consistency of the measure with the *Agreement on Safeguards* is impeded. The Member imposing a safeguard measure must, in any event, meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient "justification" for a measure and … should also provide a benchmark against which the permissible extent of the measure should be determined.[469]

7.444. We understand and conclude from this statement that the report that a Member must publish under Articles 3.1 and 4.2(c) need not address whether the established rate of duty and expected duration of the measure are "necessary" within the meaning of Articles 5 and 7.[470] That being the case, even if in some Members' legal system the decision to apply a safeguard measure is customarily taken sometime after the determination referred to in Article 4.2(a), there is no need to delay the publication of the report until the decision to apply a safeguard measure has been made and its form and level, expected duration and date of introduction have been established.

7.445. In the light of the foregoing, we consider that the competent authorities' report, or analysis and demonstration, must be promptly published once the competent authorities have made the determination referred to in Article 4.2(a), that is to say once they have made a determination of serious injury or threat thereof caused by increased imports. We thus consider that whether a Member "promptly" published its report, or analysis and demonstration, has to be examined by reference to when the aforementioned determination was made.

7.446. We now turn to the concept of "promptness" in Article 4.2(c). The dictionary defines the word "prompt" as "quick; and without delay".[471] Accordingly, Article 4.2(c) requires that the relevant report, or analysis and demonstration, be published quickly and without delay, once the relevant determination has been made. Nevertheless, the assessment of whether a report has been published promptly must, in our view, be made on a case-specific basis, taking account of the circumstances of the dispute.

7.447. Turning to the facts of this dispute, we recall that Japan's claim concerns the Notice of 14 March 2013, and that we agree that the Notice is the type of report, or analysis and demonstration, that Ukraine was required to publish "promptly". The Notice was published in the official gazette on 14 March 2013. However, as confirmed by Ukraine, the investigation in this case

[469] Appellate Body Report, *US – Line Pipe*, paras. 233 and 236.

[470] The Appellate Body in the quoted statement was referring only to Article 5.1, not Article 7.1. However, we consider that the Appellate Body's considerations can also be extended, by analogy, to Article 7.1.

[471] The *Shorter Oxford Dictionary* (2007), Vol. 2, p. 2367. See also Panel Reports, *EC – IT Products*, para. 7.1074 (interpreting the word "promptly" in Article X:1 of the GATT 1994 as meaning "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then").

was concluded on 28 April 2012.[472] Moreover, as we explain below[473], the competent authorities made a determination of threat of serious injury caused by increased imports on 28 April 2012. The date of introduction, and also the proposed form and level (increased rates of duty) and expected duration of the safeguard measure, were only established on 14 March 2013.[474] As we have explained, in our view these subsequent actions did not warrant a delay in publication of the competent authorities' report. Furthermore, as noted below at paragraph 7.453, Ukraine argues that after making its finding on 28 April 2012, it held consultations with various exporting countries. However, Ukraine has not argued, and we do not consider, that such consultations affected the competent authorities' ability to publish their report quickly and without delay after having made the determination referred to in Article 4.2(a).[475] In the light of this, we consider that since the competent authorities published their report in this case almost 11 months after the determination of 28 April 2012, they failed to publish their report, or analysis and demonstration, "promptly".

7.448. We therefore conclude that Ukraine acted inconsistently with its obligations under Article 4.2(c) because it did not publish its report, or analysis and demonstration, "promptly".

7.8.3 Claim under Article 3.1, first sentence

7.449. We now address Japan's claim under Article 3.1, first sentence, which concerns whether Ukraine failed to make a proper investigation. Article 3.1, first sentence, provides as follows:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.

7.450. Japan claims that Ukraine acted inconsistently with Article 3.1 because it failed to make a "careful study", and in particular because it did not examine data for the period 2011–2012. In interpreting the term "investigation", Japan, relying on the Appellate Body Report in *US – Wheat Gluten*, contends that the ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them and that authorities charged with conducting an inquiry or a study, i.e. an "investigation", must actively seek out pertinent information.[476] According to Japan, there is an obligation to seek out pertinent information about the "recent past". Japan contends that this obligation flows from the interpretation of the term "investigation" in the light of its context, in particular Articles 2.1 and 4.2, and the object and purpose of the Agreement on Safeguards, as well as the urgent nature of the safeguard measures contemplated in the Agreement. In Japan's view, safeguard measures should logically be applied immediately after the conclusion of an investigation finding serious injury or a threat thereof caused by increased imports because of the emergency nature of safeguard measures. According to Japan, a significant delay in applying a safeguard measure requires an update of the data.[477]

7.451. Regarding the investigation at issue, Japan submits that Ukraine failed to carry out an investigation as required by Article 3.1 because it failed to seek out pertinent information, in particular data for the period 2011–2012, which is the most recent period given that the safeguard measure was applied in April 2013. Japan observes that the safeguard measure at issue was applied more than two years after the end of the period of investigation (2008–2010). Japan maintains that a two-year gap between the end of the period of investigation and what it considers to be the date of imposition of the safeguard measure is clearly excessive and that this excessive delay cannot be justified by any efforts on the part of Ukraine to conduct negotiations with

[472] Ukraine's response to Panel question No. 124.
[473] See para. 7.487 below.
[474] See, e.g. paras. 7.497 and 7.499 below.
[475] In our view, such consultations might have affected the date of introduction, the form, the level or the expected duration of the safeguard measure ultimately applied. As we have noted, however, the competent authorities' report did not need to set forth reasoned conclusions or provide a detailed analysis on these aspects.
[476] Appellate Body Report, *US – Wheat Gluten*, paras. 53-54.
[477] Japan's first written submission, paras. 151 and 162; second written submission, paras. 50, 52, 54, 64 and 123; opening statement at the second meeting of the Panel, para. 34; and response to Panel question Nos. 30 and 47.

exporting countries. Japan argues that the fact that the competent authorities examined additional data from the first half of 2011 regarding "certain factors" does not imply that the period of investigation was extended so as to also include the first half of 2011. According to Japan, the Notice of 14 March 2013 does not include any analysis relating to the first half of 2011; and even in the Key Findings, the competent authorities only examined one factor from the first half of 2011, namely the ratio of imports in relation to domestic production.[478]

7.452. Ukraine responds that the authorities conducted the investigation in accordance with the limited obligations of Article 3.1. Ukraine disagrees with Japan's interpretation that the competent authorities should have continued to update the information even after the end of the investigation and argues that such interpretation is not supported by the text of the Agreement on Safeguards and must be rejected. In Ukraine's view, there is no requirement under the Agreement on Safeguards to continue to update the information following the end of the period of investigation and certainly not following the end of the investigation. Ukraine argues that nothing in the Agreement on Safeguards requires that the application of the measure must follow the termination of the investigation immediately or within a certain period of time. According to Ukraine, when a Member is to impose a safeguard measure is a matter that does not concern the "investigation" but only the application of the safeguard measure. Ukraine maintains that the time gap between the end of the investigation and the imposition of a safeguard measure is not determined by the Agreement on Safeguards, and that the time gap is therefore for a Member to decide upon.[479]

7.453. Regarding the investigation at issue, Ukraine argues that its investigation took into account all of the data relating to the period of investigation and that it updated this information with more recent information that was available before the investigation was concluded. Ukraine contends that it set the period of investigation as 2008 through 2010 when it initiated the safeguard investigation on 2 July 2011 and carefully investigated the information concerning this period. Ukraine notes that its competent authorities in the Key Findings also presented some more recent data for the first half of 2011, particularly concerning the further increase in import volumes in relative terms, that was available before the initiation of the investigation. Ukraine considers, however, that the competent authorities are not obliged to review data outside the period of investigation as asserted by Japan. Ukraine submits that Japan is in fact complaining that there was a gap between the date of the termination of the investigation and the date of application of the measure. Ukraine argues that the time gap in this case was not the result of an arbitrary decision of the competent authorities, but was caused by the need to exchange views with exporting countries, particularly the European Union, Japan, the Russian Federation, and the Republic of Korea.[480]

7.454. The Panel notes that Japan's claim arises from the fact that Ukraine relied on data concerning a period of investigation ending more than one year before the finding of threat of serious injury caused by increased imports and two years before its introduction. We have already concluded above, however, that Ukraine's determination of increased imports does not meet the requirements of Article 2.1, *inter alia* because it is not based on an increase of imports that was recent enough. Therefore, we see no need to make findings on whether Ukraine also acted inconsistently with Article 3.1, first sentence, because it did not seek out pertinent information about the most recent past, in particular information about the period 2011–2012. We consequently exercise judicial economy and make no findings with regard to this claim.

7.9 Claims relating to notifications, prior consultations, and the level of concessions

7.455. The Panel notes that Japan put forward various claims under Article 12 relating to Ukraine's obligations concerning notifications to the WTO and prior consultations with other Members as well as a claim under Article 8 relating to the obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations.

[478] Japan's first written submission, para. 162; second written submission, paras. 50 and 62; opening statement at the second meeting of the Panel, para. 35; and response to Panel question Nos. 24 and 30.

[479] Ukraine's first written submission, paras. 58 and 60; opening statement at the first meeting of the Panel, para. 30; second written submission, paras. 12-15; opening statement at the second meeting of the Panel, para. 12; and response to Panel question No. 3.

[480] Ukraine's first written submission, paras. 56-58, and 60; opening statement at the first meeting of the Panel, paras. 28-30; second written submission, paras. 11-15; opening statement at the second meeting of the Panel, para. 11; and response to Panel question No. 3.

7.9.1 Claims under Article 12.1

7.456. The Panel first turns to assess Japan's claims regarding Ukraine's alleged failure to comply with the notification requirements set out in Article 12.1, which provides as follows:

> A Member shall immediately notify the Committee on Safeguards upon:
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> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
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> (b) making a finding of serious injury or threat thereof caused by increased imports; and
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> (c) taking a decision to apply or extend a safeguard measure.

7.457. Japan claims that Ukraine acted inconsistently with its obligation to notify "immediately" upon initiating a safeguard investigation pursuant to Article 12.1(a).[481] Japan further claims that Ukraine acted inconsistently with its obligation under Article 12.1(b) to notify "immediately" upon making a finding of serious injury or threat thereof, as well as its obligation under Article 12.1(c) to notify "immediately" upon taking a decision to apply a safeguard measure.[482]

7.458. Ukraine submits that its notifications to the WTO were timely and should therefore be found to be consistent with its WTO obligations. Ukraine therefore argues that Japan's claims under Articles 12.1 must fail.[483]

7.459. The Panel will first address some general interpretative issues concerning Article 12.1. After that, Japan's claims will be addressed in order they are presented.

7.9.1.1 Notification requirements under Article 12.1

7.460. Article 12.1 requires WTO Members to notify the Committee on Safeguards upon the occurrence of the "events"[484] specified in the subparagraphs of this provision, namely, (i) initiating an investigatory process, (ii) making a finding of serious injury or threat thereof, and (iii) taking a decision to apply or extend a safeguard measure.[485]

7.461. Article 12.1 requires that these notifications be made "immediately" upon the occurrence of the specified events. The word "immediately" is defined as "most urgent; occurring or taking effect without delay; done at once".[486] The Appellate Body in *US – Wheat Gluten* stated that the word "immediately" "implies a certain urgency" and that the degree of urgency required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification and the character of the information supplied. The Appellate Body clarified in particular that relevant factors in assessing the degree of urgency may include the complexity of the notification to be made and the need for translation into one of the WTO's official languages. However, the Appellate Body has cautioned that the amount of time taken to prepare and submit a notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".[487]

7.462. Finally, the Appellate Body has also stated that an "'immediate" notification is that which allows the Committee on Safeguards, and Members, the fullest possible period to reflect upon and

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[481] Japan's first written submission, paras. 326-330; second written submission, paras. 255-257; and opening statement at the second meeting of the Panel, para. 61.

[482] Japan's first written submission, para. 335; second written submission, para. 258; and opening statement at the second meeting of the Panel, para. 61.

[483] Ukraine's first written submission, para. 232; opening statement at the first meeting of the Panel, para. 89; second written submission, para. 91; and opening statement at the second meeting of the Panel, para. 102.

[484] Appellate Body Report, *US – Wheat Gluten*, para 102.

[485] Ibid.

[486] The *Shorter Oxford Dictionary* (2007), Vol 1, p. 1330.

[487] Appellate Body Report, *US – Wheat Gluten*, para. 105.

react to an ongoing safeguard investigation.[488] This suggests that a determination of whether a notification was "immediate" does not require consideration of whether the Committee or Members received the notification early enough to still allow them in fact to reflect on, or react to, it.[489]

7.463. As regards the events described in the three subparagraphs of Article 12.1, we note that they reflect a logical sequence in the internal decision-making process preceding the application of a safeguard measure: first initiation, then making a determination on the conditions that must be satisfied before a safeguard measure may be applied, and finally the decision to apply or extend a safeguard measure. We note that the final step in the process envisaged by Article 12.1 – the taking of a decision to apply – may in the legal system of some Members coincide with the second step.[490] In the system of other Members, it may come after the second step.[491]

7.464. In the case of Members whose internal decision-making process provides for a gap between, on the one hand, a finding of serious injury or threat thereof caused by increased imports and, on the other hand, the decision to apply a safeguard measure, the relevant events may, of course, be notified separately and successively. In the case of Members where these events occur at the same time, nothing precludes notification of the relevant events simultaneously, whether in a single or separate notifications.

7.465. To assess whether or not a notification under Article 12.1 was "immediate", it is necessary to establish both the date on which the relevant triggering event occurred and the date of the notification. The latter is generally taken to correspond to the date on which the notification was sent to the Committee on Safeguards, but the position is less clear with regard to the former. An issue may arise as to whether the Panel should assess the immediacy of the notifications under Article 12.1 by reference to: (i) the date of adoption of the relevant decision on the action concerned (i.e. the decision to initiate, the decision to make a finding or the decision to apply or extend a safeguard measure), (ii) the date of publication of that decision, or (iii) the entry into force of that decision. We observe in this regard that in some domestic legal systems, for some relevant actions and in some situations, some or all of these dates may coincide, such that there may be no need to distinguish between these dates.

7.9.1.1.1 Claim under Article 12.1(a)

7.466. The Panel will now assess Japan's claim under Article 12.1(a).

7.467. Japan asserts that by notifying the Committee on Safeguards of the initiation of the investigation 11 days after publication of the initiation decision notice in the Official Journal, Ukraine failed to comply with the requirement of "immediate" notification, in particular in the light of the minimal information contained in the notification.[492]

7.468. Ukraine argues that its notification of the initiation of the investigation was "immediate" given that the working language of Ukraine is not one of the WTO working languages. Ukraine notes that it took the decision to initiate the investigation on 30 June 2011, published that decision on 2 July 2011, and notified the WTO on 13 July 2011, that is to say, 11 days after the publication of that decision.[493] Ukraine points out that in the *US – Wheat Gluten* dispute, the notification under Article 12.1(a) was made 16 days after publication of the decision to initiate investigation, which

[488] Ibid. para. 106.
[489] Ibid.
[490] The European Union appears to fall within this category (European Union's third-party response to Panel question No. 27).
[491] This may be because, for instance, there are different decision-makers entrusted with determining (i) whether the substantive conditions for application of a safeguard have been satisfied and (ii) whether the application of a safeguard measure is warranted. Australia and the United States appear to fall within this second general category (Australia's and the United States' third party responses to Panel question No. 27). See also Panel Report, *Dominican Republic – Safeguard Measures*, footnote 516.
[492] Japan's first written submission, paras. 327 and 330; second written submission, paras. 255-257; opening statement at the second meeting of the Panel, para. 61.
[493] Ukraine's first written submission, para. 225.

was found not to be "immediate". Ukraine notes in this connection that the United States' investigating authority works and publishes in a WTO working language.[494]

7.469. Ukraine submits that the timeliness of a notification under Article 12.1 is to be determined on a case-by-case basis after assessing all factors influencing the time to respond. Ukraine argues that the case-by-case nature of the assessment derives from the fact that no specific time period is mentioned in Article 12 to explain the term "immediately". Ukraine submits that in this case, the fact that the official language of the investigating authority is not one of the three official working languages of the WTO is reason to provide flexibility to Members.[495]

7.470. Ukraine submits that the key date for determining the timeliness of a notification under Article 12.1(a) is the date of publication of the relevant decision.[496] Ukraine refers to the Appellate Body report in *US – Wheat Gluten* that used the date of publication as the relevant reference.[497]

7.471. Japan responds that translation issues cannot justify the 11-day delay in the notification, in particular in the light of "the character of the information supplied". Japan submits in this respect that the need to translate a document of only 604 words into one of the WTO's languages cannot justify a delay of 11 days in view of the obligation to limit the amount of time taken to prepare a notification under Article 12.1 to a "minimum".[498]

7.472. Japan points in this regard to the report in *Korea – Dairy,* where the panel concluded that a delay of 14 days between the publication of the decision on initiation and its notification to the WTO was not "immediate" notification and was therefore inconsistent with Article 12.1. Japan highlights that in that case the language of the decision, Korean, was also not a WTO working language.[499]

7.473. The Panel observes that it is common ground that Ukraine made a notification to the Committee on Safeguards regarding the initiation of its safeguards investigation. The parties disagree, however, over whether Ukraine's notification was "immediate". On 30 June 2011, Ukraine took Decision No. SP–259/2011/4402-27 "On Initiation of the Safeguard Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export".[500] On 2 July 2011, Ukraine published the "Notice of Initiation and Conducting of the Safeguard Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export" in the *Uryadovyi Kuryer*, which made reference to the decision to initiate the safeguard investigation and established that it would enter into force on the date of publication of the notice.[501] Ukraine notified the Committee on Safeguards of the initiation of the investigation on 13 July 2011.[502] We note that in its notification, Ukraine points to 2 July 2011 as the date of initiation of the investigation.[503]

7.474. The parties agree that for purposes of Article 12.1(a) the date on which an investigatory process is considered to have been "initiated" is the date of publication of the decision to initiate.[504] The Appellate Body in *US – Wheat Gluten* used the date of publication for determining whether a delay in notifying the initiation of a safeguard investigation meant that the notification

[494] Ukraine's first written submission, para. 225 (referring to Appellate Body Report, *US – Wheat Gluten*); opening statement at the second meeting of the Panel, para. 84; second written submission, para. 86.

[495] Ukraine's first written submission, paras. 218-219 (referring to Appellate Body Report, *Korea – Dairy*, para. 7.128); second written submission, para. 83; and opening statement at the second meeting of the Panel, para. 61.

[496] Ukraine's first written submission, para. 214; second written submission, paras. 255-257; and opening statement at the second meeting of the Panel, para. 61.

[497] Ukraine's first written submission, para. 214 (referring to Appellate Body Report, *US – Wheat Gluten,* para. 111).

[498] Japan's second written submission, para. 256 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 105).

[499] Japan's second written submission, para. 257 (referring to Panel Report, *Korea – Dairy*, para. 7.134).

[500] Ukraine's first written submission, para. 208; and second written submission, para. 86.

[501] Exhibit JPN-3.

[502] Notification under Article 12.1(A) of the Agreement on Safeguards on Initiation of an Investigation and the Reasons for it, WTO document G/SG/N/6/UKR/9 (Exhibit JPN-4).

[503] Exhibit JPN-4, p. 2.

[504] Ukraine's first written submission, para. 214; and Japan's response to Panel question No. 106.

was not immediate.[505] We therefore use the date of publication as the relevant date for determining whether a notification to the Committee on Safeguards of the initiation of a safeguards investigation was "immediate" within the meaning of Article 12.1. Thus, the question before us is whether a notification made 11 days after the publication on 2 July 2011 can be considered "immediate" within the meaning of Article 12.1(a).

7.475. We recall that Ukraine's investigation was not conducted in a WTO working language, and the published notice was also not in a WTO working language.[506] However, Ukraine's notification addresses only five elements: the initiation date of the investigation; the products subject to the investigation; the reasons for initiating the investigation; the contact point; and the deadlines and procedures for parties to present evidence.[507] None of these elements is unusual or complicated, and the notice does not contain any particularly complex information. The document is less than two pages long and contains approximately 600 words. It therefore seems to us that translation in this instance should not have been a time-consuming process.[508] Thus, in our view, neither the nature of the information nor the length of the document justify a translation delay of 11 days.

7.476. As Ukraine has not posited any other justification for the 11-day period between publication of the Notice of Initiation and its notification under Article 12.1(a) in this case, we consider that the notification was not "immediate" and therefore conclude that Ukraine acted inconsistently with Article 12.1(a) in this regard.

7.9.1.1.2 Claims under Articles 12.1(b) and (c)

7.477. The Panel now turns to assess Japan's claims under Articles 12.1(b) and (c).

7.478. Japan asserts that Ukraine acted inconsistently with its obligation to notify "immediately" upon making a finding of a serious injury or threat thereof pursuant to Article 12.1(b), and "immediately" upon taking a decision to apply a safeguard measure pursuant to Article 12.1(c).[509] Japan argues that in *US – Wheat Gluten*, the Appellate Body found that the relevant triggering event in the context of Article 12.1(c) is the taking of a decision, and that this provision focuses on whether a decision has occurred or has been taken, and not on whether that decision has been given effect.[510] Japan submits that this same analysis is applicable to Article 12.1(b), as this provision focuses on whether a finding of serious injury or threat of serious injury has been made.[511]

7.479. Japan submits that in the present case, Ukraine took the decision to apply a safeguard measure on 28 April 2012, published its decision on 14 March 2013 and notified the Committee on Safeguards on 21 March 2013. Japan argues that since the triggering event is the taking of the decision, which took place on 28 April 2012, the notification was made almost one year after the taking of the decision and is therefore inconsistent with the requirements of Articles 12.1(b) and (c).[512]

7.480. Ukraine responds that according to the Appellate Body, the triggering event under Article 12.1(c) is the date when the decision becomes official and not when it enters into force.[513]

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[505] Appellate Body Report, *US – Wheat Gluten*, para. 111, stating that "[t]he USITC notice was published in the United States Federal Register on 1 October 1997 [and] not notified to the Committee on Safeguards until 17 October 1997". See also Panel Report in *Korea – Dairy*, para. 7.134. Panel Report in *US – Wheat Gluten*, para. 8.196 and footnote 182. Appellate Body Report, *US – Wheat Gluten,* paras. 111-112.

[506] According to Article 3 of Ukraine's Safeguards Law, "the investigations shall be performed in the state language of Ukraine" (Exhibit JPN-1).

[507] Exhibit JPN-4.

[508] We note in this regard that Ukraine has not brought to our attention any significant constraints on its ability to translate the notification from Ukrainian to a WTO working language, which might have affected our assessment.

[509] Japan's first written submission, para. 335; and second written submission, para. 258.

[510] Japan's first written submission, para. 333; and second written submission para. 263 (referring to the Appellate Body Report, *US – Wheat Gluten*, para. 120).

[511] Japan's first written submission, para. 334; and second written submission, para. 265.

[512] Japan's first written submission, para. 335; and second written submission, para. 267.

[513] Ukraine's first written submission, para. 216 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 120).

Ukraine also submits that it follows from the panel report in *Dominican Republic – Safeguard Measures* and from statements of the Appellate Body in *US – Wheat Gluten* that the key obligation regarding a definitive measure is that it is notified prior to its entry into force. Ukraine argues that in its view the date of publication is key in considering the timeliness of a notification.[514]

7.481. Ukraine considers that 28 April 2012 cannot be viewed as the date of the taking of a decision to apply a safeguard measure. Ukraine asserts that the relevant decision is a document for internal use, and it cannot be considered as an appropriate legal document until its official publication. Ukraine therefore submits that it is the publication of the notice that is the key date for purposes of the timeliness of Ukraine's notifications under Articles 12.1(b) and (c).[515] Ukraine submits that since the triggering event occurred on 14 March 2013 and the notifications to the Committee on Safeguards were made on 21 March 2013, only seven days later, the notifications were "immediate"[516] and therefore consistent with Articles 12.1(b) and (c).[517]

7.482. Japan does not agree with Ukraine's assertion that the relevant triggering event under Article 12.1 is the date of publication or "when the decision becomes 'official'".[518] Japan asserts that Ukraine's view is not supported by the text of Article 12.1 and is based on an erroneous reading of the Appellate Body's findings in *US – Wheat Gluten*.[519] Japan considers that Ukraine's argument that the relevant triggering event for the purposes of Article 12.1(c) must also be the "date of publication" is contrary to the text of Article 12.1 and the intention of the drafters, since the different triggering events under Articles 12.1(a) and 12.1(c) reflect a substantive difference in the position of the WTO Members and their consequences.[520] Japan also does not agree that "the key obligation regarding the notification of a definitive measure is that it is notified prior to entry into force". Japan notes in this context that the Appellate Body emphasized that "the timeliness of a notification under Article 12.1(c) depends only on whether the notification was immediate".[521]

7.483. Japan also submits, in the alternative, that if the Panel were to conclude that the relevant triggering event is the "publication" on 14 March 2013, then a delay of seven days between the date of publication and the date of notification does not comply with the requirement of "immediacy", in particular taking into account the very long delay between the actual taking of the decision on 28 April 2012 and its publication on 14 March 2013. Japan claims that administrative difficulties, such as translation into a working language of the WTO, cannot be invoked as a justification for a delay of almost a year between the taking of the decision and its publication in the Official Journal.[522]

7.9.1.1.2.1 Notification under Article 12.1(b)

7.484. The Panel begins with the notification under Article 12.1(b). It is common ground that Ukraine made a notification to the Committee on Safeguards after making a finding on injury or threat thereof caused by increased imports. The parties disagree, however, whether that notification was "immediate". Ukraine notified the making of a finding of serious injury or threat thereof to the Committee on 21 March 2013.[523] This was a joint notification under Articles 12.1(b) and (c), concerning both the finding of threat of serious injury and the application of the safeguard measure.

[514] Ukraine's first written submission, paras. 216-217; second written submission, para. 83; and opening statement at the first meeting of the Panel, para. 81 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 120, and Panel Report, *Dominican Republic – Safeguard Measures,* para. 7.433).

[515] Ukraine's first written submission, paras. 226-227; second written submission, paras. 87-88; and response to Panel question No. 128.

[516] Ukraine's first written submission, para. 228; opening statement at the first meeting of the Panel, para. 88; second written submission, para. 89; and opening statement at the second meeting of the Panel, para. 101.

[517] Ukraine's first written submission, paras. 228 and 232; and second written submission, para. 91.

[518] Japan's second written submission, para. 260 (referring to Ukraine's first written submission, para. 216).

[519] Japan's opening statement at the first meeting of the Panel, paras. 100-101; and second written submission, para. 260.

[520] Japan's second written submission, paras. 261-262; and response to Panel question No. 106.

[521] Japan's second written submission, para. 266 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 120).

[522] Japan's second written submission, para. 268.

[523] WTO document G/SG/N/8/UKR/3, G/SG/N/10/UKR/3, G/SG/N/11/UKR/1 (Exhibit JPN-7).

7.485. The notification refers to the Notice of 14 March 2013 concerning the Decision of 28 April 2012 of the Interdepartmental Commission on Foreign Trade No. SP-275/2012/4423-08, which according to item 9 of the notification, was published on 14 March 2013.[524] The notification also states that the introduction of the measure was to occur 30 days after publication of the Notice of Imposition on 14 March 2013.

7.486. The Notice of 14 March 2013 states that the Commission "has decided that import of motor cars to Ukraine […] increased relative to domestic production by the domestic industry, and that such increase took place under conditions and volumes which threatened to cause serious injury to the domestic industry" and that "the national interests of Ukraine require imposition of safeguard measures against such imports".[525] Thus, it is clear from the Notice of 14 March 2013 that the Commission "[made] a finding of [threat of] serious injury … caused by increased imports" within the meaning of Article 12.1(b). The text of the 28 April 2012 decision was not submitted to the Panel. The Notice of 14 March 2013 indicates that the Commission decided to impose a safeguard measure based on the decision and underlying findings adopted on 28 April 2012.

7.487. After referring to, and endorsing, the findings in the Commission's 28 April 2012 decision, the Notice of 14 March 2013 goes on to state that a safeguard measure "shall be imposed" in the form of a special duty, and specifies the applicable rates of duty and the duration of the measure.[526] The Notice of 14 March 2013 states that this decision is to enter into force 30 days after publication of the Notice. As already mentioned, it was not published until much later after the decision of 28 April 2012 was taken, this is, on 14 March 2013.

7.488. We note that the Notice of 14 March 2013 incorporates and endorses but does not modify or supersede the finding of threat of serious injury caused by increased imports made on 28 April 2012. The only new element evident from the Notice of 14 March 2013 in respect of the 28 April 2012 finding is the publication of the Commission's decision. Indeed, neither party has suggested that the Commission's finding of 28 April 2012 was merely preliminary or incomplete. Moreover, the fact that the finding of 28 April 2012 was part of the Notice of 14 March 2013, which contains other findings and is broader in scope, does not detract from the fact that the Notice of 14 March 2013, at a minimum, incorporates the relevant finding.

7.489. On these facts, we find that the competent authorities on 28 April 2012 adopted a decision making a finding of threat of serious injury caused by increased imports within the meaning of Article 12.1(b). The decision that contained this finding was not published, however, until 14 March 2013, and the decision to apply a safeguard based on that finding only entered into force one month later.

7.490. The issue to which we now turn our attention is which of these dates – the date of adoption or publication of the finding of threat of serious injury caused by increased imports, or the date of entry into force of that finding through the application of a safeguard based on it – is the relevant triggering date for purposes of assessing whether Ukraine's notification under Article 12.1(b) was "immediate".

7.491. The context of Article 12.1 suggests that we should not base our assessment on the date of entry into force of the finding. Article 12.3 requires the Member "proposing to apply" a safeguard measure to grant adequate opportunity for "prior" consultations. It follows from this requirement in Article 12.3 that these consultations need to take place before a safeguard measure is applied, i.e. before a finding of threat of serious injury enters into force through application of a safeguard measure. Article 12.3 also states that the consultations serve, *inter alia*, to allow exporting Members to review the information provided under Article 12.2. That provision identifies information to be included in notifications, *inter alia*, "evidence of serious injury or threat thereof caused by imports", that is, evidence supporting the finding referred to in Article 12.1(b). All of this indicates to us that the notification under Article 12.1(b) must also precede the date of entry into force of the finding referred to in that provision.

[524] Exhibit JPN-7, p. 5.

[525] Notice of Imposition of Safeguard Measures on Imports of Motor Cars to Ukraine Regardless of Country of Origin and Export, (Exhibit JPN-2), pp. 3-4.

[526] Exhibit JPN-2, p. 9.

7.492. In this case there was a gap of more than ten months between the date of adoption of the finding of serious injury caused by increased imports and the date of publication of that decision. Moreover, the record indicates that there was no intervening change to the substance of the finding at issue, nor was there any supplementary investigation after the date of adoption of that finding. We note that Ukraine's Safeguards Law does not appear to provide for separate publication of this finding[527], and that the finding on 28 April 2012 may have been an internal decision without the status of a legal norm under Ukrainian law. However, neither consideration demonstrates that WTO rules, specifically those set forth in Article 12.1(b), do not require a Member to notify a finding of threat of serious injury immediately after the relevant finding is made, in this case by Ukraine's competent authorities on 28 April 2012.

7.493. For all these reasons, we consider that, in the circumstances of this case, a finding of threat of serious injury was made on 28 April 2012. That finding was neither preliminary nor incomplete, and the decision to make that finding was not altered, rescinded or suspended after 28 April 2012. Ukraine was therefore required by Article 12.1(b) to notify this finding immediately after it was made, regardless of the provisions of Ukraine's Safeguards Law or the fact that it was not separately published.

7.494. Having found that in the circumstances of this case the event triggering the obligation under Article 12.1(b) occurred on 28 April 2012, we must assess whether Ukraine's notification under Article 12.1(b) of 21 March 2013 was "immediate". We recall that more than ten months passed after the competent authorities made the relevant finding and before submission of the notification to the Committee on Safeguards. Even factoring in the undisputed need for translation and the fact that the notification under Article 12.1(b) was more technical than the notification under Article 12.1(a), the notification is only four pages long and counts just over 1,800 words, its translation could not therefore have required several months. Ukraine has not made any argument to that effect. As Ukraine has not pointed to any other circumstances to be taken into consideration, it clear to us in view of the substantial delay that Ukraine in this instance did not proceed with the required degree of urgency and failed to keep the delay in notifying the Committee on Safeguards to a minimum. We therefore conclude that Ukraine did not notify the Committee on Safeguards immediately upon making the finding referred to in Article 12.1(b) and that it consequently acted inconsistently with Article 12.1(b).

7.9.1.1.2.2 Notification under Article 12.1(c)

7.495. The Panel observes that it is common ground that Ukraine made a notification to the Committee on Safeguards after taking the decision to apply a safeguard measure, but again, the parties disagree whether Ukraine's notification under Article 12.1(c) was "immediate". As noted above, Ukraine made a joint notification under Articles 12.1(b) and (c) on 21 March 2013.[528] The notification refers to the Notice of 14 March 2013 and states that the introduction of the measure will occur 30 days after publication of the Notice.

7.496. As also noted above, the Notice of 14 March 2013 incorporates the Commission decision of 28 April 2012, and describes the decision of 28 April 2012 as the decision "according to which safeguard measures were imposed".[529] The Notice of 14 March 2013 mentions that the decision of 28 April 2012 was taken pursuant to Article 16 of Ukraine's Safeguards Law. According to Article 16(3)of that Law, a Commission decision on application of a safeguard measure must contain, *inter alia*, the duration of a measure and the date of its entry into force:

> The decision of the Commission on application of the safeguard measures shall contain the information on:

[527] This inference also appears to be confirmed by the fact that the finding was published only on 14 March 2013, as part of the Notice of the same date.
[528] WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/1 (Exhibit JPN-7).
[529] Exhibit JPN-2, p. 4.

> […] the date of commencement of application of the safeguard measures, the date of the Commission's decision entering into force, other information and regulations of application of the safeguard measures.[530]

7.497. Nothing in the Notice of 14 March 2013 indicates that the decision of 28 April 2012 established the parameters of application such as the duration of the measure or its date of entry into force. But even if it did, we note that the Notice of 14 March 2013 establishes the date of entry into force by stating that the decision to apply a safeguard measure will enter into force 30 days after its publication. Even if the decision of 28 April 2012 had similarly indicated that the measure would enter into force after publication, that decision was not in fact published until 14 March 2013. Consequently, the decision of 28 April 2012 did not establish a date for its entry into force. Therefore, we consider that the decision of 28 April 2012 does not constitute a "decision of the Commission on application of … safeguard measures" within the meaning of Article 16(3) of the Safeguards Law. In contrast, the Notice of 14 March 2013 unquestionably is such a decision, as it makes clear when the decision to apply a safeguard measure, based on the decision of 28 April 2012, will enter into force – 30 days after publication of the Notice of 14 March 2013.

7.498. As Article 12.2 makes clear, the date of entry into force – or the date of introduction in the language of Article 12.2 – is information that must be provided to the Committee on Safeguards in making a notification under Article 12.1(c). This suggests to us that the "taking of a decision to apply … a safeguard measure" under Article 12.1(c) necessarily includes a decision on the date of introduction of the measure. Absent such a decision by the competent authorities that commits them to a date of introduction, the decision on application remains incomplete in a significant respect.

7.499. As discussed above, the Notice of 14 March 2013 establishes the date of the entry into force of Ukraine's safeguard measure on passenger cars – the date of introduction. It also explicitly imposes a safeguard measure in the form of a special duty, and specifies the applicable rates of duty and the duration of the measure. For the foregoing reasons, we consider that the Notice of 14 March 2013 sets out all the essential elements of a "decision to apply … a safeguard measure". Moreover, the fact that the publication of the Notice of 14 March 2013 necessarily meant, by its own terms, that the safeguard measure would enter into force 30 days later supports our conclusion that the competent authorities "took" a decision to apply a safeguard measure, that is, they committed themselves to a particular date of introduction. Accordingly, we find that the competent authorities "[took] a decision to apply … a safeguard measure" within the meaning of Article 12.1(c) on 14 March 2013, the date on which the Notice was published.

7.500. In contrast, while it seems clear that the Commission decision of 28 April 2012 contained the substantive basis on which a "decision to apply … a safeguard measure" was based, we cannot conclude that the competent authorities on 28 April 2012 went as far as "taking" a decision to apply a safeguard measure. Notably, there is no indication in the evidence before us that they committed to any particular date for the introduction of such a measure. It is clear, however, that a date for introduction of the measure was fixed as of the publication of the Notice of 14 March 2013.

7.501. We now turn to the date to be used for assessing whether Ukraine's notification under Article 12.1(c) was made "immediately" upon taking a decision to apply a safeguard measure. Based on the foregoing, we consider that, in the specific circumstances of this case, the competent authorities took their decision to apply a safeguard measure only on 14 March 2013, when they published the Notice.[531] We therefore find that the relevant date by reference to which we must assess whether Ukraine's notification under Article 12.1(c) was "immediate" is 14 March 2013.

7.502. Ukraine's notification was sent to the Committee on Safeguards on 21 March 2013, seven calendar days after the decision to apply a safeguard measure. In *US – Wheat Gluten*, the Appellate Body found that a delay of five calendar days in notifying a decision to apply a safeguard

[530] Exhibit JPN-1, p. 17.

[531] We do not mean to suggest that the date of publication is the date that should generally be used for determining whether the taking of a decision to apply a safeguard measure has been notified immediately. Rather, we are saying that in the specific situation before us, the evidence suggests that the relevant decision was only taken when it was published.

measure was not inconsistent with Article 12.1(c). The notification in question in that case was approximately 790-words long. The delay in the present dispute is greater, but unlike in *US – Wheat Gluten*, the Notice of 14 March 2013 in this case required translation into one of the WTO's working languages. Ukraine's joint notification under Articles 12.1(b) and (c) provides considerably more substantive information than the notification under Article 12.1(a). This is evidenced by the fact that it is four pages long and contains just over 1,800 words. In our view, the need (i) to prepare and finalize the original document, which is more than twice as long as the one at issue in *US – Wheat Gluten*, and (ii) to have it translated after it had been finalized, can justify a longer delay than five days. In the absence of specific arguments and evidence to the contrary, and taking account of the length of the document, we see no basis to conclude that by notifying the WTO seven days after publication of the Notice of 14 March 2013, Ukraine in this case did not proceed with the required degree of urgency or failed to keep the delay in notifying the Committee on Safeguards to a minimum. We therefore conclude that Japan has not established that Ukraine failed to notify the Committee on Safeguards immediately upon taking a decision to apply a safeguard measure within the meaning of Article 12.1(c).

7.9.2 Claim under Article 12.2

7.503. The Panel now turns to Japan's claim that Ukraine acted inconsistently with Article 12.2 in making its notification to the WTO Committee on Safeguards. Article 12.2 provides that:

> 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.

7.504. Japan claims that the notification made by Ukraine pursuant to Articles 12.1(b) and (c) on 21 March 2013 is inconsistent with Article 12.2 because it did not contain all pertinent information.[532] More specifically, it argues that Ukraine's notification does not include certain essential evidence of serious injury or threat thereof caused by increased imports, and does not include a timetable for progressive liberalization.[533]

7.505. Ukraine argues that its notification to the WTO Committee on Safeguards of 21 March 2013 included the requisite pertinent information on the injury determination and the decision to impose the safeguard measure and was sufficient to be consistent with its WTO obligations.[534] Ukraine adds that in assessing whether or not Article 12.2 has been complied with, it is important to focus on the overarching goals of notifications.[535] Referring to *Argentina – Footwear (EC)*, Ukraine argues that the notification must be sufficiently descriptive of the actions taken or proposed, and of the bases for those actions, so that Members with an interest in the matter can decide whether and how to pursue it further.[536]

7.506. In response, Japan argues that a Member must not only comply with the spirit of Article 12.2 but also its letter. Japan takes the view that the notification must at a minimum address all the items specified in Article 12.2 as constituting all pertinent information as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguard investigation.[537]

[532] Japan's first written submission, para. 339; and second written submission, para. 272.
[533] Japan's first written submission, paras. 342-348.
[534] Ukraine's first written submission, para. 230. See also Ukraine's second written submission, para. 91.
[535] Ukraine's first written submission, para. 222.
[536] Ibid.
[537] Japan's second written submission, para. 271.

7.507. The Panel notes that this claim concerns the content of Ukraine's notification of 21 March 2013 under Articles 12.1(b) and (c).[538] The parties disagree whether that notification provides sufficient information to comply with the minimum requirement imposed by Article 12.2. We will examine the notification in question to determine if it meets the minimum requirement imposed by Article 12.2.

7.9.2.1 "All pertinent information"

7.508. The Panel recalls that Article 12.2 sets forth the required content of notifications to the WTO Committee on Safeguards under Articles 12.1(b) or 12.1(c). Such notifications must provide "all pertinent information" with respect to several matters concerning the investigation, determinations, and the proposed safeguard measure. Article 12.2 indicates that information that is pertinent in all cases "include[s]" certain specified information. This was confirmed by the Appellate Body in *Korea – Dairy*:

> The text of Article 12.2 makes it clear that a Member proposing to apply a safeguard measure is required to provide the Committee on Safeguards with *all* pertinent, not just *any* pertinent, information. Moreover, it provides that such information *shall* include certain items listed immediately after the phrase "all pertinent information", namely, evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration of the measure and a timetable for progressive liberalization. These items, which are listed as mandatory components of "all pertinent information", constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.[539]

So far as the evidence of serious injury or threat thereof caused by increased imports is concerned, the Appellate Body further clarified that:

> We believe that "evidence of serious injury" in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a). In other words, according to the text and the context of Article 12.2, a Member must, *at a minimum*, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting "all pertinent information", as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.[540]

7.509. Accordingly, notifications of "all pertinent information" under Article 12.2, must, at a minimum, provide information about all of the items listed in Article 12.2, namely (i) evidence of serious injury or threat thereof caused by increased imports; (ii) precise description of the product involved; (iii) the proposed measure, (iv) proposed date of introduction, (v) expected duration and (vi) timetable for progressive liberalization. In addition, so far as evidence of serious injury or threat thereof caused by increased imports is concerned, the relevant notification must include information about each of the eight factors listed in Article 4.2 that are required to be evaluated, namely (i) the rate and amount of the increase in imports of the product concerned in absolute and relative terms; (ii) the share of the domestic market taken by increased imports, (iii) changes in the level of sales, (iv) production, (v) productivity, (vi) capacity utilization, (vii) profits and losses, and (viii) employment.[541]

7.510. As these fourteen items all form part of the minimum content to be included in a notification under Articles 12.1(b) and (c), this necessarily means that if any one of these items is missing, the notification concerned fails to meet the requirements of Article 12.2.

7.511. With these considerations in mind, we now turn to assess Ukraine's notification.

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[538] Members are required to notify immediately under Article 12.1(b) upon making a finding of serious injury or threat thereof caused by increased imports; and under Article 12.1(c) upon taking a decision to apply or extend a safeguard measure.

[539] Appellate Body Report, *Korea – Dairy*, para. 107. (emphasis original)

[540] Ibid. para. 108. (emphasis original; original footnote omitted)

[541] Ibid. paras. 108 and 109.

7.9.2.2 The competent authorities' notification

7.512. Japan contends that the notification does not contain all pertinent information regarding evidence of serious injury or threat thereof caused by increased imports. More specifically, Japan asserts that the following information was absent from the notification:

i. the amounts of the decrease in imports in absolute terms and the amounts of the increase in imports in relative terms over the period of investigation;

ii. the intervening trends for 2008 to 2009 and for 2009 to 2010 in relation to each of the injury factors;

iii. the absolute figures for each of the injury factors; and

iv. information concerning the causal link between increased imports of the product concerned and the serious injury or threat thereof.[542]

7.513. Japan submits that the notification likewise does not include a timetable for progressive liberalization.[543] Japan argues that the timetable for progressive liberalization is part of the pertinent information that is required in a notification under Article 12.1, and therefore the absence of such a timetable defeats the fundamental goal of transparency and information.[544]

7.514. Ukraine considers that Japan's procedural claim under Article 12.2 must fail.[545] Ukraine maintains that its notification under Articles 12.1(b) and (c) was sufficient under WTO rules.[546] In particular, Ukraine considers that its notification included the requisite pertinent information on the determination of serious injury or threat thereof and the decision to impose the safeguard measure. The supplement to the notification of 21 March 2013, notified to the WTO Committee on Safeguards on 28 March 2014, provided further pertinent information on the application of the measure.[547]

7.515. Ukraine acknowledges that it did not notify any timetable for progressive liberalization until 28 March 2014.[548] However, Ukraine submits that its notification of 21 March 2013 satisfied its obligations under Article 12.2 with respect to the liberalization timetable, based on what Ukraine views as the overarching goals of Article 12.[549] In particular, Ukraine considers it relevant that its authorities had sent a number of letters to Japan between 25 August 2011 and 25 March 2013, which Ukraine alleges provided Japan with the information needed to undertake consultations with Ukraine under Article 12.3.[550] Ukraine further emphasizes that the initial proposed safeguard rate of duty for cars with an engine volume in the range of 1500 cm^3 but not exceeding 2200 cm^3 was reduced from 15.1% to 12.95% as a result of the consultations with Japan that were held on 19 April 2012. Ukraine argues that as one of the purposes of the notification is to inform Members of the circumstances of the case and the intentions of the imposing Member with a view to allowing any interested Member to decide whether to request consultations which may lead to the modification of the proposed measure, it is relevant that this purpose of the notification was met in the present case, given that Japan had the information and had the consultations which lead to the modification of the proposed measure.[551]

7.516. In response, Japan argues that the supplementary notification of 28 March 2014 does not contain any of the information concerning injury and causal link identified by Japan as absent from

[542] Japan's first written submission, paras. 340-346.
[543] Ibid. paras. 347-348.
[544] Japan's second written submission, para. 280.
[545] Ukraine's second written submission, para. 91.
[546] Ukraine's first written submission, para. 230. Ukraine also argues that it complied with the Article 7.4 substantive obligation through its liberalization plan implemented in April 2014. See Ukraine's first written submission, para. 194.
[547] Ibid. para. 230.
[548] Ukraine's first written submission, para. 210.
[549] Ibid. paras. 222-224, 232.
[550] Ibid. para. 231.
[551] Ibid. para. 232.

the notification of 21 March 2013.[552] Moreover, in Japan's view, the fact that Ukraine's subsequent notification of 28 March 2014 contains a timetable for progressive liberalization does not render the notification of 21 March 2013 consistent with Article 12.2.[553] Finally, Japan adds that the letters sent to Japan are irrelevant for determining Ukraine's compliance with Article 12.2, as such a determination depends on the content and extent of the information Ukraine made available to the Committee on Safeguards in its notifications.[554]

7.517. The Panel will begin its analysis by addressing the issue of whether the notification contains a timetable for progressive liberalization[555], as required by Article 12.2. Ukraine's notification of 21 March 2013 contains information on the determination of injury or threat thereof, in particular the trends of certain injury indicators of the domestic industry during the period of investigation, and on the assessment of the export potential of certain exporting countries. Additionally, the notification contains information about the proposed measure, specifically, on its form and the applicable rates of duty; a description of the product involved; the proposed date of introduction; and the expected duration of the safeguard measure. However, the notification provides no timetable for progressive liberalization. This fact is not in dispute between the parties.[556]

7.518. Following the notification of 21 March 2013, Ukraine applied its safeguard measure as from 14 April 2013. It subsequently decided, on 12 February 2014, to liberalize that measure by reducing the duty rates in two successive steps, after 12 and 24 months.[557] This decision was published in the official gazette on 28 March 2014 and notified to the WTO Committee on Safeguards on the same day.[558] We note that the notification of 28 March 2014 does contain a timetable for progressive liberalization.

7.519. Ukraine's supplementary notification of 28 March 2014 came almost one year after the entry into force of the safeguard measure. However, the text of Article 12.2 clearly imposes an obligation to provide a timetable for progressive liberalization on "the Member *proposing* to apply or extend a safeguard measure" (emphasis added). The term "proposing" entails that the Member has not applied, but intends to, or is about to, apply a safeguard measure. If a safeguard measure had already been adopted, the Member would no longer be "proposing" to apply it. Thus, it seems clear to us that a timetable notified after the measure has already been imposed cannot satisfy Article 12.2.

7.520. The panel in *Korea – Dairy* similarly found that Articles 12.1, 12.2 and 12.3[559], taken together, impose an obligation to notify the details of a proposed safeguard measure *before* it is applied, so that affected Members may consult on it before it takes effect.[560] The Appellate Body confirmed that the requirement in Article 12.2 to provide all pertinent information, which includes the timetable for progressive liberalization, allows exporting Members with a substantial interest to engage in prior consultations:

> In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations,

[552] Japan's second written submission, para. 276.
[553] Ibid. para. 278. See also Japan's first written submission, para. 348.
[554] Japan's second written submission, para. 277.
[555] One of the guiding principles of the Agreement on Safeguards is that safeguard measures be progressively liberalized while in effect. The obligation for the imposing Member to progressively liberalize a safeguard measure is set out in Article 7.4. For the text of Article 7.4, see para. 7.349 above.
[556] In response to a question from the Panel, Ukraine stated that it considers that the reduction of the duty rate from 15.1% to 12.95%, following consultations with Japan on 19 April 2012, amounts to liberalization. Even assuming for the sake of argument that the reduction of the duty rate can be considered liberalization, this would not detract from the fact that no timetable for progressive liberalization was included in Ukraine's notification of 21 March 2013.
[557] Ukraine's first written submission, para. 38.
[558] See WTO document G/SG/N/8/UKR/3/Suppl.1-G/SG/N/10/UKR/3/Suppl.2-G/SG/N/11/UKR/1/Suppl.1 (31 March 2014) (Exhibit JPN-9).
[559] For the text of Article 12.3, see para. 7.526 below.
[560] Panel Report, *Korea – Dairy*, para. 7.120.

> as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements.[561]

7.521. It is true that a safeguard measure is by definition liberalized only after it has entered into force, and that pursuant to Article 7.4[562] there is a requirement to progressively liberalize only in the case of safeguard measures with an expected duration of over one year. However, Article 12.3 gives affected Members a right to an adequate opportunity for consultations before, not after, a safeguard measure is applied. Affected Members are therefore entitled to receive the proposed timetable for progressive liberalization before any consultations under Article 12.3 are held. It is clear to us in view of the foregoing that, like all other pertinent information, the timetable for progressive liberalization must be notified before the associated safeguard measure enters into force.

7.522. As regards the letters that Ukraine's authorities sent to Japan, we note that Article 12.2, read together with Article 12.1, establishes an obligation to provide information not just to one Member, but to the WTO Committee on Safeguards, and that under Article 12.3 all Members having a substantial interest as exporters of the product concerned must be given an opportunity for prior consultations. But even leaving that aside, the letters identified by Ukraine in any event do not contain a proposed timetable for progressive liberalization.

7.523. Furthermore, we recall that this Panel was established on 26 March 2014, i.e. two days before Ukraine's supplementary notification of 28 March 2014. Therefore, as of the date of the Panel's establishment, Ukraine had not notified any timetable for progressive liberalization to the WTO Committee on Safeguards. Accordingly, the Panel finds that Ukraine's notification of 21 March 2013, the only notification submitted as of the date of this Panel's establishment, does not satisfy the requirement to provide "all pertinent information", since it failed to provide one of the mandatory elements identified in Article 12.2 as being part of "all pertinent information", i.e. a proposed timetable for progressive liberalization.

7.524. For all the above reasons, we conclude that, as of the date of this Panel's establishment, i.e. 26 March 2014, Ukraine was acting inconsistently with its obligations under Article 12.2 because it had not provided, in its notification of 21 March 2013, "all pertinent information" as required under that provision. Ukraine's supplementary notification of 28 March 2014 does not affect our conclusion.

7.525. The Panel recalls that Japan also argues that other information is missing from the notification of 21 March 2013. Since we have already found that Ukraine acted inconsistently with its obligations under Article 12.2 by failing to provide a proposed timetable for progressive liberalization as required, we do not consider it necessary to go on to make additional findings regarding whether Ukraine also acted inconsistently with Article 12.2 by failing to provide the other information identified by Japan. We therefore decline to make findings regarding Japan's claim so far as those arguments are concerned.

7.9.3 Claim under Article 12.3

7.526. The Panel now turns to Japan's claim that Ukraine failed to provide Japan with an adequate opportunity for prior consultations under Article 12.3, which reads as follows:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

7.527. Japan claims that Ukraine failed to provide an adequate opportunity for consultations after it made a notification under Articles 12.1(b) and (c) on 21 March 2013.[563] Japan argues that

[561] Appellate Body Report, *Korea – Dairy*, para. 111.
[562] For the text of Article 7.4, see para. 7.349 above.
[563] Japan's first written submission, para.350; and second written submission, para. 282.

Article 12.3 provides that one of the objectives of the opportunity for prior consultation is to allow for "reviewing the information provided under paragraph 2 (of Article 12)". Japan therefore considers that the opportunity for prior consultations should be provided after the notification containing information identified in Article 12.2 has been made. Japan submits that despite its repeated requests after Ukraine's notification on 21 March 2013, Ukraine failed to provide adequate opportunity for prior consultations on the proposed safeguard measure.[564]

7.528. Japan adds that the consultations held between Japan and Ukraine on 19 April 2012 did not fulfil the requirements of Article 12.3. Japan argues that Article 12.3 requires the Member imposing a safeguard measure to provide affected exporting Members sufficient time and sufficient information for meaningful consultations. In Japan's view, the reference in Article 12.3 to "the information provided under paragraph 2 (of Article 12)" indicates that the information listed in Article 12.2 is the minimum information that the imposing Member has to provide to enable meaningful consultations. Japan contends that the information provided to it in advance of the consultations of 19 April 2012, namely the Key Findings,[565] did not contain all of the minimum information required by Article 12.2, in particular, the proposed date of application, the precise rate of duty and certain pertinent information concerning injury and causation.[566]

7.529. Ukraine responds that Japan's focus on the notification under Article 12.1 and on the pertinent information required by Article 12.2 is misplaced. Ukraine considers highly relevant the fact that, pursuant to Article 12.3, the consultations must be based on "the information provided under paragraph 2" and not on the notification under Article 12.1 itself. In Ukraine's view, if an interested Member has received information that is subsequently also provided in a notification under Article 12.1, then that is sufficient to allow for proper consultations under Article 12.3. Ukraine asserts that it provided Japan with the relevant information regarding its proposed measure prior to both the decision of 28 April 2012 to impose a safeguard measure and the decision of 21 March 2013 to publish the safeguard measure.[567] In particular, Ukraine refers to its consultations with Japan of 19 April 2012, which in its view satisfied its obligation under Article 12.3.[568]

7.530. The Panel notes that Japan and Ukraine disagree over how the pertinent information required by Article 12.2 is to be provided for purposes of prior consultations under Article 12.3, and whether prior consultations were held that allowed a review of relevant information. What is not in dispute, however, is that as concerns the safeguard measure at issue Japan can be considered a "Member having a substantial interest as [an exporter] of the product concerned" within the meaning of Article 12.3. We note that Japan's share of Ukraine's total imports of passenger cars was 15% in 2010 according to the Notice of Imposition of 14 March 2013.

7.531. Before addressing the issues raised by Japan's claim, we recall the sequence of relevant events:

[564] Japan's first written submission, paras. 351-358.
[565] Exhibit JPN-6 (Revised Version).
[566] Japan's first written submission, paras. 359-367.
[567] Ukraine's second written submission, para. 94.
[568] Ukraine's first written submission, paras. 238-239.

Date	Event
11 April 2012	Ukraine sent a letter, with Key Findings attached, to the Embassy of Japan in Ukraine inviting Japan to consultations under Article 12.3.[569]
19 April 2012	Consultations were held between Ukraine and Japan in Kiev.[570]
28 April 2012	Safeguard investigation on passenger cars completed.[571] Decision on the Imposition of Safeguard Measures adopted.[572]
14 March 2013	Notice of Imposition - published in the *Uryadovyi Kuryer* No. 48.[573]
21 March 2013	Ukraine notified the WTO Committee on Safeguards pursuant to Articles 12.1(b) and (c).
27 March 2013	A meeting was held between representatives of the Ministry of Economic Development and Trade of Ukraine and Embassy of Japan in Ukraine.[574]
4 April 2013	Japan requested consultations pursuant to Article 12.3.[575]
9 April 2013	A meeting was held between representatives of the Ministry of Economic Development and Trade of Ukraine and Ministry of Economy, Trade and Industry of Japan.[576]
13 April 2013	Safeguard measure at issue entered into effect.
15 April 2013	Ukraine communicated to the WTO Committee on Safeguards that "the Ministry of Economic Development and Trade of Ukraine proposes that the consultations take place at the Ministry's premises in Kiev/Ukraine during April 2013."[577]
20 April 2013	Japan requested that the consultations take place in Geneva.[578]
23 April 2013	Japan reiterated its concerns about the lack of adequate opportunity for consultation during the regular meeting of the WTO Committee on Safeguards.[579] At the same meeting of the WTO Committee on Safeguards, Ukraine stated that it had held consultations with Japan to discuss the results of the investigation on 19 April 2012 and fully complied with the Agreement on Safeguards.[580]
4 June 2013	Ukraine sent a letter to the Permanent Mission of Japan in Geneva stating that it "has provided the adequate opportunity for prior consultations with Japan as stated in Article 12.3 of the Agreement".[581]
Thereafter	Japan reiterated on several occasions, in letters to Ukraine, and in communications to and statements before the WTO Council for Trade in Goods and the Committee on Safeguards, its position that the consultations held in Ukraine failed to provide an adequate opportunity for prior consultations under Article 12.3.[582]

[569] Exhibit JPN-6 (Revised Version).
[570] We note that the letter dated 11 April 2012 from the Ukrainian competent authority to the embassy of Japan in Ukraine specifically refers to the proposed consultations as consultations pursuant to Article 12.3 of the Agreement on Safeguards.
[571] Ukraine's response to Panel question No. 83. See also Japan's response to Panel question No. 130.
[572] This is referred to in the Notice of Imposition of Safeguard Measures on Imports of Motor Cars to Ukraine Regardless of Country of Origin or Export was published in the *Uryadovyi Kuryer* No.48 of 14 March 2013 (Exhibit JPN-2), p. 4.
[573] The Notice of Imposition of Safeguard Measures on Imports of Motor Cars to Ukraine Regardless of Country of Origin or Export was published in the *Uryadovyi Kuryer* No. 48 of 14 March 2013 (Exhibit JPN-2).
[574] Ukraine's response to Panel question No. 83.
[575] See WTO document G/SG/108 (Exhibit JPN-14).
[576] Ukraine's response to Panel question No. 83. See also Japan's response to Panel question No. 130.
[577] See WTO documents G/SG/108/Suppl.1 and G/SG/108/Suppl.1/Corr.1 (Exhibit JPN-15).
[578] Letter of the Permanent Mission of Japan to the United Nations and Other International Organizations in Geneva to the Permanent Mission of Ukraine to the United Nations Office and Other International Organizations in Geneva, 20 April 2013 (Exhibit JPN-16).
[579] See WTO document G/SG/W/229 (Exhibit JPN-18).
[580] Minutes of the Regular Meeting of the Committee on Safeguards held on 23 April 2013, WTO document G/SG/M/43, pp. 8-9 (Exhibit JPN-17).
[581] Letter of the Permanent Mission of Ukraine to the United Nations Office and Other International Organizations in Geneva to the Permanent Mission of Japan to the United Nations and Other International Organizations in Geneva, 4 June 2013 (Exhibit JPN-19).
[582] Japan's first written submission, paras. 354-357.

7.532. It is clear from the above that the only consultations between Ukraine and Japan on the proposed safeguard measure before its entry into force were those held on 19 April 2012. In advance of those consultations, information was made available to Japan on the proposed safeguard measure only in the Key Findings communicated to it on 11 April 2012. The notification pursuant to Articles 12.1(b) and (c) was not made by Ukraine until 21 March 2013, almost one year later. No further consultations took place between Japan and Ukraine prior to the entry into force of the safeguard measure on 13 April 2013.

7.533. With respect to the requirements of Article 12.3, the Appellate Body observed in *US – Wheat Gluten* that:

> Article 12.3 states that an "adequate opportunity" for consultations is to be provided "with a view to": reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the proposed measure must be provided in advance of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to "the information provided under" Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3.[583]

7.534. Article 12.3 requires a Member proposing to apply a safeguard measure to provide an adequate opportunity for prior consultations with WTO Members having a substantial interest in exporting the product concerned. As these consultations are meant to be "prior consultations" on the proposed safeguard measure[584], they must precede the application of a safeguard measure. And since one of the stated objectives of these consultations is to allow for a review of the information provided under Article 12.2, the relevant information must have been provided in advance of the consultations. Moreover, the information whose review must be possible during the consultations is that which was "provided under paragraph 2 [of Article 12]". We understand from this phrase that the information in question consists of "all pertinent information" within the meaning of Article 12.2, including that pertaining to the items identified in Article 12.2 and the factors listed in Article 4.2.

7.535. Japan takes the view that the "pertinent information" referred to in Article 12.2 must be provided through a notification under Article 12.1 and that there is a link between the "pertinent information provided" by means of a notification under Article 12.1 and the obligation to provide "an adequate opportunity for consultations" under Article 12.3.[585] In contrast, Ukraine considers that the requirements of Article 12.3 are satisfied if an interested Member has actually received the information to be included in a notification under Article 12.1, whether through a notification under Article 12.1 or otherwise. Ukraine's interpretation is not the most natural reading of the text of the relevant provisions. Article 12.3 refers to information "provided" under Article 12.2, not information "referred to", or "identified", in Article 12.2. For us, this suggests that if the information is not "provided" as per Article 12.2, that is, in the notifications referred to in Articles 12.1(b) and (c), a Member cannot be found to have complied with the relevant requirement. Moreover, the past participle "provided" tracks the language used in Article 12.2, which requires the Member proposing to apply a safeguard measure to "provide" the Committee on Safeguards with all pertinent information. Thus, a Member proposing to apply a safeguard measure must first "provide" the information to the Committee so that the information thus "provided" can be used by interested exporting Members for purposes of the prior consultations required by Article 12.3. Thus, the immediate context of Article 12.3 supports an interpretation of Article 12.3 as referring to the pertinent information provided to the Committee on Safeguards in notifications under Articles 12.1(b) and (c).

[583] Appellate Body Report, *US – Wheat Gluten*, para. 136.
[584] Article 12.3 is addressed to "a Member proposing to apply or extend a safeguard measure".
[585] Japan's second written submission, para. 287, referring to Appellate Body Report, *Korea – Dairy*, para. 111.

7.536. Nevertheless, we accept that this interpretation alone might not be fully dispositive of all issues presented in a case where the complaining party has been provided with all pertinent information otherwise than through a notification. However, in the dispute before us we need to address this point only if Japan was, in fact, provided with all pertinent information.

7.537. With these considerations in mind, the Panel now examines whether, in the present dispute, Ukraine provided Japan with adequate opportunity for prior consultations with a view to, *inter alia*, reviewing the information provided under Article 12.2. As mentioned earlier, the only consultations on the proposed safeguard measure that were held prior to the entry into force of that measure were those held on 19 April 2012. Ukraine had provided no notification to the WTO under Article 12.1(b) or (c) at the time. While Ukraine provided the Key Findings to Japan prior to the consultations, on 11 April 2012, those findings do not include information concerning a timetable for progressive liberalization, which is one of the mandatory elements of information to be provided under Article 12.2.Thus, it is clear that Japan was not provided with the information required under Article 12.2 before the consultations were held. Moreover, the Articles 12.1(b) and 12.1(c) notification made on 21 March 2013 similarly failed to provide information regarding a timetable for progressive liberalization [586] Since Japan was not provided with all pertinent information identified in Article 12.2, it is clear to us that, even assuming Ukraine's interpretation of the relevant provisions were correct, an issue we need not decide, by failing to provide Japan with all pertinent information identified in Article 12.2 prior to the consultations, Ukraine acted inconsistently with Article 12.3.

7.538. For the reasons set out above, we therefore conclude that, although consultations took place in April 2012 prior to the application of the measure at issue, Ukraine acted inconsistently with its obligations under Article 12.3 because it failed to provide Japan, a Member with a substantial export interest in the product subject to the proposed safeguard measure, with adequate opportunity for prior consultations with a view to reviewing *all* pertinent information within the meaning of Article 12.2, which includes the proposed timetable for progressive liberalization.

7.9.4 Claim under Article 12.5

7.539. The Panel now turns to Japan's claim under Article 12.5, which provides that:

> The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

7.540. Japan claims that Ukraine acted inconsistently with Article 12.5 because, even if the Panel were to find that Ukraine and Japan held consultations pursuant to Article 12.3, the results of such consultations were not notified, and *a fortiori* not notified "immediately", to the Council for Trade in Goods.[587]

7.541. Ukraine responds that Japan cannot complain about any failure to notify, in view of its own failure to notify the results of the consultations. Ukraine asserts in this connection that Article 12.5 sets forth a shared obligation for the "Members" concerned, in the plural, in the consultations, to notify the results.[588] In Ukraine's view the lack of a notification to the Council for Trade in Goods could not have caused any harm to Japan given that this provision aims to protect the interests of

[586] We recall that the supplementary notification dated 28 March 2014 does contain a timetable for progressive liberalization. However, it was notified almost a year after the entry into force of the safeguard measure, and is therefore not relevant for purposes of our evaluation under Article 12.3.
[587] Japan's first written submission, para. 369.
[588] Ukraine's first written submission, para. 242.

Members other than Japan and Ukraine.[589] Ukraine submits that the alleged lack of notification is in any case a harmless error.[590]

7.542. The Panel notes that Japan in its response to one of its questions at the second substantive meeting confirmed that if the Panel were to find that no consultations were held under Article 12.3, as asserted by Japan, the Panel need not make a finding on its Article 12.5 claim.[591]

7.543. We have found above that Ukraine failed to provide Japan with an adequate opportunity for prior consultations contrary to Article 12.3. Therefore, the condition on which Japan's claim under Article 12.5 rests is not fulfilled. Given Japan's position, we consequently refrain from addressing this conditional claim further and make no findings on its merits.

7.9.5 Claim under Article 8.1

7.544. The Panel now turns to Japan's claim under Article 8.1, which provides that:

> A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

7.545. Japan claims that Ukraine acted inconsistently with Article 8.1 because it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994 in accordance with Article 12.3.[592] Japan argues that Ukraine's failure to provide adequate opportunity for prior consultations within the meaning of Article 12.3 is in itself a reason for the Panel to find that Ukraine acted inconsistently with its obligations under Article 8.1.[593]

7.546. Ukraine argues that the consultations that took place in April 2012 demonstrate that it has always endeavoured to maintain an equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and Japan as well as with other exporting Members that would be affected by the safeguard measure at issue.[594] Ukraine adds that Article 8 should be read in a holistic manner in the sense that there is no violation of a legal provision requirement if that legal provision itself provides for a balancing mechanism, as does Article 8.[595] Ukraine notes that according to Article 8.2, if there is no agreement following consultations, or *a fortiori* when no consultations take place, the affected exporting Member is free, no later than 90 days after the safeguard measure is applied, to suspend the application of substantially equivalent concessions or other obligations under the GATT 1994 to the trade of the Member applying the safeguard measure. In Ukraine's view, as Japan was free to resort to this form of approved self-help under Article 8.2, its claim under Article 8.1 is without merit.[596]

7.547. Japan responds that Article 8.2 allows temporary relief for the harm caused by the application of a safeguard measure, but does not address the breach of Article 8.1, which sets out a clear legal obligation to be complied with by a Member proposing to apply safeguard measure.[597]

7.548. The Panel recalls that the Appellate Body stated in *US – Wheat Gluten* that:

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[589] Ukraine's first written submission, para.244. See also Ukraine's opening statement at the first meeting of the Panel, para. 96.
[590] Ukraine's first written submission, para. 244.
[591] Japan's response to Panel question No. 108.
[592] Japan's first written submission, para. 370.
[593] Ibid. para. 373.
[594] Ukraine's first written submission, para. 248.
[595] Ibid. para. 249.
[596] Ibid.
[597] Japan's second written submission, para. 296.

> Article 8.1 imposes an obligation on Members to "endeavour to maintain" equivalent concessions with affected exporting Members. The efforts made by a Member to this end must be "in accordance with the provisions of" Article 12.3 of the Agreement on Safeguards.
>
> In view of the explicit link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot …] "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure".[598]

7.549. In that dispute, the Appellate Body upheld the panel's finding that, contrary to Article 12.3, the United States did not provide an adequate opportunity for consultations because the form of the proposed measure was not clear enough to enable meaningful consultations. The Appellate Body elaborated as follows:

> [A]n exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, inter alia, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.[599]

7.550. The Appellate Body in the same dispute also upheld, "for the same reasons" as those it cited when upholding the panel's finding under Article 12.3, the panel's additional finding that the United States had acted inconsistently with its obligations under Article 8.1.[600] This confirms to us that the lack of pertinent information at the time consultations are held under Article 12.3 leads to a breach of Article 8.1. Compliance with Article 8.1 must be made in accordance with the provisions of Article 12.3.

7.551. In the present dispute, we have found above that Ukraine acted inconsistently with its obligations under Article 12.3 because it failed to provide Japan with adequate opportunity for prior consultations with a view to reviewing all pertinent information, which includes the proposed timetable for progressive liberalization. We note that the information that was missing in *US – Wheat Gluten* was different in nature and related to the form of the proposed measure and the nature of the remedy. Nevertheless, in our view, the proposed timetable for progressive liberalization is equally relevant to achieving the objective of endeavouring to maintain a substantially equivalent level of concessions and other obligations that would be affected by a safeguard measure. The timetable for progressive liberalization is an important element in determining, per Article 8.1, "any adequate means of trade compensation for the adverse effects" of the proposed safeguard measure on the trade of exporting Members. Absent a timetable for progressive liberalization, an affected exporting Member cannot accurately assess the adverse effects caused by the safeguard measure as the level and duration of the adverse effects will depend on whether and when any liberalization of the safeguard measure will be introduced, and thus, an adequate level of compensation cannot be calculated.

7.552. Consequently, we conclude that, to the extent that Ukraine failed to provide adequate opportunity for prior consultations to review a proposed timetable for progressive liberalization, Ukraine cannot be said to have "endeavoured to maintain" a substantially equivalent level of concessions and other obligations, because without a proposed timetable for progressive liberalization, exporting Members such as Japan were unable to form an accurate understanding as to what might constitute a substantially equivalent level of concessions and other obligations.

7.553. For the reasons set out above, the Panel therefore concludes that Ukraine acted inconsistently with its obligations under Article 8.1 because it has failed to endeavour to maintain a substantially equivalent level of concessions and other obligations.

[598] Appellate Body Report, *US – Wheat Gluten*, paras. 145-146.
[599] Ibid. para. 137.
[600] Ibid.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude that Ukraine acted inconsistently with:

a. Article XIX:1(a) of the GATT 1994, by failing to make a proper determination regarding (i) the existence of unforeseen developments and (ii) the effect of GATT 1994 obligations;

b. Article 2.1 of the Agreement on Safeguards, by failing to make a proper determination regarding increased imports;

c. Article 4.2(a) of the Agreement on Safeguards, by failing to make a proper determination regarding threat of serious injury to the domestic industry;

d. Article 4.2(b) of the Agreement on Safeguards, by failing to demonstrate the existence of a causal link and to conduct a proper non-attribution analysis;

e. Article 4.2(c) of the Agreement on Safeguards, by failing to publish promptly its analysis of the case under investigation and its demonstration of the relevance of the factors examined;

f. Article 8.1 of the Agreement on Safeguards, by failing to endeavour to maintain an adequate balance of concessions and other obligations.

g. Article 12.1(a) of the Agreement on Safeguards, by failing to notify the WTO Committee on Safeguards immediately after initiating a safeguard investigation;

h. Article 12.1(b) of the Agreement on Safeguards, by failing to notify the WTO Committee on Safeguards immediately after making a finding of serious injury or threat thereof caused by increased imports;

i. Article 12.2 of the Agreement on Safeguards, by failing to provide, in its notification of 21 March 2013, "all pertinent information" as required by that provision; and

j. Article 12.3 of the Agreement on Safeguards, by failing to provide Japan with adequate opportunity for prior consultations with a view to reviewing all pertinent information.

8.2. Further, and also for the reasons set forth in this Report, we conclude that Japan failed to establish that Ukraine acted inconsistently with:

a. Article 3.1, second sentence, of the Agreement on Safeguards, by failing to provide reasonable public notice to all interested parties and public hearings or other appropriate means for interested parties to present evidence, views, and responses to presentations of other parties;

b. Article 3.1, last sentence, of the Agreement on Safeguards, by failing to publish its report "promptly";

c. Article 3.1, last sentence, or Article 4.2(c), of the Agreement on Safeguards, by failing to provide a timetable for progressive liberalization in its Notice of 14 March 2013;

d. Articles 5.1 and 7.1 of the Agreement on Safeguards, by failing to apply the safeguard measure as necessary to facilitate adjustment;

e. Article 7.4, first sentence, of the Agreement on Safeguards, by failing to progressively liberalize the safeguard measure at regular intervals; or

f. Article 12.1(c) of the Agreement on Safeguards, by failing to notify the WTO Committee on Safeguards immediately after taking a decision to apply a safeguard measure.

8.3. In the light of the conditional nature of Japan's claim under Article 12.5 regarding notification of the results of consultations under Article 12.3 and our finding that the condition was not fulfilled, we reached no conclusion on this claim.

8.4. With respect to the remainder of Japan's claims under Articles 2.1[601]; 3.1, first sentence[602]; 3.1, last sentence, and 4.2(c)[603]; 4.1(a) and 4.1(b)[604]; 4.2(a)[605]; 5.1[606]; and 11.1(a)[607] of the Agreement on Safeguards and Articles II:1(b) and XIX:1(a)[608] of the GATT 1994, we exercised judicial economy and reached no conclusions.

8.5. 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 Agreement on Safeguards and the GATT 1994, Ukraine nullified or impaired benefits accruing to Japan under those Agreements.

8.6. Having found that Ukraine acted inconsistently with certain provisions of the Agreement on Safeguards and the GATT 1994, as described above, in accordance with Article 19.1 of the DSU, we recommend that the DSB request Ukraine to bring its measures into conformity with its obligations under those Agreements.[609]

8.7. Japan requested the Panel to exercise its authority under the second sentence of Article 19.1 to suggest ways in which Ukraine could implement the recommendations of the Panel, and in particular, to suggest that Ukraine revoke its safeguard measures.[610]

8.8. Article 19.1 of the DSU states that WTO panels may suggest ways in which the Member concerned could implement their recommendations. However, a panel is not required to make such a suggestion. In the light of the nature and number of inconsistencies with the Agreement on Safeguards and the GATT 1994 that we have found in this case, we suggest that Ukraine revoke its safeguard measure on passenger cars.

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[601] Cited in support of claims concerning Ukraine's determinations of increased imports, serious injury or threat thereof, and the causal link.

[602] Cited in support of a claim concerning the conduct of the investigation.

[603] Cited in support of claims concerning Ukraine's determinations of unforeseen developments, the effect of GATT 1994 obligations, increased imports, serious injury or threat thereof and the causal link, and a claim concerning the necessity of the measure to prevent serious injury.

[604] Cited in support of claims concerning Ukraine's determinations of serious injury or threat thereof and the causal link.

[605] Cited in support of claims concerning Ukraine's determinations of increased imports and the causal link.

[606] Cited in support of a claim concerning the necessity of the measure to prevent serious injury.

[607] Cited in support of claims concerning Ukraine's determinations of unforeseen developments, the effect of GATT 1994 obligations, increased imports, serious injury or threat thereof and the causal link, and a claim concerning the necessity of the measure to prevent serious injury.

[608] Cited in support of the same claims as those identified in the previous footnote.

[609] With regard to the conclusion contained in para. 8.1j above, we note that after the establishment of this Panel, Ukraine notified to the Committee on Safeguards a timetable for progressive liberalization of the safeguard measure at issue in this dispute.

[610] Japan's first written submission, paras. 374-376.

WORLD TRADE ORGANIZATION

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26 June 2015

(15-3267)

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UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS468/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 29 July 2014

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Upon indication from either party that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel may, after consultation with the parties, adopt appropriate additional procedures. Such indication shall be given at the latest two weeks prior to the relevant information being provided.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Japan requests such a ruling, Ukraine shall submit its response to the request in its first written submission. If Ukraine requests such a ruling, Japan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that each party and third party considers that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by Japan.

If Ukraine chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. The integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four paper copies of all documents it submits to the Panel, except for exhibits and executive summaries submitted in accordance with paragraphs 19 and 20. Exhibits may be filed in four copies on CD-ROM or DVD and two paper copies. Executive summaries may be filed in one single paper copy. The DS Registrar shall stamp the filed documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and such other WTO Secretariat staff as may be notified to parties and third parties. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 6 August 2014

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the party. In this regard, BCI shall include information that was previously submitted to the investigating authorities of Ukraine, the Ministry of Economic Development and Trade's Department for WTO Cooperation and Trade Remedies, as BCI in the safeguard investigation at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. These procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute.

3. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI.

8. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

10. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 11 below.

11. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body.

12. At the request of a party, the Panel may apply these working procedures or an amended form of these working procedures to protect information that does not fall within the scope of the information set out in paragraph 1. The Panel may, with the consent of the parties, waive any part of these procedures.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. INTRODUCTION

1. Japan has initiated the present proceedings in order to demonstrate that the safeguard measures imposed by Ukraine manifestly violate various procedural and substantive requirements under the Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994. First, the competent authorities imposed the safeguard measures in fundamental misunderstanding of the core requirements for their application and, in particular, the logical connection between them. Second, Ukraine failed to conduct a careful and thorough examination of the facts as reflected in the published report. Third, it violated a number of procedural requirements under the GATT 1994 and the Agreement on Safeguards.

2. THE APPLICABLE STANDARD OF REVIEW

2. **First**, Japan submits that the objective assessment of the matter at hand pursuant to Article 11 of the DSU requires the Panel to examine whether the conclusions and analysis of the competent authorities are reasoned and adequate by reference to their published report within the meaning of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[1] This is in the present case the Notice of 14 March 2013. Any explanations in other documents, such as the Key Findings or Ukraine's written submissions, are not relevant for this assessment.

3. In the course of the proceedings Ukraine appeared to argue that the Key Findings are part of the published report. However, the word "publish" in Articles 3.1 and 4.2(c) must be interpreted as meaning "to make generally available through an appropriate medium", rather than simply "making publicly available".[2] A document, such as the Key Findings, which has only been provided to interested parties, cannot be regarded as being "published" within the meaning of Article 3.1. It is even doubtful whether the Key Findings can be said to have been "made publicly available", since they were only sent to the representatives of the affected exporting countries and thus, not even to all interested parties. The Key Findings were not explicitly referred to in the Notice of 14 March 2013 either. There is no evidence that clarifies the relationship with the Key Findings and "a report and materials" mentioned in the Notice of 14 March 2013 and so Ukraine's allegation that the Key Findings were a non-confidential extract from the report of the Ministry is irrelevant.

4. Thus, Japan considers that the Panel should limit its assessment to the only published report in this case, that is the Notice of 14 March 2013. However, even by reference to the Key Findings, the explanations given by the authorities were not reasoned and adequate.

5. **Second**, Japan notes that, in its first written submission Ukraine included information on the imports and the injury factors from unidentified documents and developed *ex post* explanations or analyses on various issues, none of which can be found in the Notice of 14 March 2013 or in the Key Findings. Such *ex post* data cannot be used *a posteriori* to explain determinations made during the investigation and to justify the application of the safeguard measures.

6. Moreover, the Panel may take into account the evidence on the record of the investigation but only to assess the complexities of the facts of the case, examine whether there were other alternative explanations and ultimately determine whether the explanation provided in the published report is reasoned and adequate.[3] The Key Findings, as part of the record of the

[1] Appellate Body Report, *US – Steel Safeguards*, para. 299.
[2] Panel Report, *Chile – Price Band System*, para. 7.128.
[3] Appellate Body Report, *US – Lamb*, paras. 105-106, and Appellate Body Report, *US – Tyres (China)*, para. 123.

investigation, may therefore be useful to the Panel's examination as to whether the conclusions reached by the authorities in their published report are reasoned and adequate. For instance, the Key Findings confirm that other factors causing injury had been identified during the investigation but were not analysed by the authorities in their published report.

7. **Third**, to the extent that the Panel finds that the report of the competent authorities fails to provide a reasoned and adequate explanation of the authorities' determinations, these determinations should be found inconsistent with the specific requirements of the relevant provisions of the Agreement on Safeguards, in particular its Articles 2 and 4.[4]

3. LEGAL CLAIMS: SUBSTANTIVE REQUIREMENTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

8. Japan submits that Ukraine failed to make proper determinations concerning the two circumstances, namely the unforeseen developments and the effect of the obligations incurred under the GATT 1994, and the three conditions, namely an increase in imports, a serious injury or threat thereof of the domestic industry and a causal link between the increase in imports and the serious injury (or threat thereof), that must be met before a safeguard measure can be applied in accordance with Article XIX:1(a) of the GATT 1994 the Agreement on Safeguards.

3.1 Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

9. **First**, Japan argues that Ukraine violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards since the Notice of 14 March 2013, i.e. the "published report", does not set forth the competent authorities' findings and reasoned conclusions reached on all pertinent issues of fact and law and does not contain a detailed analysis of the case, as well as a demonstration of the relevance of the factors examined with respect to various issues.

10. The failure of the competent authorities to adequately address in the published report each pertinent issue of fact and law violates their obligation under Article 3.1, last sentence to give an account of a judgement or statement reached in a logical manner or expressed in a logical form, distinctly or in detail.[5] Article 4.2(c) is an elaboration of this requirement.[6] The absence of such "reasoned and adequate explanation" in the published report with regard to any relevant issue of law or fact entails a violation of Articles 2 and 4 of the Agreement on Safeguards.[7]

11. Furthermore, Ukraine failed to publish its report and its detailed analysis "promptly": the temporal parameter regulating the Article 3.1 publication requirement that has to be examined by reference to the time of conclusion of the investigation, i.e. at the time of the determinations.[8] Since Ukraine's decision on the application of the safeguard measures was taken on 28 April 2012, a publication of its report in the form of a Notice one year later cannot be viewed as "prompt" and therefore constitutes a violation of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

12. Finally, Ukraine's failure cannot be remedied by its claim of confidentiality. Information "by nature confidential" in the meaning of Article 3.2 of the Agreement on Safeguards refers to data confidential by reason of its content, in most cases business-sensitive information.[9] Also, "information" means data and/or evidence that is submitted by a party to the investigation or collected by the investigating authorities. Thus, Article 3.2 cannot be invoked in relation to entire reports, documents or analyses for the sole reason that they were issued by the authorities or designated as confidential by the Government.

[4] Appellate Body Report, *US – Steel Safeguards*, para. 302.
[5] Appellate Body Report, *US – Steel Safeguards*, para. 287.
[6] Appellate Body Report, *US – Steel Safeguards*, para. 289.
[7] Appellate Body Report, *US – Lamb*, para. 107.
[8] European Union's third-party response to Panel question No. 12, para. 17.
[9] Appellate Body Report, *EC – Fasteners*, para. 536, and Panel Report, *US – Wheat Gluten*, para. 8.24.

13. In any event, neither the protection of confidential information nor Ukraine's domestic law, notably Article 12(3) thereof, can dispense the authorities from the obligation to provide a reasoned and adequate explanation of how the facts support their conclusions in a published report.[10]

14. **Second**, Japan submits that Ukraine failed to conduct an investigation as required by Article 3.1, in particular, by failing to "seek out pertinent information", and to provide appropriate means through which Japan could present evidence and its views.

15. Japan observes that the meaning and scope of the obligation to carry out an "investigation" under Article 3.1, first sentence should be determined in light of its broader context, in particular Articles 2.1 and 4.2, as well as the urgent nature of the safeguard measures.

16. Article 3.1, second and third sentences set forth those investigative steps that the competent authorities must include in order to seek out pertinent information.[11] Moreover, in accordance with Article 4.2(a) as part of their "investigation" the competent authorities "must actively seek out pertinent information"[12] about the recent past and must evaluate "all relevant factors of an objective and quantifiable nature having bearing on the situation of that industry". The use of the present tense in Article 2.1 indicates not only that the increase in imports must be both sudden and recent, but also that the entire investigation period should be the recent past.[13] Similarly with respect to serious injury, Article 4.2(a) refers to the evaluation of all factors "having a bearing" on the situation of the industry and for causation, Article 4.2(b) refers to the demonstration of the "existence" of a causal link and the exclusion of other factors which are also "causing injury." The use of the present tense further supports the need for the determination to be based on the recent past.[14]

17. As for the urgent nature of the safeguard measures, these are emergency actions which, if justified, should be applied immediately. The remedy is in itself extraordinary because it involves the suspension of WTO obligations or withdrawal of concessions, and does not depend upon "unfair" trade actions.[15] Situations arising in the distant past do not deserve an urgent response and do not justify the adoption of "emergency" measures.

18. In light of the above legal standard, Japan argues that Ukraine failed to conduct a proper "investigation" as required by Article 3.1, since it failed to seek out pertinent information for the most recent period prior to application of the safeguard measures in April 2013, i.e. the period 2011 – 2012.

19. The context of Articles 3.1 and 4.2(c) clearly shows that the obligation to conduct an "investigation" requires a "careful study" of recent data. If there is a significant delay between the end of the period of investigation, the determinations and the application of the safeguard measures, it would no longer be possible to presume that the conditions required in order to apply the safeguard measures, i.e. that the imports are increasing and that current injury or threat thereof exists, are still fulfilled. Safeguard measures must be based on an investigation that determines the existence of recent "increased imports" and the existence of "serious injury".

20. It follows that Ukraine had the obligation under Article 3.1 to actively seek out relevant information in order to ensure that there was a sufficiently relevant nexus between the data examined and the determinations of "increased imports" and "serious injury".

21. Finally, Japan claims that Ukraine did not provide appropriate means through which Japan could present evidence and its views and the opportunity to respond to the presentations of other

[10] Panel Report, *US – Steel Safeguards*, para. 10.275.
[11] Appellate Body Report, *US – Wheat Gluten*, para. 54.
[12] Appellate Body Report, *US – Wheat Gluten*, para. 53.
[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130 and fn. 130.
[14] Panel Report, *US – Wheat Gluten*, para. 8.81.
[15] Appellate Body Report *Argentina – Footwear (EC)*, paras. 93-94.

parties. Very few and strictly procedural communications were sent by Ukraine to Japan during the investigation. Moreover, given the opaque and contradictory requirements in Ukraine's domestic law, Ukraine failed to ensure that the parties did have meaningful opportunities to present evidence, to submit their views and to respond to the presentations of other parties in accordance with Article 3.1 of the Agreement on Safeguards.

22. As to the March 2012 meeting, Japan was not provided with a meaningful opportunity to present evidence and its views given the very limited information concerning the elements of the investigation that had been provided beforehand and in view of the time constraints of the hearing.

3.2 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments

23. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to establish the existence of "unforeseen developments" – a legal requirement which must be demonstrated "as a matter of fact" in order for a safeguard measure to be applied lawfully.[16]

24. The Agreement on Safeguards and Article XIX of the GATT 1994 are to be considered in conjunction and any safeguard measure must be in conformity with both.[17] Furthermore, a panel would not be in a position to assess objectively the compliance with the prerequisites that must be present before a safeguard measure can be applied, if the competent authorities are not required to provide a "reasoned and adequate explanation" of how the facts support the determination of those prerequisites, including "unforeseen developments".[18] Therefore, the existence of unforeseen developments must logically be demonstrated before the safeguard measure is applied and it is the published report that must offer an explanation as to why any identified changes could be regarded as unforeseen developments.[19]

25. Ukraine failed to demonstrate this. The sole reference to "unforeseen developments" in the Notice of 14 March 2013 and in the Key Findings is the increase in imports. However, the fact that the increase in imports must be the result of unforeseen developments necessarily means that they are two distinct things.[20]

26. It was only in Ukraine's first written submission that it claimed for the first time that the "global economic crisis" was the unforeseen development. However, any identification of "unforeseen developments" after the imposition of the measure cannot lead to the consistency of the safeguard measures with Article XIX:1(a) of the GATT 1994.

27. **Second**, Ukraine failed to establish a logical connection between the alleged unforeseen developments and the increase in imports, although the competent authorities are required by Article XIX:1 to demonstrate that the unforeseen developments have "resulted" in increased imports.[21] The Notice of 14 March 2013 and the Key Findings provide no such explanation.

28. Ukraine appears to argue in its first written submission that the tariff reduction made to implement its tariff concessions resulted in an increase in imports, which coincided with the unforeseen development. However, the tariff reduction cannot be an "unforeseen development" at the time of Ukraine's accession to the WTO.

[16] Appellate Body Report, *US – Lamb*, para. 72.
[17] Appellate Body Report, *Argentina – Footwear (EC)*, para. 84.
[18] Appellate Body Report, *US – Steel Safeguards*, para. 298.
[19] Appellate Body Report, *US – Lamb*, para. 73.
[20] Panel Report, *Argentina – Preserved Peaches*, para. 7.17.
[21] Appellate Body Report, *US – Steel Safeguards*, para. 316.

29. Even if the "global economic crisis" had been recognised by the authorities as the "unforeseen development", *quod non*, it must still be demonstrated that the crisis caused a change in the competitive relationship between imported and domestic products to the detriment of the latter, thereby resulting in a sharp and sudden increase in imports. Ukraine does not demonstrate such "logical connection". In fact, the contraction in demand resulting from the global crisis cannot constitute the reason why imports increased in relative terms during 2010.

30. But even assuming that the global economic crisis may have reduced the demand for domestic products more sharply than for imported products, thereby giving rise to a relative increase in imports, any serious injury to the domestic industry would still have been the direct result of the overall fall in demand and not of the relative increase in imports.

31. Ukraine's *ex post* justifications are further undermined by the imposition in March 2009 and subsequent withdrawal towards the end of 2009 of the 13% additional duty rate on imports of cars, which appears to have caused, at least partly, the decrease in imports in 2009 and the slow increase in imports that followed in 2010.

32. **Third**, Ukraine failed to provide in its published report any reasoned and adequate explanations concerning the alleged unforeseen developments, as required by Articles 3.1 and 4.2(c). The demonstration of "unforeseen developments" must feature in the published report.[22] Thus, there must be at least some discussion by the competent authorities as to why the developments were unforeseen at the time the relevant GATT obligation was negotiated and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances described in the first clause.[23]

33. Both the Notice of 14 March 2013 and the Key Findings fail to identify any unforeseen developments, apart from the increase in imports, and *a fortiori* fail to provide any discussion or explanation as to why such events should be considered as "unforeseen" and why they resulted in an increase in imports.

34. Furthermore, there is no support whatsoever to the contention that the analysis of the unforeseen developments was confidential and that only its results were provided in the Key Findings. Clearly the Key Findings do not even contain the "results" of such an analysis. Moreover, nothing in the Notice of 14 March 2013 or any evidence in the record of the Panel indicate that Ukraine's investigating authorities treated their entire analysis as confidential pursuant to Article 3.2 of the Agreement on Safeguards. Therefore, as a matter of law, Ukraine's confidentiality treatment of its analysis or any relevant information contained therein is improper.

35. In any event, regardless of whether Ukraine properly treated the analysis (or relevant information) as confidential, the competent authorities were still required to provide a reasoned and adequate explanation on how the facts supported their determination.[24] The need to protect confidential information cannot simply dispense the competent authorities from the obligation to publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law, including the issue of unforeseen developments.

3.3 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT 1994

36. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to demonstrate that it incurred obligations under the GATT 1994 and how the effect of these obligations resulted in the increase in imports.

[22] Appellate Body Report, *US – Lamb*, para. 76.
[23] Panel Report, *Argentina – Preserved Peaches*, para. 7.23.
[24] Appellate Body Report, *US – Steel Safeguards*, para. 298.

37. The effect of the obligations incurred under the GATT constitutes a legal requirement. Whether qualified as a "circumstance" or "prerequisite", this demonstration must be made as a matter of fact before a safeguard measure can be applied consistently with Article XIX of the GATT 1994.[25] Moreover, it is for the importing Member to identify in its report the existence of the obligations under GATT and the link with the increase in imports causing serious injury to its domestic industry.[26] Finally, under Article XIX:1 it is the relevant tariff concession, rather than the tariff reduction made to implement it, that must exist and prevent the importing Member from taking WTO-consistent measures, in order to offset the change in the competitive relationship caused by the unforeseen development.

38. Ukraine failed to identify the relevant obligations incurred by it under the GATT 1994. Indeed, the Notice of 14 March 2013 does not identify and *a fortiori* does not analyse the effect of any obligations incurred by Ukraine. Likewise, the Key Findings are silent on this issue, in particular as regards Ukraine's tariff concessions.

39. Furthermore, Ukraine failed to demonstrate a logical connection between the effect of the obligations incurred under the GATT 1994 and the increase in imports. Article XIX:1(a) clearly requires an explanation as to how the effect of these obligations "resulted" in the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury. Specifically, it must be explained how these obligations had the effect of preventing the Member concerned from taking WTO-consistent measures, such as an increase in import duties.

40. The Notice of 14 March 2013 and the Key Findings provide no such assessment. Contrary to Ukraine's assumptions, it is the existence of unforeseen developments that must have resulted in the increase in imports while the obligations under GATT must prevent the importing Member from taking appropriate measures to limit the increased imports that resulted from "unforeseen developments". Moreover, Ukraine appears to acknowledge that the increase in imports was principally due to the tariff reduction made at the time of Ukraine's accession to the WTO and that the decrease in demand resulting from the global economic crisis merely coincided in time.

41. **Second**, Ukraine did not provide in its published report any reasoned and adequate explanations concerning the effect of the obligations incurred under the GATT 1994. Japan does not challenge the fact that upon its accession to the WTO in 2008, Ukraine has made tariff concessions of 10% *ad valorem* with respect to passenger cars. However, the effect of obligations incurred under the GATT 1994 constitutes a pertinent issue of fact and law that must be reflected in the authorities' published report.[27] Since neither the Notice of 14 March 2013 nor the Key Findings contain any analysis to that effect, Ukraine violated Articles 3.1 and 4.2(c).

3.4 Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports

42. **First**, Japan argues that Ukraine failed to demonstrate that the increased imports were the result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994.

43. Article XIX of the GATT 1994 and the Agreement on Safeguards constitute "an inseparable package" and must be read harmoniously.[28] Since the Notice of 14 March 2013 and the Key Findings do not contain any analysis of the alleged unforeseen developments and of the effect of the GATT obligations, the competent authorities have also necessarily failed to establish the "logical connection" between these conditions and the increase in imports. Thereby, Ukraine

[25] Appellate Body Report, *Korea – Dairy*, para. 85.
[26] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[27] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[28] *See* e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para.81.

violated Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.2(a) and 11.1(a) of the Agreement on Safeguards.

44. **Second**, Ukraine failed to demonstrate an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

45. In the first place, Ukraine failed to demonstrate a "recent" increase in imports. The phrase "is being imported" in Article 2.1 implies that the increase in imports must have been sudden and recent.[29] However, the alleged increase in imports found by the competent authorities over the period 2008 – 2010 can hardly be regarded as being "recent" for the application of a safeguard measure as of April 2013.

46. If at the time the safeguard measures are applied, the product is no longer being imported "in such increased quantities" or the imports are not causing or threatening to cause serious injury, there is nothing to prevent or remedy by safeguard measures. Moreover, safeguard measures are "matters of urgency"[30], linked to an extraordinary remedy to be imposed only within strict limits. Understood in this context, safeguard measures should be applied immediately after the conclusion of an investigation finding serious injury or a threat thereof, caused by imports "in such increased quantities".

47. A two-year gap between the end of the investigation period and the actual imposition of the safeguard measures is manifestly excessive. In particular, it is clear that the increase in imports relied upon by Ukraine was not "recent enough" at the time of the application of the safeguard measures. Furthermore, a one-year gap between the conclusion of the investigation and the actual imposition of the safeguard measure is also too long. Even if such a delay could in principle be justified by good-faith efforts on the part of a WTO Member to conduct negotiations, no such efforts were made in the present case.

48. In the second place, Ukraine failed to demonstrate that the increase in imports was "sudden, sharp and significant enough". The increase was not sudden, since the authorities ignored the fact that in 2005, 2006 and 2007 imports of the product concerned were already steadily increasing. There is also no evidence in the Notice of 14 March 2013 or in the Key Findings that the alleged increase in imports was sharp and significant.

49. In its first written submission, Ukraine provided data relating to the absolute volume of imports per year and to the change of imports in relative terms, which were not included in the Notice of 14 March 2013 or in the Key Findings and are therefore irrelevant. Moreover, with regard to the ratio of imports to domestic consumption, this factor is not directly relevant for determining whether a product is being imported in such increased quantities absolute or relative to domestic production.

50. In the third place, Ukraine failed to conduct a complete "qualitative analysis" of the data concerning imports, as it failed to examine the intervening trends as well as the "amounts" of imports, failed to demonstrate the "unexpected" nature of the increase in imports and failed to examine "such conditions" under which the imports occurred.

51. Japan submits first that Ukraine failed to examine the intervening trends with regard to the data of imports. In both the Notice of 14 March 2013 and in the Key Findings, Ukraine focused its analysis on an end-to-end point comparison between a starting point, 2008, and an end point, 2010. No data have been provided and analysed for 2009. Ukraine's *ex post* analysis in its written submissions is not relevant for the Panel's assessment, since it is the explanation in the published

[29] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[30] Appellate Body Report, *Korea – Dairy*, para. 86.

report that allows competent authorities to demonstrate that a product is being imported "in such increased quantities".[31]

52. In any event, the data provided by Ukraine in the course of the proceedings confirm the relevance of the analysis of the intervening trends. Indeed, the data concerning the imports in relation to domestic production shows first an 8.9% decrease between 2008 and 2009 followed by an increase in 2010. The competent authorities should have provided an explanation of how these trends support the finding that the requirement of "such increased quantities" was fulfilled. Otherwise, since no clear and uninterrupted upward trend in imports existed, the simple end-point-to-end-point analysis could easily be manipulated.[32]

53. Moreover, both the Notice of 14 March 2013 and the Key Findings only indicate a "rate" of decrease in absolute terms and a "rate" of increase in relative terms but not the "amounts" – a factor expressly required under Article 4.2(a). The overview in the Notice of hypothetical increase in imports after 2010 for a number of countries is not relevant, since Article 2.1 requires actual increase in imports.

54. In addition, Ukraine did not provide an explanation as to why the increased imports were "unforeseen" or "unexpected", given that its commitment in respect of cars upon accession to the WTO would logically entail such an increase.

55. Finally, Ukraine did not examine "such conditions" under which the imports occurred. In particular, it is highly relevant that while the imports in relative terms increased, the volume of imports in absolute terms substantially decreased by 71%. The analysis was important in order to properly evaluate whether the increased quantities were such as to qualify as "increased imports" under Article 2.1.[33]

56. **Third**, although the condition that there must be "increased imports" constitutes a pertinent issue of fact and law within the meaning of Article 3.1, the Notice of 14 March 2013 does not set forth any findings and reasoned conclusions on this issue. The Notice also fails to provide any "detailed analysis" of the conditions under which increased imports occurred and "a demonstration of the relevance of the factors examined", as required by Article 4.2(c).

3.5 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of serious injury and/or threat of injury

57. **First**, Ukraine's failure to clearly identify in its published report whether the determination made was one of serious injury and/or of threat thereof constitutes in itself a violation of the relevant provisions of the Agreement on Safeguards. Even in its first written submission, Ukraine still failed to expressly clarify whether the competent authorities made a finding of serious injury and/or threat thereof. It only resolved the ambiguity and confirmed that it made a determination of "threat of serious injury" upon explicit request of the Panel.[34] Japan claims that the requirement to make an adequate and reasoned explanation as to why the facts on the record support a determination of serious injury and/or threat thereof necessarily implies that the determination made (that is a determination of serious injury and/or threat of serious injury) must be clearly identified in the published report. In Japan's view, the fact that the Notice of 14 March 2013 does not clearly provide whether the determination is one of serious injury and/or one of threat thereof should in itself lead the Panel to conclude that the competent authorities did not provide an adequate and reasoned explanation as to why the facts supported their determination of serious injury and/or threat of serious injury.

[31] Appellate Body Report, *US – Steel Safeguards*, para. 374.
[32] Appellate Body Report, *US – Steel Safeguards*, para. 354.
[33] Appellate Body Report, *US – Steel Safeguards*, para. 351.
[34] Ukraine's response to Panel question No. 4.

58. **Second**, Japan submits that Ukraine failed to evaluate all relevant factors, as the competent authorities failed to provide the "amounts" of the increase in imports while this is one of the factors listed under Article 4.2(a) of the Agreement on Safeguards. Indeed, they only provided the rate of the decrease in imports in absolute terms during the POI as well as the relative rate of increase in imports in comparison to domestic production. What is relevant, however, is not only the rate of increase but also the amounts which Ukraine failed to evaluate. Without completely analysing both the rate and the amounts for imports both in absolute and relative terms, Ukraine was not in a position to reasonably conclude that the product was being imported in such increased quantities as to cause or threaten to cause serious injury to its domestic industry. The same applies to changes in various injury factors listed in Article 4.2(a) which need to be evaluated in both relative and absolute terms. Japan notes that only a relative evaluation of the changes may be misleading since large relative variations may actually reflect minor changes in absolute figures. For this reason, and in order to adequately evaluate the overall position of the domestic industry, investigating authorities were required to examine not only relative changes in the relevant factors but also the absolute amounts.

59. **Third**, Ukraine failed to provide a reasoned and adequate explanation of how the facts support their determination of threat of serious injury. The relevant section on injury in the Notice of 14 March 2013 and the Key Findings are not reasoned and adequate to demonstrate how the facts support a determination of threat of serious injury.

60. In the first place, Ukraine failed to "evaluate" the injury factors and, in particular, it did not examine the intervening trends over the period of investigation. Indeed, the Notice of 14 March 2013 does not contain any "evaluation", namely any "process of analysis and assessment, requiring the exercise of judgment on the part of the investigating authorities"[35] of the injury factors. Furthermore, the Notice of 14 March 2013 and the Key Findings only indicate the rate of increase/decrease between the beginning and the end of the period of investigation in defiance of the case law requiring intervening trends to be "systematically considered and factored into the analysis"[36]. The charts and explanations included in Ukraine's first written submission constitute *ex post* justifications which are therefore entirely irrelevant for the Panel's assessment of the matter before it.

61. In the second place, Ukraine failed to demonstrate the existence of a "significant overall impairment" that is "clearly imminent" in accordance with "the very high standard of [threat of serious] injury" [37] under the Agreement on Safeguards. Since in both the Notice of 14 March 2013 and the Key Findings there is no analysis based on "data relating to the most recent past"[38] and, in particular, no analysis of the data for 2010 in comparison to 2009, Ukraine did not provide an evaluation of and reasoned conclusions based on the most recent data pertaining to the existence of a threat of serious injury. Moreover, Ukraine neither demonstrated "that the anticipated 'serious injury' […] [is] on the very verge of occurring" nor that there is "a high degree of likelihood that the anticipated serious injury will materialize in the very near future."[39] The Notice of 14 March 2013 and the Key Findings do not contain a "prospective analysis" as to why the injury factors examined indicate that there is a high degree of likelihood that "serious injury" will materialize in the very near future.

62. In the third place, Ukraine also failed to make a determination of "threat of serious injury" which is based on the "recent past" [40] by relying on data of the period 2008 – 2010 while the safeguard measures were decided in 2012 and applied in April 2013. Indeed, for the purposes of making a fact-based determination in a future threat analysis "data relating to the most recent

[35] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.
[36] Panel Report, *Argentina – Footwear (EC)*, para. 8.216.
[37] Appellate Body Report, *US – Lamb*, para. 126.
[38] Appellate Body Report, *US – Lamb*, para. 137.
[39] Appellate Body Report, *US – Lamb*, para. 125.
[40] Panel Report, *US – Wheat Gluten*, para. 8.81.

past will provide competent authorities with an essential, and usually, the most reliable, basis for a determination of a threat of serious injury."[41]

63. **Fourth**, it clearly follows from the above that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, as it failed to provide a reasoned and adequate explanation as to how the facts support a determination of threat of serious injury in its published report. Contrary to Ukraine's claims, neither the Notice of 14 March 2013 nor the Key Findings contain "the indexed results of the conducted analysis of injury factors."[42] In particular, in the Notice of 14 March 2013 the competent authorities do not provide the explanations "to fullest extent possible"[43], since it does not even contain any data concerning 2009 or any absolute figures "in a modified form (e.g. aggregation or indexing)."[44] The protection of confidential information cannot be a justification for not complying with the requirements laid down in Articles 3.1 and 4.2(c) of the Agreement on Safeguards, considering that "even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation."[45]

3.6 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the threat of serious injury

64. **First**, since Ukraine failed to demonstrate the existence of unforeseen developments and, *a fortiori*, any change in the competitive relationship between the domestic and imported products, it could not correctly perform the causation analysis. According to Article 2.1 a safeguard measure may be applied only if it has been determined that a product is being imported, *inter alia*, "under such conditions" as to cause or threaten to cause serious injury. Thus, in the demonstration of causation the nature of the interaction between the imported and domestic products in the domestic market of the importing country must be examined.[46] In the present case, the Notice of 14 March 2013 and the Key Findings do not, however, contain any assessment of the conditions of competition in the domestic market for the product in question that would explain the interaction of the imported and domestic product.

65. Therefore, the competent authorities failed to establish an impact on the competitive relationship between domestic and imported products that resulted in the increase in imports, thereby causing threat of serious injury to the domestic industry.

66. Moreover, a coincidence in time between the increase in imports and the impairment of the domestic industry cannot prove causation. Its absence, however, creates serious doubts as to the existence of a causal link.[47] In the present case a *prima facie* contradiction exists between the import volumes which substantially decreased in absolute terms and the alleged threat of serious injury. Furthermore, the imports increased relative to domestic production only between 2009 and 2010 but decreased even in relative terms between 2008 and 2009. Conversely, while the injury indicators deteriorated between 2008 and 2009, most of them actually improved between 2009 and 2010. There is thus no clear coincidence in time between the movements in imports and the movements in injury factors.

67. The absence of a coincidence would have required a very compelling analysis of why causation could still be considered to be present. By contrast, the examination of the competent

[41] Appellate Body Report, *US – Lamb*, para. 137.
[42] Ukraine's first written submission, para. 147.
[43] Panel Report, *US – Steel Safeguards*, para. 10.274.
[44] Panel Report, *US – Steel Safeguards*, para. 10.274.
[45] Panel Report, *US – Steel Safeguards*, para. 10.275.
[46] Panel Report *Argentina – Footwear (EC)*, para. 8.250, confirmed in Appellate Body Report, Argentina – *Footwear (EC)*, para. 145.
[47] Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

authorities does not contain any analysis of the relationship between the movements in imports (volume and market share) and the movements in injury factors.

68. **Second**, Ukraine failed to make the non-attribution analysis as required by Article 4.2(b) of the Agreement on Safeguards, although, undisputedly, the competent authorities acknowledged in their Key Findings the existence of four other factors with possible injurious effects on the domestic industry at the same time as the alleged increased imports: the global financial and economic crisis, the non-competitiveness of the domestic industry, the 13% additional duty rate and the end of the government support granted to the automobile industry between 1997 and 2008.

69. Under Article 4.2(b), second sentence, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. To this end the competent authorities must identify the nature and extent of the injurious effects of the other known factors and distinguish them explicitly, through a reasoned and adequate explanation, from the effects of the increased imports.[48]

70. The Notice of 14 March 2013, while accepting that interested parties had claimed that the deterioration of the domestic industry was due to other factors, contains no further assessment. As the Key Findings are not part of the "published report", the Panel should not examine whether the competent authorities provided a reasoned and adequate explanation therein. In any event, this document contains only a very brief analysis that manifestly fails to comply with the requirements of the Agreement on Safeguards.

71. The global financial and economic crisis was recognised in the Key Findings as having a negative impact on the domestic industry as it resulted in decreased consumption. However, no analysis was carried out separating the injurious effects of the crisis from those of the increased imports. Ukraine's *ex post* justifications, while irrelevant to the Panel's analysis, are also unable to explain what injurious effects the crisis had on the domestic industry, or the process by which the competent authorities would have separated the injurious effects of the crisis from the other injurious effects.

72. Although the termination of the Government support that existed between 1997 and 2008 was referred to in the Key Findings as a factor that could have negatively impacted the domestic industry's financial condition, the authorities refused to analyse it, as it was a factor outside the period of investigation. The fact that the Government programme ended on 1 January 2008 means, however, that between 1997 and 2008 the domestic car industry was enjoying significant support from which it could no longer benefit during the investigation period. Therefore, the alleged deterioration of the domestic industry situation between 2008 and 2010 could quite likely flow from the absence of this support and the authorities were required to distinguish its injurious effects from those of the increased imports.

73. The 13-percent additional duty rate, introduced in 2009 on *inter alia* cars, was a third factor identified in the Key Findings. However, contrary to the statement therein and based on the text of the relevant law, the 13-percent additional duty covered all non-critical imports irrespective of their country of origin, including imports from countries with which Ukraine has free trade agreements. Furthermore, the fact that, according to the Key Findings, this additional duty did not rule out imports does not constitute a reasoned and adequate explanation as to why the injury caused by the termination of this duty was not attributed to the increased imports.

74. The non-competitiveness of the domestic products is the fourth factor identified by the competent authorities in the Key Findings for which no analysis was provided.

[48] Appellate Body Report, *US – Line Pipe*, para. 215.

75. **Third**, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, since the published report does not contain reasoned and adequate explanations regarding the existence of the causal link between the increased imports and the alleged threat of serious injury, nor does it include a proper non-attribution analysis.

3.7 Ukraine violated Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it applied safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment

76. **First**, Ukraine failed to apply safeguard measures only to the extent necessary to prevent or remedy serious injury. As already mentioned above, Ukraine failed in its causation and non-attribution analysis by setting the duty rate and the duration of the safeguard measure in such a manner that it addresses also injury attributed to other factors. Since the compliance with Article 5.1 is linked with the observance of the causation requirement established in Article 4.2(b), it can be presumed that the safeguard measures have not been applied only to the extent necessary under Article 5.1.[49] Furthermore, Ukraine did not clarify why and how its tariff concession prevented it from taking measures to offset the change generated by the unforeseen development and therefore failed to establish that the safeguard measure was applied only to the extent necessary to prevent or remedy such serious injury. Japan also notes that since Ukraine applied its safeguard measures only in April 2013 on the basis of an analysis of imports and of the situation of the industry concerning the period prior to 2011, such measures cannot be regarded as having been applied "only to the extent necessary to prevent or remedy serious injury."

77. **Second**, Ukraine failed to progressively liberalize the safeguard measures and failed to apply them only to the extent necessary to facilitate adjustment. In the present case, Ukraine introduced the safeguard measures for a period of three years. It was therefore under the legal obligation to progressively liberalize these measures at regular intervals during the period of their application. Ukraine failed to meet this obligation since it did not provide for the progressive liberalization in the initial decision imposing the safeguard measure as reflected in the Notice of 14 March 2013 and an *a posteriori* decision which became effective on 28 March 2014 does not render the measures consistent with Article 7.4 of the Agreement on Safeguards. Indeed, the requirement to provide for a progressive liberalization, by submitting a relevant timetable, has to be satisfied before the safeguard measures are applied as confirmed by Article 12.2 of the Agreement on Safeguards which provides that in the notification made pursuant to Articles 12.1(b) and 12.1(c) the Member proposing to apply the safeguard measure must provide the "timetable for progressive liberalization." Moreover, Ukraine also defied progressive liberalization as a means to achieve the purpose of facilitating adjustment in accordance with Article 7.4 and, therefore, failed to apply the safeguard measures only "to the extent necessary to facilitate adjustment" in violation of Article 7.1 and 5.1.

78. **Third**, Japan considers that by failing to provide a timetable for progressive liberalization in its Notice of 14 March 2013, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards since a timetable for progressive liberalization constitutes a "pertinent issue of fact and law" within the meaning of Article 3.1 and therefore should be part of the report published by the competent authorities. Likewise, the lack of a timetable for progressive liberalization constitutes a violation of Article 4.2(c) which requires the publication of a detailed analysis of the case and a demonstration of the relevance of the factors examined.

3.8 Ukraine violated Article II:1(b) of the GATT 1994

79. Japan claims that the unlawfulness of Ukraine's safeguard measures has been demonstrated beyond all doubt. Therefore, it must be concluded that Ukraine imposed duties which are in excess of those set forth in its schedule, thereby violating Article II:1(b) of the GATT 1994.

[49] Appellate Body Report, *US – Line Pipe*, para. 261.

4. LEGAL CLAIMS: PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS

80. Japan claims that Ukraine has violated Articles 12.1 and 12.2 of the Agreement on Safeguards, since it has failed to immediately notify the Committee on Safeguards in accordance with the requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards. Furthermore, Japan submits that Ukraine violated Articles 12.3, 12.5 and 8.1 of the Agreement on Safeguards.

4.1 Ukraine failed to comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards

81. **First**, Ukraine failed to notify "immediately" the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply safeguard measures, thereby violating Article 12.1 of the Agreement on Safeguards. Article 12.1 of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards at three points: a) when initiating an investigatory process; b) when making a finding of serious injury; and c) when taking a decision to apply or extend a safeguard measure. In all three cases, the notification must be made "immediately." An "immediate" notification is to be made "without delay, at once, instantly"[50] in order to allow "the Committee on Safeguards, and Members, *the fullest possible period* to reflect upon and react to an ongoing safeguard investigation."[51] Article 12.1 sets out "three separate obligations" to make notification to the Committee on Safeguards, "each of which is triggered 'upon' the occurrence of an event specified in one of the three subparagraphs."[52]

82. In the first place, Ukraine failed to "immediately" notify the Committee on Safeguards upon initiating the safeguard investigation. In the present case, the decision to initiate the safeguard investigation published in the Official Journal on 2 July 2011 was only notified on 13 July 2011, i.e. 11 days after its publication. Japan does not dispute that the need for translation into one of the WTO's working languages, invoked as a justification for the delay by Ukraine, is a factor that may be taken into account to determine the degree of urgency required under Article 12.1 of the Agreement on Safeguards. However, Japan does not agree with Ukraine that this factor claimed to have a bearing on the degree of immediacy in this case, justifies a notification period of 11 days and would, as a result, allow to consider a notification made in that period of time to be "immediate" under Article 12.1(a). In particular, in light of the "the character of the information supplied"[53], the need to prepare a document counting 604 words in one of the WTO's working languages cannot justify a delay of 11 days, especially with regard to a Member's obligation under Article 12.1 to limit the amount of time taken to prepare a notification to a "minimum".[54]

83. In the second place, Ukraine violated its obligation to notify "immediately" upon making a finding of a serious injury or threat thereof pursuant to Article 12.1(b) of the Agreement on Safeguards and upon taking a decision to apply a safeguard measure pursuant to Article 12.1(c). It follows from the text of Article 12.1 and the intention of the drafters that the relevant date by reference to which the Panel should assess the existence of any delay in notifying the relevant information pursuant to Articles 12.1(b) and 12.1(c) is respectively the moment of making a finding of injury for the purposes of Article 12.1(b) and the moment of taking a decision to apply a safeguard measure for the purposes of Article 12.1(c). Indeed, the aforementioned triggering event under Articles 12.1(b) and 12.1(c) gives "the (…) Members, *the fullest possible period* to reflect upon and react"[55] to the corresponding stage in the investigation given the imminence of the application of the measure entailing the opportunity for WTO Members to exercise their rights under the Agreement on Safeguards, in particular Article 12.3, and to require the imposing

[50] Panel Report, *Korea – Dairy*, para. 7.128 confirmed by Appellate Body Report, *US – Wheat Gluten*, para. 105.
[51] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).
[52] Appellate Body Report, *US – Wheat Gluten*, para. 102.
[53] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[54] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[55] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).

Member's compliance with the substantive obligations under the Agreement on Safeguards. In the present case, the "decision" to impose safeguard measures taken by Ukraine on 28 April 2012 which was published in the Official Journal on 14 March 2013 has been notified to the Committee on Safeguards on 21 March 2013. Since, as noted above, the triggering event is the "taking" of the decision which took place on 28 April 2012, the notification was made almost one year after the taking of the decision and is therefore clearly inconsistent with the requirement of "immediate" notification under Article 12.1(b) and (c) of the Agreement on Safeguards.

84. **Second**, Ukraine violated Article 12.2 of the Agreement on Safeguards. Article 12.2 requires the Member proposing to apply a safeguard measure to provide the Committee on Safeguards with "*all* pertinent, not just *any* pertinent, information."[56] The notifications under Article 12.1(b) and 12.1(c) must "*at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."[57]

85. In the first place, the notification made by Ukraine pursuant to Article 12.1(b) and Article 12.1(c) of the Agreement on Safeguards on 21 March 2013 does not include evidence of serious injury or threat thereof caused by the increased imports, as the following mandatory information is absent from the notification: the amounts of the decrease in imports in absolute terms and the amounts of the increase in imports in relative terms over the investigation period, the intervening trends for 2008-2009 and for 2009-2010 in relation to each injury factor, the absolute figures for each injury factor and "the causal link between increased imports of the product concerned and serious injury or threat thereof".

86. In the second place, in violation of Article 12.2, Ukraine did not provide any "timetable for progressive liberalization" in its initial notification made on 21 March 2013. The fact that Ukraine's notification made on 28 March 2014, i.e. more than a year after its notification on 21 March 2013, includes a timetable for progressive liberalization cannot render the previous notification made by Ukraine on 21 March 2013 consistent with Article 12.2 of the Agreement on Safeguards. In that respect, it should be underlined that "the notification serves essentially a transparency and information purpose,"[58] enabling in particular exporting Members to "be in a better position to engage in meaningful consultations, as envisaged by Article 12.3"[59]. The absence of the required information, including the timetable for progressive liberalization, defeats this fundamental goal of "transparency and information".

4.2 Ukraine failed to comply with the requirements of Article 12.3 of the Agreement on Safeguards

87. **First**, Ukraine did not provide an adequate opportunity for prior consultations with Japan after Ukraine notified the Committee on Safeguards under Article 12.1(c) and 12.2 of the Agreement on Safeguards on 21 March 2013. Despite the repeated requests of Japan and other WTO Members for consultations under Article 12.3 after Ukraine's notification on 21 March 2013, no consultations were held with a view to reviewing the information provided by Ukraine in its notification pursuant to Article 12.2 of the Agreement on Safeguards made on 21 March 2013.

88. It follows from the wording of the Agreement on Safeguards and the findings of previous panels and the Appellate Body that the requirements under Article 12.3 cannot be satisfied, if consultations took place on the basis of all the information under Article 12.2 provided by different means than the notifications under Articles 12.1(b) or 12.1(c). Indeed, Article 12.3 provides that an adequate opportunity for prior consultations are to be provided "with a view to, *inter alia*, reviewing the information ***provided under paragraph 2***" of Article 12. The information "provided under paragraph 2" is the information that has been provided "in making the notifications" under

[56] Appellate Body Report, *Korea – Dairy*, para. 107.
[57] Appellate Body Report, *Korea – Dairy*, para. 109.
[58] Appellate Body Report, *Korea – Dairy*, para. 111 referring to Panel Report, *Korea – Dairy*, para. 7.126.
[59] Appellate Body Report, *Korea – Dairy,* para. 111.

Article 12.1(b) and 1(c) to the Committee on Safeguards. Thus, the wording clearly confirms that the opportunity for prior consultations must be given once the notification has been made pursuant to Articles 12.1(c) and 12.2 of the Agreement on Safeguards. Furthermore, the "information provided under paragraph 2" covers not only "all pertinent information" but also any "additional information" provided upon the request of the Council for Trade in Goods or the Committee on Safeguards. In the absence of any notification under Articles 12.1(b) and 12.1(c), it would appear impossible to provide the "additional information" at the request of the Council for Trade in Goods or the Committee on Safeguards.

89. **Second**, in any event, the consultations held on 19 April 2012 do not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards. Article 12.3 requires that the Member proposing to apply the safeguard measure provide exporting Members with sufficient time and sufficient information for meaningful consultations. [60]

90. The Key Findings sent by the Ministry of Economic Development and Trade of Ukraine on 11 April 2012 to the Embassy of Japan in Ukraine did not provide sufficient information to enable meaningful consultations, as they did not contain a proposed date of application, any precise details, such as the rate of the safeguard measure or any pertinent information of essential nature concerning injury, causation and other elements mentioned in Article 12.3.

91. Furthermore, Ukraine did not provide Japan with "sufficient time" to enable meaningful consultations since the Key Findings was only provided to Japan 8 days prior to the date of the consultations.

4.3 Ukraine violated Article 12.5 of the Agreement on Safeguards

92. Japan claims that even if it were to be found that consultations were held between Ukraine and Japan, the results of these consultations have not been notified, and *a fortiori* not notified "immediately" to the Council for Trade in Goods. Thereby, Ukraine violated Article 12.5 of the Agreement on Safeguards.

93. Indeed, it is the Member "proposing to apply or extend a safeguard measure" under Article 12.3 who is obliged to make the notification as a "Member concerned" within the meaning of Article 12.5.

94. Neither the alleged failure of Japan to notify the results of the consultations under Article 12.5 nor the alleged harmless nature of the violation has any bearing on the fact that Ukraine did not comply with the requirement stated in Article 12.5 of the Agreement on Safeguards.

95. If the Panel were to hold that consultations within the meaning of Article 12.3 were held, the Panel must sustain Japan's claim under Article 12.5, since it is not contested that any result of alleged consultations under Article 12.3 in this case has ever been notified to the Council for Trade in Goods.

4.4 Ukraine violated Article 8.1 of the Agreement on Safeguards

96. Japan claims that Ukraine failed to comply with Article 8.1 of the Agreement on Safeguards since it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994 in accordance with Article 12.3 of the Agreement on Safeguards.

97. As pointed out above, Ukraine has failed to "provide an adequate opportunity for prior consultations" within the meaning of Article 12.3. For that reason alone, Ukraine should therefore be found to violate Article 8.1 of the Agreement on Safeguards. Indeed, "[i]n view of the explicit

[60] Appellate Body Report, *US – Wheat Gluten*, para. 136.

link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot […] 'endeavor to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure."[61]

98. In this regard, Article 8.2 does not serve as a rectification of a violation of Article 8.1. Article 8.2 does not address the breach of Article 8.1, since it is concerned with a temporary relief to the harm of a safeguard measure as a consequence of the failure to reach an agreement on adequate means of trade compensation under Article 8.1.

5. CONCLUSIONS

99. Japan respectfully requests the Panel to find that Ukraine acted inconsistently with its obligations under the Agreement on Safeguards and the GATT 1994, and in particular, that the safeguard measures adopted by Ukraine are in violation of the following provisions:

- Articles 3.1 and 4.2(c) of the Agreement on Safeguards because Ukraine failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

- Article 3.1 of the Agreement on Safeguards because Ukraine failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and the alleged "unforeseen developments"; and failed to provide reasoned and adequate findings and conclusions with regard to such "unforeseen developments";

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide reasoned and adequate findings and conclusions with regard to the increase in imports;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to examine all relevant injury factors; and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of threat of serious injury;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged threat of serious injury; failed to make a proper non-attribution analysis; and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link

[61] Appellate Body Report, *US – Wheat Gluten*, para. 146.

between the increased imports and the alleged threat of serious injury and non-attribution of other factors;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards because Ukraine has failed to apply safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measures by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measures are necessary to prevent or remedy the alleged threat of serious injury;

- Article II:1(b) of the GATT 1994 because Ukraine imposes duties which are in excess of those set forth in its schedule through the unlawful safeguard measures at issue;

- Articles 12.1 and 12.2 of the Agreement on Safeguards because Ukraine did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

- Article 12.3 of the Agreement on Safeguards because Ukraine did not provide adequate opportunities for prior consultations on the proposed safeguard measures and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;

- Article 12.5 of the Agreement on Safeguards because Ukraine did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards;

- Article 8.1 of the Agreement on Safeguards because Ukraine did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994, in accordance with Article 12.3 of the Agreement on Safeguards.

100. Japan also respectfully requests the Panel to recommend that the DSB requests Ukraine to bring its measures into conformity with the Agreement on Safeguards and the GATT 1994 by revoking its safeguard measures.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

LIST OF ABBREVIATIONS

This document uses abbreviations as follows:

- **The Agreement**: Agreement on Safeguards;
- **The Commission:** the Interdepartmental International Trade Commission;
- **The Key Findings:** the Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export;
- **The Law**: Law of Ukraine "On Application of Safeguard Measures against Imports to Ukraine";
- **The Ministry:** the Ministry of Economic Development and Trade of Ukraine;
- **The Notice**: the Notice on the application of safeguard measures on the imports of motor cars into Ukraine regardless of the country of origin or export published on 14 March 2013.

I. Introduction

1. This dispute concerns a safeguard measure on certain passenger cars, one of the first safeguards adopted by Ukraine as a newly-acceded Member who liberalized its tariff from 25 per cent to 10 per cent and was hit hard by the 2008 global crisis immediately after its accession.

2. The safeguard measure grants such Members the ability to escape from otherwise inflexible obligations under the WTO. In the event of unforeseen developments threatening domestic industry, only the safeguard measures may guarantee the stability of Member's commitments and enable the Member to restore competitiveness of domestic industry facing a surge of imports and the resulting serious injury. It is clear that domestic industries protected by safeguard measures gain the benefit of a temporary respite from competition with imports to build-up its competitiveness.

3. The global financial crisis had a severe impact on the economy of Ukraine and especially its motor car industry. The referred crisis resulted in a 15% decrease in Ukrainian GDP and rapid depreciation of the national currency. Its effect on the passenger car industry was even more severe.

4. The impact of 2008 global financial crisis and liberalized trade as a result of accession to the WTO caused an increase in imports relatively to the domestic production and consumption was an unforeseen development that called for emergency action on imports given that there was a surge in imports relative to domestic production during that same period.

5. All of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 were evident. Therefore, Ukraine had the right to impose the challenged safeguard measure on certain passenger cars.

6. The measure was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The safeguards measure was significantly liberalized during the period of its application.

7. Finally, Ukraine also complied with the procedural obligations contained in Articles 3, 8 and 12 of the Agreement, as well as Article XIX:2 of GATT 1994, regarding the consultations at certain stages of the process, notifications, and publications. These procedural obligations are different from the substantive obligation set forth in Article 2 which determines the right to impose safeguard measures and still were complied fully.

8. Thus Japan's claims to the contrary must therefore be rejected.

II. Arguments of Ukraine

1. Japan's claim that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it did not conduct a proper "investigation" and did not publish a sufficiently detailed report is flawed

a. Introduction

9. Ukraine conducted a proper investigation under Article 3.1 of the Agreement and published a sufficiently detailed report under Articles 3.1, last sentence, and 4.2(c) of the Agreement.

b. Legal argument

10. First, Ukraine maintains that the investigation was conducted in accordance with the limited obligations of Article 3.1 of the Agreement. The Agreement does not stipulate any particular requirement to investigation determination period. According to the Article 8.2 of the domestic Law the "period of investigation shall be normally from one to three years". As it was made clear in the Notice and appropriate notification to the WTO, during the investigation period in 2010 compared to 2008 import of cars in Ukraine increased relative to the domestic production and consumption that threaten to cause serious injury to domestic industry. Thus, the conclusions were based on the period in 2010 compared to 2008. Furthermore, the investigating authority also presented some more recent data that was available before the investigation was concluded for the 1st half of 2011 compared to 2008 and 2010 in the Key Findings, particularly, about the further increase in import volumes in relative terms.

11. Ukraine set the period of investigation as 2008 through 2010 when it initiated the safeguard investigation on 2 July 2011 and carefully investigated the information inside this period. The investigating authority is not obliged to review the data outside the period of investigation as erroneously claimed by Japan.

12. Therefore, the investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected. There is no obligation in the Agreement to continue to update the information following the end of the period of investigation and certainly not following the end of the investigation.

13. Moreover, it was generally accepted by the parties and the third parties that a delay before the imposition of safeguard measures could possibly be justified by good faith efforts to negotiate safeguard measures. It is important that a number of consultation and meetings between the Ukrainian officials and the representatives of other exporting Members were held to discuss the possible imposition of safeguard measure before the application of the measures.

14. Second, Japan complains about the fact that there was a gap between the date of the termination of the investigation and the date of application of the measure. However, there is nothing in the Agreement that provides that the application of the measure must follow the finish of the investigation within a certain period of time. Moreover, this matter does not concern the investigation but only the application of the measure and does not invoke the substantive norms of Article 3.1 and Article 4.2 that are limited to the actions of the investigating authority in the investigation, which was finished on 28 April 2012. Therefore, Ukraine was not obliged in any way to consider any additional factors or periods after the safeguard investigation was finished.

15. Furthermore, Article 3.1 of the Agreement does not prescribe any deadline for the publication requirement. It merely provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". In the context of Article 3.1 and especially Article 4.2 that requires the Member to publish such report "promptly", this publication obligation arises only at the time of adoption of the measure, and not before that time.

16. Third, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defence of their interests, in accordance with the procedural obligation of Article 3.1.

17. Ukraine contacted the Embassy of Japan during the investigation and provided it and all the other registered interested parties with a summary of their rights and obligations as an interested party of the safeguard investigation, as well as the relevant procedures and a mechanism to actively participate in the investigation according to the Law and the Agreement.

18. In the Notice on initiation the interested parties were provided a 45-day period to send the comments and views to the investigating authority for a consideration. A number of the interested parties used the right to present their position regarding whether or not the application of a safeguards measure was necessary. The arguments of the interested parties were taken into consideration by the investigating authority. Japan, however, did not send its comments to the investigating authority.

19. As for the hearings, all of the interested parties had a notice of and an ample opportunity to participate in the hearings held on 22 March 2012 and to present evidence and its views and arguments. A number of the interested parties used the right to participate actively in the hearings and to present their positions, which were taken into consideration by the investigating authority.

20. Japan did not request to have access to the information provided by other interested parties, particularly the application by the domestic industry, and did not complain about not being provided such information by these parties automatically. It was concluded by the investigating authority during the investigation that Japan was fully informed by the other interested parties, supplied with all the available evidence, views, submissions, and presentations.

21. It is important that the Member is obliged only to provide an opportunity for the participation, but obviously cannot force the interested parties to present their interests. Japan was able to participate much more actively in the investigation like the other interested parties did, but did not fully exercise its rights at that moment. It is highly doubtful that Japan's limited participation by providing only declarative statements during the investigation was the fault of the Ukrainian investigating authorities in the light of all of the above facts. If such arguments are taken for granted, any interested party in any future investigation that ignored its right to communicate with others interested parties and authorities can question the safeguard measure afterwards on a similar premise.

c. Conclusion

22. The investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's apparent argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected.

23. Ukraine published its detailed analysis of the investigation promptly upon adoption of measure and therefore complied with the publication-related obligations of Articles 3.1 and 4.2(c) of the Agreement. There is no set of rules in the Agreement or Article XIX of GATT 1994 concerning the format of published report.

24. Similarly, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defense of their interests, in accordance with the procedural obligation of Article 3.1. Japan's claim to the contrary is not supported by the facts on the record.

25. Therefore, Ukraine requests that all of Japan's claims under Article 3.1 and 4.2 (c) of the Agreement be rejected.

2. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments is flawed

a. Introduction

26. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement is not justified because Ukraine properly demonstrated the existence of "unforeseen developments", their logical connection to the increase in imports relatively to the domestic production, and consequently fulfilled its obligations under Articles 3.1 and 4.2(c) of the Agreement.

b. Legal argument

27. Unforeseen developments are a circumstance that is found in Article XIX of GATT 1994 and must be demonstrated as a matter of fact. Moreover, the unforeseen developments can only be viewed together with the binding effect of the obligations under the GATT. As the injury to the domestic industry or threat thereof has to be caused by the significant increase of imports, but not by the unforeseen developments or the obligations incurred under GATT 1994 directly. It is the causal relationship between the increase in imports and the injury to the domestic industry or threat thereof that is the prerequisite for the application of safeguard measures and need to be analysed during the safeguard investigation. The unforeseen developments and the obligations incurred under GATT 1994 are the circumstances that shall cause the significant increase of imports.

28. In the present case the global financial and economic crisis that was neither foreseen nor expected by Ukraine earlier during its trade negotiations on concessions, and the obligations assumed during Ukraine's accession caused the increase in imports relatively to the domestic production. One of these circumstances alone could not result in a significant enough change in competitive relationship between imports and domestic products.

29. The facts confirm that the increased imports can only be associated with the combination of a global economic crisis just after the liberalization and other major changes in the Ukrainian economy as a result of the WTO accession. These circumstances existed as a matter of fact and were identified in the Key Findings, the Notice, and the notification to the WTO even though the latter included only a reference to the results of these circumstances.

30. As the 2008 global financial and economic crisis is a widely accepted and an uncontested fact, it does not indeed require any additional evidence to prove its existence. Moreover, as this circumstance was not questioned by the interested parties, it was concluded by the investigating authority that it existed as a matter of fact and did not need any confirmation.

31. The investigating authority explained that it was unforeseen that imports would increase by 37.9 per cent relative to domestic automobile production in Ukraine in 2010 compared to 2008, despite the decrease in import volumes in absolute terms. This relative increase in imports decreased the market share of the domestic industry by 35.45 per cent. The significant increase in market share of imports came on the heels of the global financial crisis, which had a significant impact on the Ukrainian passenger car industry. Japan was obviously aware of the global crisis during the period of investigation.

32. Ukraine did provide an analysis of the consequences of the global financial and economic crisis. Moreover, Ukraine also analysed other factors that were caused directly by the crisis, namely the consequent decrease in consumption in the non-attribution section of the Key Findings. It was determined that this effect of the global economic crisis could not be responsible for the injury to the domestic industry.

c. Conclusion

33. Ukraine established a clear relationship between the unforeseen developments that existed as a matter of fact and the increase in imports that threatened to seriously injure the domestic industry.

34. Japan's argument Ukraine did not provide sufficient "reasoned conclusions" on "all pertinent issues" including the unforeseen developments in violation of the requirement to provide a report on these issues is not supported by the evidence on the record.

35. Therefore, Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement must fail.

3. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT is without merit

a. Introduction

36. Contrary to Japan's claim, Ukraine's determination was conducted in accordance to Article XIX:1(a) in context of the "effect of obligations incurred under the GATT". Ukraine mentioned the effect of its GATT obligation under Article II:1(b) to maintain tariffs on these products at no more than 10 percent, did address the logical connection of those obligations to the increase in imports, and reported on these "pertinent" elements under Articles 3.1 and 4.2 of the Agreement.

b. Legal argument

37. To accede to the WTO, Ukraine committed to reduce the import duty on passenger cars in 2008 from 25 percent to 10 percent with no phase-down period. Unfortunately, after the tariffs decreased as a result of Ukraine's obligations the global financial and economic crisis started. Due to these circumstances the imports of passenger cars into Ukraine relative to domestic production increased in the same time as the absolute amount of imports decreased as referred to in the Notice.

38. The reduction of the tariff to 10 percent was analysed in the non-attribution section of the Key Findings. It was concluded that its effect on the imports of passenger cars into the Ukraine market during the period of investigation was limited though and could not cause the significant increase in imports by itself.

39. Furthermore, there is no need for any detailed conclusions and other explanation when as a matter of fact it is uncontested that Ukraine made significant tariff commitments in respect of passenger cars when it joined the WTO in 2008. Of all countries, Japan cannot seriously deny that as a matter of fact this is the case given its active involvement in the Ukraine's accession negotiations.

40. It is a fact that Ukraine made significant tariff concession on passenger cars when it joined the WTO on 16 May 2008. This is a fact Japan cannot deny given its active involvement in the Ukraine's accession negotiations. Moreover, Ukraine mentioned the obligations in the Key Findings incurred under the GATT in a specific context clearly presenting the results of the analysis of causality between the obligations and the increase in imports.

c. Conclusion

41. Ukraine therefore requests the Panel to reject Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement.

Claim 4: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports must fail

a. Introduction

42. Ukraine obviously fulfilled its obligations in regard to its determination of the increased imports. Japan's claims must fail because Ukraine showed that the increased imports were caused by unforeseen developments and the effect of its GATT 1994 obligations, and the investigating authority did examine all the elements relating to increased imports, that is:

the evidence of import increase is recent;
the increase was sufficiently recent, sudden, sharp and significant;
the qualitative analysis of the imports increase was conducted;
the unforeseen or unexpected aspects of the increase were obvious;
the conditions of the increase in imports were analysed.

43. Therefore, Ukraine acted in accordance to Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Moreover, Ukraine reported these elements pursuant to Articles 3.1 and 4.2(c) of the Agreement. Japan's claims are not supported by the facts on the record and are without merit.

b. Legal argument

44. First, as explained in the prior section, Ukraine demonstrated that the increased imports were the result of unforeseen developments and the effect of the tariff commitments it made on passenger cars. The first argument of Japan, which is a purely consequential argument that is based on its flawed claims relating to Article XIX of GATT 1994, is thus without merit.

45. Second, Ukraine met its obligations under the Agreement by examining all elements related to the increase in imports. The data used by Ukraine in its analysis was the most recent data available as was explained above.

46. Third, the increase in imports that caused a threat of serious injury was sufficiently recent, sudden, sharp and significant. Although the volume of passenger car imports into Ukraine decreased by 71 percent, there was a significant increase in imported passenger cars in relative terms. In 2010, the most recent year of data, imports of passenger cars relatively to domestic consumption and domestic production showed a sudden and significant increase. In 2010, they sharply increased by 37.1 and 37.9 percent respectively from 2008. The increase by over 30 percentage points is obviously sudden, sharp and significant.

47. Ukraine analyzed the amounts and rates of the increase in imports and taking into account the non-disclosure requirements of Article 3.2 provided the non-confidential summary of such analysis in the Key Findings, Notice and notification to the WTO.

48. Japan aims to add to the obligations of Ukraine under Article 4.2 of the Agreement a responsibility that would be simultaneously a violation of Article 3.2 provision which explicitly states that: "such information shall not be disclosed without permission of the party submitting it". As explained by the Panel in *US – Steel Safeguards*, the non-disclosure requirement is more important as far as the authority is able to resort to "ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality".

49. However, by providing not only the rates, but also the amounts, hence, the absolute figures of the import increase or any of other relevant factors having a bearing on the situation of that industry Ukraine would violate its obligations under Article 3.2 and invalidate all the efforts it took to protect confidential data of the domestic industry by making the confidentiality of the indexed data vulnerable to a simple numerical analysis.

50. In its Key Findings, Notice, and WTO notification Ukraine managed to present a sufficiently detailed picture of the increased imports and oblige its non-disclosure obligations by indicating that "the volume of imports of motor cars into Ukraine in quantitative terms decreased by 71%, the share of imports increased by 37.1% to domestic consumption and by 37.9% to domestic production". It is obvious that the rates of increase in imports were based on the absolute figures.

51. As discussed in more detail when addressing Japan's injury related claims, this sudden increase in imports relative to domestic production and consumption threatened to cause further serious injury. The domestic industry's market share decreased by 35 percent in 2010 over 2008 levels.

52. This analysis was fully conducted by the investigating authority during the investigation and was properly summarized in the Key Findings, the Notice and the WTO notification. The absolute figures, however, were confidential and were therefore not disclosed.

c. Conclusion

53. Japan's claims regarding the determination of increased imports under Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected.

Claim 5: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of injury and/or threat of injury is flawed

a. Introduction

54. Ukraine conducted a comprehensive investigation of injury under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Japan's arguments fail for the following reasons:

Ukraine evaluated the injury factors properly;
Ukraine did determine that there was a significant overall impairment to the domestic industry;
Ukraine based the investigation on the most recent data available;
Ukraine determined a threat of serious injury pertaining to the most recent past; and
Ukraine conducted the qualitative examination of all injury factors properly.

55. Moreover, as Ukraine fulfilled its obligations in the above context, Japan's consequential claims that the failure to sufficiently explain these elements in the Notice violates Articles 3.1 and 4.2(c) of the Agreement must fail as well.

b. Legal argument

56. Serious injury is defined in Article 4.1 of the Safeguards Agreement as "a significant overall impairment in the position of the domestic industry". The same provision states that "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, adding that a determination of the existence of a threat shall be based on facts and not merely on allegation, conjecture or remote possibility.

57. Ukraine analysed all the injury factors including the market shares and provided a reasoned and adequate explanation of how the facts supported its final determination. Contrary to Japan's arguments, Ukraine conducted a full analysis of the serious injury or threat of injury factors. Ukraine summarized its confidential analysis of the factors required by the Agreement taking into account the non-disclosure requirements of Article 3.2 and the guidance of the Panel in *US – Steel Safeguards*.

58. As the public summary makes clear, Ukraine analysed the data trends over the course of the period of investigation for each factor indicated in Article 4.2 and provided a result of such analysis in the Key Findings, Notice and the WTO Notification. Each factor evidences the "the worsening financial and economic condition of the domestic producers" over the course of the period investigation. The potential for significant injury is shown in each factor that decreased significantly from 2008 to 2010.

59. Nevertheless, it was found by investigating authorities that while all the factors confirm the worsening condition of the domestic industry, the high standards of material deterioration due to the increase in imports put by the wording of the "serious injury" criterion established by the Agreement could not be met incontestably.

60. The standards concerning the current deterioration of the domestic industry under the "threat of serious injury" are lower if such threat is shown to be imminent. Appellate Body stated in its report in *US – Line Pipe* that "defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure."

61. Ukraine did find that the worsening of all the relevant factors of an objective and quantifiable nature coupled with a significant export potential of the notable exporters of motor cars into Ukraine can qualify as a "threat of serious injury".

62. As was concluded by the investigating authority, the significant worsening of domestic industry (including the major increase in the market share) was a consequence of the increasing imports at that moment. Ukraine analysed the capacity in the exporting countries, they had significant available productive capacity ready to be exported to Ukraine.

63. The significant export potential of the exporting countries led the investigating authority to believe that the import trends then present would continue and cause even more significant deterioration of the domestic industry. The foreign industries referred to in the Notice are responsible summarily for more than 90 per cent of Ukrainian motor car imports; their orientation on exports and free additional capacity could be directed to Ukraine.

64. As the share of specific importing countries in the total imports was not expected to change notably and the total exports from these countries was supposed to increase, the amount of exports from these countries to Ukraine was supposed to grow majorly as well.

65. Therefore, Ukraine not only analysed the injury factors to conclude the fact of imminent serious injury, but also included the export potential of the exporting countries in its analysis.

66. Ukraine provided an adequate public summary of its reasoned and adequate explanation of how the seven injury factors were examined and applied in the injury investigation. Ukraine's analysis of the domestic passenger car industry in absolute figures, however, was confidential. In its Key Findings, Notice and notification to WTO Ukraine provided a public summary of its confidential analysis. Ukraine followed the guidance of the Panel in *US – Steel Safeguards*, which discussed a way to provide the relevant explanations while addressing the confidentiality issues.

67. In order to protect the domestic passenger car industry's confidential information about sensitive technological, productive, managerial, financial and aspects of its activity that may cause a damage to the commercial interests of the company if disclosed, the results of the quantitative and qualitative evaluation of threat of serious injury to the domestic industry were not presented by the investigating authority in absolute terms. Acknowledging the need to disclose as much relevant information as possible, the investigating authority published the indexed results of the conducted analysis of injury factors. Therefore, Ukraine addressed the requirements of both Articles 3.1 and 4.2(c) of the Agreement as much as it was possible in these circumstances.

c. Conclusion

68. For all of the reasons above, it is clear that a proper determination of threat of serious injury was made and that all relevant factors were examined. All of Japan's claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of GATT 1994 must therefore be rejected.

6. Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the serious injury or threat of injury is flawed.

a. Introduction

69. Ukraine fulfilled its obligations as it demonstrated the existence of a causal link between increased imports and serious injury or threat thereof and ensured that the injury caused by factors other than the increased imports is not attributed to the increased imports.

70. Alleged violations of Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement claimed by Japan are without merit. Consequential arguments that the lack of reasoned conclusions on this issue is a violation of Articles 3.1 and 4.2(c) of the Agreement must therefore fail as well.

b. Legal argument

71. Ukraine conducted the causation analysis required by Article 4.2(b). During the investigation, Ukraine "established that the volume of the Product under investigation imported into Ukraine has been growing throughout the period of investigation in relation to production volume of the domestic industry". Ukraine also recognized that although imports of passenger cars decreased by 71 percent from 2008 to 2010 in absolute terms, imports increased by 38 percent relative to the Ukrainian domestic passenger car production. These data demonstrated that, although there was a decline in the passenger car across the market, imports were still able to increase in relation to domestic production.

72. During the investigation, Ukraine found that although the imports decreased in absolute terms, the volume of the product under investigation imported into Ukraine has been growing throughout the period of investigation relatively to the production volume of the domestic industry and the domestic consumption.

73. Ukraine recognized that although imports of passenger cars decreased by 71 per cent from 2008 to 2010 in absolute terms, imports increased by 37.9 per cent relatively to the Ukrainian domestic passenger car production and by 37.1 relatively to domestic car consumption. These data demonstrated that imports were still able to increase in relative terms.

74. Ukraine found that the consumption of passenger cars fell by 78.8 per cent between 2008 and 2010 while the domestic producers' market share fell by 35 per cent over the same period and concluded that, in light of the increase in imports relative to production volumes and the conditions of such imports, the domestic passenger car industry was driven out of the Ukrainian market by imports. The growing market share of imports resulted in "a worsening of the poor state of the domestic industry and a threat of serious injury in the future".

75. It was for Japan to demonstrate that despite this clear correlation, the causation analysis of Ukraine was lacking. In addition, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. The genuine and substantial relationship of cause and effect between the increase in imports and the threat of serious injury cannot be in doubt.

76. The investigating authority concluded that the domestic product has characteristic features that are very similar to the characteristic features of the product that was the subject of investigation, and therefore can be considered to be a "similar good" within the meaning of the provisions of the Agreement and the Law. Moreover, the relatively narrow definition of the good under investigation and its high similarity to the imported good led the investigating authority to believe that the imports and the domestic production are engaged in a clear direct competitive relationship and can be easily substituted for each other.

77. Such a relationship means that because the importers and domestic industry are competing for a contracting domestic market, any change in market share taken by imports has an obvious and direct influence on the demand for the production of the domestic industry, its financial and economic state. Therefore, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. Japan has failed to provide evidence that imported and domestic passenger cars covered by the investigation were not in direct competition.

78. Moreover, as far as it concerns the other claims of Japan Ukrainian investigating authorities conducted a proper non-attribution analysis.

79. As such, Ukraine recognized that the decrease in consumption caused by global financial crisis was an objective factor that influenced every industry in Ukraine and abroad. As the deterioration of automotive industry is more significant than it was expected from Ukrainian industry or a car producer in any other country, it was concluded that the decrease in consumption could be responsible for only a limited part of the injury to the national industry.

80. Regarding the abolition of government support in 2008 and the corresponding deficient competitiveness of the domestic products, the investigating authority noted that these factors could cause the deterioration of the domestic industry, but cannot explain the coinciding increase

of imports. It was also noted that the government support of motor car producers ended before 2008 and the investigation authority did not consider earlier data. The deterioration of the domestic industry could be attributed to the sudden lack of competitiveness caused by abolition of government support if the investigation period included 2007, but the claim that it could influence the domestic industry negatively after 3 years later is presumptuous.

81. As for the imposition of the additional 13 % import surcharge imposed on the imports of motor cars under the WTO Balance of Payments mechanism, Ukraine has noted that this surcharge could have influenced the extent of injury caused to the domestic industry only in a limited way as it was in force only during a short period from March till September 2009 and therefore could not be attributed to the trends in 2008 and 2010. The countries unaffected by this duty were the Members of CIS FTA, the Russian Federation with a 30 % share of total imports in 2009.

c. Conclusion

82. For all of these reasons, Japan's claim of violation of Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected. Ukraine determined that there was a clear causal link between the increase in imports and the injury to the directly competitive domestic industry and ensured that any injury caused by other factors was not attributed to the increased imports.

7. Japan's claim that Ukraine violated Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its imposition of the measures to the extent necessary to prevent or remedy serious injury and to facilitate adjustment is without merit

a. Introduction

83. Ukraine acted in accordance to Article XIX:1(a) of the GATT 1994 and Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement by applying the safeguard measures only to the extent necessary to prevent the threat of serious injury: the duty level and the length of the application was appropriate, as well as the progressive liberalization of the measure.

b. Legal argument

84. Ukraine clearly took into account the level of causal impact of the increase in imports on the serious injury to the domestic industry when it set the level of duty, the duration of the measure, and the scheme for progressive liberalization of the measure allowing the domestic industry to adjust.

85. Ukraine's measure is imposed strictly to the extent necessary to remedy the serious injury. It was therefore appropriate to apply a rate of duty sufficient to remedy the entirety of the serious injury that was threatened to be caused by the increased imports.

86. The investigation of the injury revealed that the level of duty requested by the domestic industry (33.4 to 47 per cent), which is comparable to the deterioration of the domestic industry, was excessive in light of the effect on the imports and the possibility of imposing a lesser duty sufficient to remedy and prevent the serious injury. Therefore, a level of duty of only 6.46 to 12.95 per cent was imposed.

87. Japan claimed that this level of duties is excessive as it was seemingly understood by Japan that to prevent the whole deterioration to the domestic industry.

88. However, Ukraine wants to recall the explanations of the Appellate Body in US — Line Pipe, which concluded that although the "serious injury" in Article 5.1 and Article 4.2 was "one and the same", the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied "only to the extent that they address serious injury attributed to increased imports", not "all serious injury".

89. It must be emphasised that these duties were imposed on such a level that was intended only to prevent the imminent serious injury. That was the reason why Ukraine did apply safeguard

measures only 6.46 to 12.95 per cent, but not the requested 33.4 to 47 per cent: the latter duty could stop the deterioration of the domestic industry but would definitely be in excess of the extent necessary to prevent the serious injury caused by the increase in imports.

90. Thus, Ukraine acted in accordance with Article XIX:1(a) of the GATT 1994 and Article 5.1 of the Agreement.

91. Second, the duration of the measure was determined to be strictly necessary to remedy the amount of serious injury. Due to the high level of serious injury a safeguard measure of sufficient duration to remedy the injury and to allow the industry to adjust was required.

92. Importantly, Ukraine once again did not go to the maximum of what it was entitled to do. It did not impose a measure for four years as possible under Article 7.4 of the Agreement, but imposed a measure of a shorter duration of three years only. In addition, it provided for a rapid and steep liberalization of the measure, again going well beyond what it is required to do. Thus the measure is in line with Article XIX:1(a) of the GATT 1994 and Article 7.1 of the Agreement, and is not more restrictive than necessary.

93. Third, the three-year measure triggered the requirement to progressively liberalize the measure over its full duration. Ukraine satisfied that requirement by implementing a plan of progressive liberalization that provided for a step-wise reduction in the duty level after 12 months and then after 24 months of the application of the safeguard measures.

94. Article 7.4 of the Agreement stipulates that a Member imposing a safeguard measure "shall progressively liberalize it at regular intervals during the period of application". This substantive obligation to liberalize a safeguard measure of greater than three years duration is of course related to the procedural requirement to notify a timetable for liberalization to the WTO Committee on Safeguards. However, the obligations are different. In this context, the substantive obligation to liberalize a measure at regular intervals requires a plan that is put into place and then implemented. The timing for notification of the timetable to the WTO is a separate obligation that must be addressed separately under Article 12.2.

95. Hence, Ukraine satisfied the Article 7.4 requirement by implementing a plan of progressive liberalization. The plan provided for a step-wise reduction in the duty level by the third after 12 months of implementation and then 24 months. By devising, implementing and notifying this plan, Ukraine has satisfied its obligation under Article 7.4 of the Agreement.

c. Conclusion

96. The safeguard measure was applied by Ukraine to facilitate adjustment in its every relevant aspect: level and duration, and scheduled progressive liberalization. The measure eases the process of economic adjustment to the competition of the domestic industry.

97. Thus, by taking into account all of these factors, Ukraine's investigation and determination are in line with Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement.

8. Japan's claim that Ukraine violated Article II:1(b) of the GATT 1994 is a merely consequential claim that has to be rejected

98. Japan claimed that that Ukraine violated Article II:1(b) of the GATT 1994 by applying an unjustified safeguard measure and therefore imposing a tariff higher than the bound rate is not supported by the evidence.

99. A safeguard measure, implemented in accordance with Article XIX of the GATT 1994 and the Agreement, are permitted as "emergency action on imports of particular products".

100. As Ukraine's measure is a lawful safeguard measure applied under XIX of GATT 1994 and the Agreement that appropriately applies a separate form of duty on particular products to prevent or remedy serious injury or threat thereof caused by increased imports, it does not violate Article II:1(b) of the GATT 1994. Because Japan's predicate claims above must fail, so must fail this consequential claim.

101. Therefore Ukraine acted in accordance to Article II:1(b) of the GATT 1994 by imposing a safeguard measure according to Article XIX of GATT 1994 and the Agreement.

9. Japan's claim that Ukraine did not comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards is in error

a. Introduction

102. Ukraine notified the Committee on Safeguards "immediately" under Article 12.1 of the Agreement upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply measures. Japan's claims are not supported by the evidence and should be rejected.

b. Legal argument

103. All notifications made by Ukraine were as immediate as possible in the light of the Ukrainian language not being an official WTO language. Ukraine has satisfied its notification obligations under the Agreement and Japan's claims to the contrary must be rejected.

104. As to the Article 12.1(a) requirement to notify the initiation of the investigation, Ukraine took the decision to initiate the investigation on 30 June 2011, published that decision on 2 July 2011, and notified the WTO on 13 July 2011. Ukraine submits that eleven days after publication of the notice about the decision to initiate is clearly "immediate" notification in accordance with Article 12.1 (a).

105. As to the Article 12.1(b) requirement to notify the injury determination and the Article 12.1(c) requirement to notify the decision to impose a measure, Ukraine took a decision on 28 April 2012, published the Notice about that decision on 14 March 2013, notified the WTO on 21 March 2013, and made the measure effective on 14 April 2013.

106. Ukraine considers that the 28 April 2012 date cannot be viewed to be the triggering event of taking a decision. According to the Ukrainian Safeguard Law, the investigation is finished after the relevant decision of the Commission is taken. The decision itself, however, is the document of internal use and cannot be viewed as an appropriate legal document until the official publication of the notice about the decision is made. Thus, it is the decision to publish the notice (and thus to allow its entry into force thirty days later) that is the key decision for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

107. The publication of the Notice, which provides findings and reasoned conclusions reached on all pertinent issues of fact and law under Articles 3.1 and 4.2 of the Agreement that makes the subsequent application of the safeguard measure imminent, is a key event for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

108. Thus, given the triggering event occurred on 14 March 2013 and the notification to the Committee on Safeguards came on 21 March 2013, the notification seven days later is "immediate" in the sense of Article 12.1.

109. Regarding the requirement to give all pertinent information in the Article 12.1(b) notification of injury/threat determination, the Appellate Body has focused on the need to provide the information listed in Article 12.2 as well as information concerning the injury factors in Article 4.2(a). The Appellate Body in *Korea – Dairy* described "an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification".

110. These notifications sufficiently described the measure, which had not yet entered into force. Ukraine also notes that it is relevant that it had also provided Japan with the Key Findings, which provided it with information to undertake consultations, as is the stated purpose of the Article 12.1 notification requirements before the consultations and sent a number of letters over the period of 25 August 2011 to 25 March 2013. This is important given that, as confirmed by the Appellate Body in *Korea – Dairy*, another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions with a view to

allowing "any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation". Japan had the information it needed and did consult with Ukraine back in 2012 based on the information that was made available.

c. Conclusion

111. Ukraine's notifications relating to the investigation on passenger cars to the WTO Committee on Safeguards were timely and of sufficient content so as to be found consistent with its WTO obligations. For all of the above reasons, Ukraine considers that Japan's notification claims under Articles 12.1 and 12.2 of the Agreement must fail.

10. Japan's claim that Ukraine did not comply with the requirements of Article 12.3 of the Agreement on Safeguards is without merit.

a. Introduction

112. Japan's claims under Article 12.3 of the Agreement that Ukraine's consultations process violated its obligations must fail for two reasons: Ukraine did provide an adequate opportunity for prior consultations after its notification to the Committee on Safeguards, and the consultations that Ukraine held with Japan on 19 April 2012 were clearly sufficient to fulfil the requirements of the Agreement.

b. Legal argument

113. The requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, then that is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation and Article XIX:2 of GATT 1994.

114. Contrary to Japan's claims the wording of the Appellate Body in *US – Wheat Gluten* clearly states that the information required to be provided under Article 12.2 is not a simple equivalent to the notifications under Article 12.1 of the Agreement, but the information that is needed to enable meaningful consultations to occur under Article 12.3.

115. Ukraine argues that Japan's focus on the Article 12.1 notification of the pertinent information given in Article 12.2 is misplaced. Ukraine provided Japan with the relevant information on its proposed measure prior to either the decision taken on 28 April 2012 or to the decision to publish that measure on 14 March 2013.

116. This requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, it is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation.

117. Japan and Ukraine held substantive consultations under Article 12 on 19 April 2012, after which the originally proposed level of 15.1 per cent duty for cars with engine volumes in the range of 1500 cm^3 – 2200 cm^3 was reduced to 12.95 per cent. Japan's claims that the information provided before the consultation was incorrect due to this liberalization and thus does not provide an opportunity to hold a meaningful consultations are faulty.

118. Ukraine also notes that additional consultations (after the Notice was published and before the safeguard measures entered into force) on this issue between the Ukrainian officials and the representative of the Ministry of Economy, Trade and Industry of Japan took place on the 09 April 2013.

c. Conclusion

119. In light of these facts which confirm that the substance of the information obligation of Article 12.3 was met, and the lack of any harm or prejudice to Japan in undertaking effective consultations given the positive result of the 19 April 2012 consultations with Japan, Ukraine has fulfilled its obligation under Article 12.3 of the Agreement. Ukraine therefore requests the Panel to reject all of Japan's claims under Article 12.3 of the Agreement.

11. Japan's claim that Ukraine violated Article 12.5 of the Agreement on Safeguards is to be rejected

120. Japan's argument that Ukraine did not notify immediately the results of the consultations to the Committee on Safeguards, thereby violating Article 12.5 of the Agreement, is faulty.

121. However, Ukraine asserts that this provision imposes an obligation on the "Members concerned" in the plural. A Member, like Japan, that has not itself complied with this obligation is estopped from complaining about an alleged violation of this notification obligation.

122. If Ukraine decided to provide any kind of concessions to compensate for the safeguard measures and thus noticeably influencing its trade regime, such concessions would be notified to the Council for Trade in Goods.

12. Japan's claim that Ukraine did not endeavour to maintain a substantially equivalent level of concessions and therefore violated Article 8.1 of the Agreement on Safeguards is in error

a. Introduction

123. Ukraine has always endeavoured to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and Japan as well as with the other exporting Members and acted in accordance to Article 8.1 of the Agreement.

b. Legal argument

124. It is important that consultations took place in April 2012 already well before the implementation of the measure and the Members concerned were properly informed about the proposed measure beforehand. Japan's claim must be rejected for that reason alone.

125. In addition, Article 8 must be read in a holistic manner. There is no "violation" of a legal provision requirement, if the legal provision itself provides for a balancing mechanism as does Article 8. Indeed, Article 8.2 provides that, if there was no agreement following consultations, the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure.

126. Unlike other WTO Members Japan took a passive stance and did not execute its right to balance the influence of the safeguard measure.

c. Conclusion

127. Ukraine considers that sufficient consultations were held and that it always endeavoured to maintain an equivalent level of concessions with Japan such that Article 8.1 cannot be said to have been violated. In addition, given the available option of approved self-help, Japan's claim of a violation of Article 8.1 is without merit.

III. Conclusions

128. As was just presented, the imposition of the challenged safeguard measures and the respective safeguard investigation were conducted by Ukrainian investigating authorities in full compliance with the substantive and procedural requirements for the adoption of safeguard measures in the Agreement and Article XIX of GATT 1994.

129. Specifically, all of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 existed as a matter of fact. Moreover, all the procedural obligations concerning the safeguard investigation under Article 3 and 4 of the Agreement were met. Therefore, Ukraine had a right to impose the challenged safeguard measure on certain passenger cars.

130. Furthermore, Ukraine correctly applied the measure in the context that it was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The decrease of the proposed safeguard duty level following the April 2012 consultations and the subsequent 2014 liberalization of the measure are evidence of Ukraine's good faith.

131. Finally, a number of procedural obligations relating to the notification and publication of the measure and consultations at certain stages of the process imposed by the Agreement were also duly met by Ukraine during the investigation.

132. Therefore, Ukraine applied the safeguard measures on the imports of passenger cars into Ukraine in strict accordance with the Agreement, Articles XIX and II of GATT 1994. While some aspects and procedures are not explicitly or implicitly stipulated by the relevant WTO jurisprudence the investigating authority used a guidance of Ukrainian domestic regulations or acted in good faith on its own discretion.

133. For all of the above reasons, Ukraine requests that all of Japan's claims be rejected.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. DELAY IN APPLYING A SAFEGUARD MEASURE SUGGESTS THAT "SUCH INCREASED QUANTITIES" OF IMPORTS DO NOT EXIST RECENTLY ENOUGH AS TO CAUSE OR THREATEN TO CAUSE SERIOUS INJURY

1. The *Agreement on Safeguards* and Article XIX of the *General Agreement on Tariffs and Trade 1994* (GATT) together establish that safeguard measures are temporary emergency actions that can only be taken where necessary to prevent or remedy serious injury caused by a surge in imports.[1] Safeguard measures give domestic industry the opportunity to adjust to different economic conditions by temporarily restricting import competition.

2. If an investigation finds that a safeguard measure is necessary, a delay in applying the safeguard measure following that investigation may raise doubt as to whether the imposition of the measure is justified. A delay may mean that the increase in imports that originally supported the imposition of the measure is no longer recent enough to justify an emergency measure to remedy "increased imports".

3. Australia accepts that the *Agreement on Safeguards* does not establish a specific timeframe for the imposition of a safeguard measure once the requisite determinations have been made. However, the conclusion that a delay may render the safeguard measure inconsistent with the *Agreement on Safeguards* is implicit in the requirements that the increased imports be recent, that such imports have caused or threatened to cause serious injury and that a safeguard measure is imposed only to the extent necessary to remedy this injury.

4. The Appellate Body in *Argentina – Footwear (EC)* found that the language "such increased quantities" in Article 2.1 of the *Agreement on Safeguards* requires that the increase in exports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[2] The Appellate Body also noted that "the phrase, 'is being imported' implies that the increase in imports must have been sudden and recent."[3] Australia agrees with these findings.

5. In Australia's view, the language of Article XIX:1(a) of the GATT, Article 4.2(b) of the *Agreement on Safeguards* and Appellate Body jurisprudence[4] support the view that the injury suffered, or threat thereof, must be recent in order to justify the imposition of safeguard measures. That is, the serious injury must have been caused by a recent increase in imports, and must therefore logically also be recent itself. This is consistent with the Appellate Body's finding in *Argentina – Footwear (EC)* that safeguard measures be "emergency actions".[5]

6. Similarly, suspending the application of a safeguard measure following a determination of serious injury would indicate that there was no longer a need to prevent or remedy serious injury or to facilitate adjustment. The subsequent reapplication of the safeguard measure after one year would also raise doubts as to whether the same serious injury (or threat thereof) still existed.

7. In addition, if the serious injury or the threat thereof is not recent, it may be difficult to show that the measure is still "necessary" to prevent or remedy serious injury or facilitate adjustment within the meaning of Articles 5.1 and 7.1 of the *Agreement on Safeguards.* In particular, noting that safeguard measures are intended to be *emergency* actions to prevent or remedy injury, a delay before the safeguard measure is applied suggests that there may no longer be the urgency that previously necessitated such a measure.

[1] Appellate Body Report, *United States – Steel Safeguards*, para. 331.
[2] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[3] Ibid., para. 130.
[4] Ibid.
[5] Ibid., paras. 93-94.

8. If a Member decides to extend a safeguard measure during its four year application period, the authorities must show that it continues to be necessary under Article 7.2 and in conformity with the procedures set out in Articles 2, 3, 4 and 5. That is, the authorities must demonstrate that the emergency measures continue to be justified due to a serious injury or threat thereof caused by increased imports.

9. Finally, Australia notes that the extent to which a delay in application of the safeguard measure renders it inconsistent with the requirements of the *Agreement on Safeguards* will largely depend on the facts of each case.

II. NOTIFICATION OF SAFEGUARD MEASURES

10. Article 12.1 of the *Agreement on Safeguards* creates three discrete obligations for Members to immediately notify the initiation of a safeguard investigation and the reasons for initiation; any findings of serious injury or threat of serious injury caused by increased imports; and any decision taken to apply or extend a safeguard measure. Australia understands a "finding" under Article 12.1(b) to mean a determination within the meaning of Article 2 of the *Agreement on Safeguards* made pursuant to an investigation under Article 3 that a 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.

11. Article 12.2 of the *Agreement on Safeguards* sets out further requirements for Members when making notifications referred to in Article 12.1, including the provision of a "timetable for progressive liberalization." Australia notes that the Appellate Body in *United States – Wheat Gluten* specifically clarified that the notification obligations set out in Articles 12.1(b), 12.1(c) and 12.2, although related, are discrete.[6]

12. Australia emphasises the importance of not conflating the requirements of Articles 12.1(a), 12.1(b) and 12.1(c). The initiation of an investigation, the making of a finding that domestic industry has suffered a serious injury or is suffering from the threat of a serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are three discrete matters. Immediate notification of each of these actions to the Committee on Safeguards is important in order to preserve the transparency of emergency safeguard measures and to ensure that WTO Members are able to monitor the progress of safeguard investigations and measures.

13. In Australia, the Productivity Commission is the competent authority that undertakes safeguard investigations following referral from the Australian Government. The Productivity Commission's report on its findings and recommendations is submitted to the Australian Government upon completion of its investigation. Under the *Productivity Commission Act 1998* (Cth), the Productivity Commission must table and make public its report within 25 sitting days of Parliament. Australia's practice has been to publish the report within a timeframe ranging between the same day or up to three days with notification to the WTO on the same day.

14. The Productivity Commission's findings and recommendations are not legally binding. As such, the Australian Government may choose not to accept the Productivity Commission's recommendation to impose a measure.

III. REQUIREMENTS FOR THE PUBLICATION OF A REPORT CONTAINING THE FINDINGS OF THE SAFEGUARD INVESTIGATION

15. Together, Articles 3.1 and 4.2(c) establish that the report of the competent authorities, setting out the findings and reasoned conclusions resulting from the investigation, must be published promptly and should include a detailed analysis of the investigation and the factors examined. Australia emphasises that these two requirements cannot be read in isolation from one another.

16. Given that Article 12 contains discrete obligations to notify both the findings of the competent authority and the government's decision to apply a safeguard measure, the obligation

[6] Appellate Body Report, *United States – Wheat Gluten*, para. 124.

to publish a report in Article 3.1 is clearly distinct from the timing of any subsequent decision to apply a safeguard measure and related notification requirements. It is important not to conflate the obligations to publish a report of the findings of the safeguard investigation; to notify the Committee on Safeguards; and to notify Members with a substantial interest as exporters of the relevant product if a safeguard measure is actually adopted under Article 12.1 and 12.3. For instance, WTO Members are still required to publish the findings of their investigation where these findings reflect that a safeguard measure is not justified.

IV. ADDITIONAL OBSERVATIONS AS TO THE SCOPE OF THE SAFEGUARD MEASURE

17. In addition to the conditions of Article 2.1, Australia notes the more detailed requirements of Article 4.2(a) and (b) of the *Agreement on Safeguards* in relation to injury and causation.

18. Following the initial application of the safeguard measure, Ukraine appears to have removed the measure from a subset of the products on which its original determination was based.[7] This raises the question of whether injury caused by the increase in imports of the remaining products would have, by itself, justified the imposition of the measure.

[7] Ukraine's Notification to the WTO, G/SG/N/10/UKR/3/Suppl.1, 22 May 2013.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The EU welcomes the adoption of BCI procedures in this case. We consider that BCI procedure should be broadly similar in all trade remedy cases and that ADA and ASCM BCI procedures should be aligned on those adopted in the present case. Members submitting BCI are not required to obtain prior written authorisation from any firm. They should not be obliged – merely encouraged – to follow the confidentiality designation given by the investigating authority. Not only parties, but also panels and third parties should have the right to challenge BCI designation.

2. Art. 3.1 AoS, first sentence, does not contain any express obligation that the investigation be objective. However, the term "investigation" implies objectivity, and this is confirmed by the use of the term "objective" in other provisions of the AoS. Art. 3.1, first sentence, does not contain any express obligation regarding the time between the end of an investigation period and the entry into force of a safeguard measure. Investigating authorities thus have a discretion with respect to this matter, albeit not one that is unfettered. There should not be an excessive period between the end of an investigation period and the initiation of an investigation, the determination, or the application of the measure, particularly given the emergency nature of safeguard measures. Up-dated data should be accepted as long as this remains possible, subject to the requirements of due process. The determination and application of a measure should be based on sufficiently recent data. In this respect, the ADA and ASCM provide relevant context.

3. There is a difference between determination and application, but they are not clinically isolated. As a gap opens up, the investigation and determination may no longer support the application. The situation is not analogous to a Member deciding to apply or not to apply a bound tariff rate. In the case of a contingent trade remedy a Member only has a right to apply the duty if certain conditions are present. If those conditions are not present, there is no right to apply the relevant duty. There is a textual connection between investigation and application in Art. 5(1) of the AoS, which refers to "the last three representative years".

4. For example, assume a data-lag of three months. Imports of the relevant product are: 2010 (95), 2011 (0), 2012 (105), 2013 (100). There is a sudden increase in imports in the first six months of 2014. An investigation is initiated on 1 July 2014 (based on data for January to March 2014). The record closes on 1 October 2014 (with data for the first six months of 2014 confirming the sudden increase). The measure is adopted and applied on 1 January 2015. The quantitative restriction is 100 based on "the average of the last three representative years". 2011 (where there was an unrelated exogenous shock) is rejected as unrepresentative. The first six months of 2014 are not representative, because they constitute the sudden increase being investigated. Data for the second six months of 2014 is, quite properly, not on the record. The measure is consistent with the AoS. Now assume there is a gap of one year between adoption (1 January 2015) and application (1 January 2016). At the moment of application (1 January 2016) the quantitative restriction must be based on the last three representative years. Otherwise, there may be a breach of Art. 5.1, but also a breach of Art. 3.1, contextually informed by Art. 5.1. We would apply the same logic to suspension and un-suspension.

5. The EU observes that the AoS does not contain any further elaboration of the term "reasonable public notice". It may reasonably be understood in light of the context provided by the ADA and the ASCM. One would expect the publication of a document providing reasonable notice of the investigation to all interested parties. The term "interested parties" in the AoS should be understood to include the exporting Member. The EU doubts that Ukraine's notice complied with these requirements. Further, we observe that the obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law, in conjunction with the obligation of notification under Art. 12.2, should also serve the purpose of Art. 12.3 of providing an adequate opportunity for prior consultations with those Members having a substantial interest as exporters, including with respect to the compensation provided for in Art. 8.1. The EU is not persuaded that these requirements were satisfactorily complied with in this case.

6. A failure to publish the report/analysis constitutes a breach of the procedural obligations in Arts. 3.1 and 4.2(c). The EU suggests that the Panel also assess the WTO consistency of the report/analysis. If the Panel determines that the report/analysis is inconsistent with one or more other procedural or substantive obligations, it would be appropriate to include such findings in the Panel's report.

7. The temporal parameter regulating the publication obligation is the term "promptly" in Art. 4.2(c) of the AoS. This term refers to publication after some other event. Such other event is not the application of a safeguard measure, because that would imply an element of retroactivity. We suggest an harmonious reading with Art. X of the GATT. Pursuant to Art. X:1 of the GATT publication must be made "promptly", meaning promptly following the determination itself. However, under Art. X:2, enforcement can only occur on or after publication. Consequently, Art. 4.2(c) of the AoS requires publication promptly following the determination that the conditions justifying the use of a safeguard measure are present, and the form that such safeguard measure would take.

8. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. The measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. This may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. However, there is no express reference to the global financial crisis.

9. The measure at issue must contain a reasoned and adequate explanation regarding the existence of unforeseen developments, sufficient for the importing Member to understand and contest if it so wishes. In the municipal proceedings, such unforeseen developments must be demonstrated to have existed pursuant to evidence on the record. Such evidence should be referenced in the measure or be on the record and adduced by the importing Member to the Panel, at its own initiative or on request.

10. The term "result" in Art. XIX:1(a) of the GATT 1994 supports the view that there must be a logical connection or causal link between the unforeseen developments and the increase in imports. One way of getting at the question of whether or not there is such a link is to look at the question of whether or not the unforeseen developments have modified the competitive relationship between imported and domestic products, causing a decrease in domestic sales. The causal link should be genuine and substantial. Non-attribution factors, including foreseen or foreseeable developments, should be discounted.

11. The unforeseen developments must be unforeseen at the time of the negotiations, and specifically when they close. In the event of a difference, we would agree that the latter date provides a better guide.

12. The obligations in Art. 12 to notify and provide opportunities for consultations are an integral part of the transparency process related to the adoption of safeguards. The Appellate Body has clarified that the notification obligations set out in Arts. 12.1(b), 12.1(c) and 12.2, although related, are discrete. The action of initiating an investigation, the action of an investigatory authority coming to a finding that a domestic industry has suffered serious injury or is suffering from the threat of serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are separate matters. Each of these actions must be immediately notified to the Committee on Safeguards.

13. Ukraine did not make an immediate notification of the initiation of a safeguard investigation under Art. 12.1(a). Furthermore, Ukraine also notified its safeguard investigation findings and measure under Art. 12.1(b) at the same time as its notification under Art. 12.1(c). As a third party joined in the consultations, the EU participated in the consultations between Japan and Ukraine. Like Japan and the United States, we think that the information shared by Ukraine prior to 19 April 2012, (i.e., the Key Findings) lacked much of what is required under Art. 12.2. Ukraine had to provide "all pertinent information," not just the listed mandatory components in Art. 12.2. The Appellate Body has clarified that "all pertinent information" is assessed objectively and should include, at a minimum, the items listed in Art. 12.2 as well as the factors evaluated pursuant to Art. 4.2. This would include at least the proposed date of introduction of the safeguard measure,

the expected duration of the safeguard, and the timetable for progressive liberalization. Neither Ukraine's written submission, nor the Key Findings that spurred the 19 April 2012 consultations, indicate that any of this information was provided to Japan in advance of those consultations. The EU therefore agrees that Ukraine failed to provide adequate opportunity for prior consultations under Art. 12.3.

14. A Member cannot hold Art. 12.3 consultations after sharing the information that Art. 12.2 requires in notifications under Art. 12.1(b) and (c), even if it has not actually submitted its Art. 12.1(b) and (c) notifications. Art. 12.2 provides that "[t]he 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." Thus, the "information provided under paragraph 2" would include any information provided at the request of the Council for Trade in Goods or the Committee on Safeguards. However, Ukraine gives no indication of how any such request could be made in the absence of Art. 12.1(b) and (c) notifications. Therefore, even if the documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

15. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. We note that the measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. As we understand it, this may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. We consider that the measure at issue does not demonstrate that the increase in imports was recent enough, sudden enough, sharp enough or significant enough to justify the measure; and that there is a lack of persuasive qualitative analysis of the data in the measure at issue.

16. The EU considers that publication of indexed figures in relation to the injury requirements may comport with the requirements of Arts 3.1 and 4.2(c) of the AoS, provided that it is possible, on such basis, to properly assess the measure against the obligations in the AoS. The EU further considers that, in the context of panel proceedings, in which confidential information is protected, the investigating authority (that is, the defending Member) is required to adduce such confidential information as is necessary for the assessment of consistency. Failure to do so may justify the drawing of reasonable inferences and reliance on the facts available.

17. Art. 2.1 of the AoS refers to an increase in imports relative to domestic production, not consumption. By contrast Art. 3.2 of the ADA and Art. 15.2 of the ASCM refer to an increase in imports relative to production or consumption. Certain items are included in production but not consumption, such as exports. Thus, when comparing with domestic production, a decrease in exports could give the impression of a relative increase in imports, when none would in fact exist. However, given that the terms of the different agreements are clearly precise and different on this point, the EU would conclude that there is no obligation, in Art. 2.1 of the AoS, to make the comparison with domestic consumption, or with domestic production and domestic consumption.

18. However, Art. 4.2(a) of the AoS refers expressly to the "share of the domestic market taken by increased imports" and Art. 4.2(b) requires a causation and non-attribution analysis. Therefore, even if the issue of consumption may not be relevant for the determination of increased imports, it will be relevant for the assessment of whether or not serious injury has been caused.

19. Art. 4.2(a) requires an investigating authority to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. The term "changes" indicates that all changes during the period of investigation may be relevant. In the example given above one would ideally expect the domestic industry indicators to be positive and stable during 2010 to 2013, but to deteriorate during the first six months of 2014, as a result of the unforeseen developments and the imports. However, if, during each of the nine six month periods making up the investigation period, the domestic industry indicators simply toggle between negative and positive, that could undermine the proposition that the unforeseen developments and the imports have caused the negative indicators in the first six months of 2014. It might rather suggest, for example, that there is a seasonal variation, with a downward turn in the first six months of each year.

20. One approach to injury and causation is to assess them, at least initially, separately, in a so-called bifurcated analysis. First one determines whether or not there is serious injury. Second, one determines its cause. This can work for some kinds of serious injury, where the existence of the injury is determined by reference to historical data and trends. For other types of serious injury (such as price suppression or impedance) a unitary analysis is necessary, because it is not possible to distinguish between the existence of the injury and what is causing it. Ultimately all injury and causation analysis must be unitary, in the sense that the analysis must eventually be made on a holistic basis. Although Art. 4.2(a) focuses on injury and Art. 4.2(b) focuses on causation and non-attribution, they are part of a single and continuous process of analysis designed to ascertain whether or not the unforeseen developments and the imports have explanatory force for the serious injury. Thus, if, in the context of Art. 4.2(a), an investigating authority ignores intervening trends in the data, it is just "kicking the can down the road" to Art. 4.2(b). Rather than such a compartmentalised approach, a better approach is to see the two provisions as related and as requiring a logical progression of analysis.

21. Art. 4.2(b) requires objective evidence of a causal link between the imports and the serious injury; and that injury caused by other factors shall not be attributed to the imports. As we see it, the question is whether or not the other factors are such as to sever any genuine and substantial relationship of cause and effect between the imports and the serious injury. For example, the facts might demonstrate that the state of the domestic industry is rather the result of a very large debt incurred to make an investment that has failed. Perhaps a licence was revoked, or an envisaged market did not materialise. We believe that an investigating authority is required to examine and assess such alleged non-attribution factors when they are brought to the notice of the investigating authority, and particularly when they are put to the investigating authority during the course of the municipal proceedings by one or more of the interested parties.

22. Assessing causation and non-attribution is rarely an easy or an exact science. Qualitative methods involve weighing all the evidence and assessing the temporal relationship between different events, in order to come to a rational and reasonable conclusion about what caused what. Quantitative methods, which are not required by the AoS, would involve setting up a model of the market; testing and calibrating the model in order to ensure that it provides a reasonable picture of how the market actually works; and then shocking the model by eliminating the putative cause and analysing the results.

23. Art. 7.4 of the AoS does not preclude liberalisation through decisions post-dating the initial determination or the initial application. However, it is difficult to reconcile the obligation of liberalisation with the proposition that, following the determination, during an initial period the measure should be relatively more permissive (that is, not applied at all) and in a subsequent period relatively more restrictive (that is, applied). Viewed over time, such a measure does not progressively liberalise. It does the opposite: it progressively protects.

24. Art. 12.2 of the AoS mandates that the notification shall include a timetable for progressive liberalisation. If this is not done, and the measure at issue is silent, the evidence would support the view that no progressive liberalisation is provided for, has occurred, or is occurring. If the Panel's assessment reveals that there is a measure before it with a duration of three or four years, and that one or more regular intervals has passed without any progressive liberalisation, then the Panel would be in a position to determine a breach not only of Art. 12.2, but also of Art. 7.4. What amounts to a regular interval would need to be assessed on a case-by-case basis, but any period in excess of one year would generally be difficult to justify. In such circumstances, if the defending Member wishes to avoid an adverse finding under Art. 7.4, it would be for the defending Member to adduce evidence pertinent to the question of progressive liberalisation.

25. In the case of initial application, the determination must be duly supported by a finding that increased imports have caused serious injury or threat thereof, as detailed in the investigation. If there is an excessive period of time between the determination and the application, the results of the investigation may no longer objectively support the application. This could be cured by re-opening the record and up-dating the data, subject to due process. In the case of extension, Art. 7(2) of the AoS requires a separate finding that the safeguard measure continues to be necessary to prevent or remedy serious injury. In the case of remedy, this means that there will be a separate finding of serious injury to justify the extension. In the case of prevention, there will have to be a separate finding that removal of the measure would result in serious injury.

26. There are circumstances in which the concept of estoppel can serve as a useful analytical tool, particularly when the actions or the conduct of a Member may reasonably be taken to imply a particular conclusion.

27. In principle, pursuant to Art. 3.8 of the DSU, an infringement is considered prima facie to constitute a case of nullification or impairment. Members have occasionally attempted to rebut that presumption, but none has ever succeeded. It would be particularly problematic for a WTO adjudicator to step into a municipal proceeding and substitute its own judgment for the future judgment of an investigating authority as to what other consequences a breach might or might not have in the specific context of the municipal proceedings. It is for the defending Member, in the first place, to decide how it wishes to pursue the objective of compliance. Should a panel wish to do so, it can make suggestions pursuant to Art. 19(1) of the DSU.

ANNEX C-3

ORAL STATEMENT OF KOREA, REPUBLIC OF

Mr. Chairman, Members of the Panel,

1. The Republic of Korea appreciates this opportunity to present its views to the Panel as a third party. While several important issues are raised in this dispute, Korea would like to focus its statement on the meaning of "explanation" presented in the Agreement on Safeguards.

2. As has been previously confirmed by the Appellate Body, the importing Member's safeguard measures amount to "extraordinary measures"[1]. This is true in part because safeguards "do not depend on 'unfair' trade action, as is the case with anti-dumping or countervailing measures."[2] Rather, an importing Member may impose a safeguard measure when the increase in imports is caused by developments which were not foreseen at the time that the WTO commitments were made.

3. The extraordinary nature of safeguards requires that a high standard be met when it is imposed. The measure must be temporary and carefully administered. Appropriate compensation needs to be provided. And importantly for this argument, explanation that details the measure's rationale is required.

4. "Explanation" is not language that explicitly appears in the Safeguards Agreement. This is a departure from other trade remedy agreements, such as the Subsidies Agreement and the Anti-Dumping Agreement. Nevertheless, Korea is convinced that the Safeguards Agreement obligates a Member seeking to impose a safeguard measure to provide adequate explanation as to why the extraordinary measure was necessary.

5. Specifically, Articles 3.1 of the Safeguards Agreement states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) states that "[t]he 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." An examination of the Agreement's provisions reveals that the competent authorities' obligation to explain its measures is clearly laid out.

6. Moreover, the Appellate Body has established a high standard for meeting the obligation of explanation stipulated in the Agreement. In *US – Lamb*, the Appellate Body stated that "in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, "establishing explicitly" implies that the competent authorities must provide a 'reasoned and adequate explanation of how the facts support their determination.'"[3] The Appellate Body further noted that "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."[4] In *US – Steel Safeguard*, the Appellate Body stated that "a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and in a way that leaves nothing merely implied or suggested, that imports from sources covered by the measure, alone, satisfy the requirements for the application of a safeguard measure."

7. The Safeguards Agreement is an acknowledgement of the importing Member's interest in protecting its industry from increased imports. At the same time, the WTO seeks to balance the importer's interest with that of the exporter by placing the onus on the importing Member to provide detailed explanation for imposing the safeguard measure.

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[1] Appellate Body Report, *US – Line Pipe*, para. 80.
[2] Appellate Body Report, *US – Line Pipe*, para. 81 (quoting *Argentina – Footwear (EC)*, paras. 93-95.)
[3] Appellate Body Report, *US – Line Pipe*, para. 181.
[4] Appellate Body Report, *US – Line Pipe*, para. 194.

8. Detailed explanation that satisfies a certain standard also holds transparency implications. A competent authority is required to provide information as to the unforeseen developments that causes or threatens serious injury to its domestic industry. Transparency in administering safeguard measures is all the more significant given the extraordinary and exceptional nature of the measure.

9. Detailed explanation is important for due process purposes as well. It allows the exporter an opportunity to review the competent authority's decision and, if necessary, to plead the illegality of the measure before the importing Member's domestic courts or the WTO.

10. Korea posits, in light of the object and purpose of Articles 3.1 and 4.2(c) of the Safeguards Agreement, as well as relevant decisions by the Appellate Body, that a high standard of explanation has been established which needs to be met when imposing a safeguard measure. A competent authority that provides insufficiently detailed explanations for its measure would have failed to clear that standard.

11. Thank you.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. Introduction

1. Turkey is participating in this Panel not only because of its systemic interest in the interpretation and implementation of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards (AoS), but also its substantial trade interests as it is one of the major exporter countries and has been an interested party during the investigation process.

2. In the present dispute, Turkey wishes to contribute to the Panel's analysis by expressing its opinion on four issues, namely i) requirement of *unforeseen developments* within the meaning of Article XIX of the GATT 1994, ii) the analysis of increase in imports iii) serious injury or threat of serious injury and iv) the causation requirement.

II. The Requirement of Unforeseen Developments within the Meaning of Article XIX of the GATT 1994

3. In their submissions, the parties of the present dispute take different views on whether the determination of unforeseen developments is a prerequisite for imposition of a safeguard measure. While Japan asserts that the existence of unforeseen developments is a prerequisite for imposition of a safeguard, Ukraine rejects such claims.[1]

4. Article XIX:1(a) of the GATT 1994 provides that:

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

5. First of all, as underlined in the previous Appellate Body and Panel Reports, Article XIX of the GATT 1994 and the Safeguards Agreements are to be applied cumulatively.[2] Thus, in order to impose a WTO-consistent safeguard measure, a Member must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.[3]

6. Regarding the effects and the requisite nature of the circumstances in the first clause of Article XIX:1(a), the Appellate Body provided useful guidelines, which, in Turkey's view, should be followed. According to the Appellate Body, the first clause of Article XIX:1(a), which includes i) *unforeseen developments* and ii) *the effect of the obligations incurred by a [Member] under the GATT*, do not establish independent conditions, additional to the conditions set forth in the second clause of Article XIX:1(a), which are reiterated in Article 2.1 of the AoS.[4] However the circumstances in the first clause must be demonstrated as a matter of fact, in order for a safeguard measure to be applied consistently with Article XIX of the GATT 1994.[5]

7. As the Appellate Body use the word "circumstances" instead of a singular form, in reference to the situations in the first clause, a Member wishing to apply a safeguard measure must

[1] Japan's first written submission, para. 75; Ukraine's first written submission, para. 73.
[2] *See*, for example, Appellate Body Reports in *Argentina – Footwear (EC),* para. 92; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71; and Panel Reports in *Argentina – Preserved Peaches*, para. 7.12; *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.
[3] Appellate Body Reports, *Argentina – Footwear (EC),* para. 84.
[4] Appellate Body Report, *Korea – Dairy*, para. 85
[5] Appellate Body Report, *Korea – Dairy*, para. 85 and Appellate Body Report, *US – Lamb*, para. 71.

demonstrate that increase in imports is not only the result of "unforeseen developments" but also the result of "the effect of the obligations incurred by the Member under the GATT 1994", as well.[6] It should also be noted that such circumstances must be established through a reasoned and adequate explanation in the document that put the measure in effect.[7]

8. Moreover, increase in imports should be the result of the factual circumstances referred to in the first clause of the Article XIX of the GATT 1994 and cannot be regarded as the unforeseen development itself. In this regard, as indicated by the Panel in *Argentina — Preserved Peaches,* "[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.*[8]

9. Thus, Turkey considers that the existence of absolute or relative increase in imports cannot amount to a demonstration of the presence of unforeseen developments. Such an interpretation of the unforeseen developments requirement has been previously rejected by a WTO Panel[9] and would be inconsistent with Article XIX:1(a) of the GATT 1994.

10. Furthermore, as emphasized by the Appellate Body in *US-Lamb*, demonstration of the existence of unforeseen developments must be made before the safeguard measure is applied.[10] Therefore, in Turkey's view, any identification of "unforeseen developments" after the imposition of the measure, cannot make the measure consistent with Article XIX:1(a) of the GATT 1994.

III. The Analysis of Increase in Imports

11. Article 2.1 of the AoS states 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 to the domestic industry that produces like or directly competitive products." (emphasis added).

12. Accordingly, increased imports, in absolute or relative terms, is a condition for the application of a safeguard measure. As the jurisprudence of WTO confirms, Turkey notes that "the increased imports requirement *can* be met not only if there is an absolute increase in imports, but also if there is an increase relative to domestic production".[11]

13. However, in Turkey's view, certain conditions should be met in order to be in compliance with the Article XIX of the GATT 1994 and AoS. First of all, as the Appellate Body explained, "the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination."[12] Instead, 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".[13] This means that a simple determination of increase in imports either in absolute or relative terms do not make the measure consistent with Article XIX and AoS. On the contrary, Turkey considers that an investigating authority should make a detailed and reasoned analysis both quantitatively and qualitatively for establishing that increase in imports is sudden, recent, sharp, and significant enough to cause or threaten to cause serious injury.

14. Secondly, it should be noted that a simple comparison of imports levels at the start and the end of the period of investigation (POI) is not acceptable. According to the Appellate Body in *US – Steel Safeguards*, such a determination "could easily be manipulated to lead to different results,

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[6] Appellate Body Report, *Korea – Dairy*, para. 85

[7] Appellate Body Report, *US – Lamb*, para. 76. *See* also Panel Report, *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.

[8] Panel Report, *Argentina – Preserved Peaches*, para. 7.24 (emphasis in original).

[9] Panel Report, *Argentina – Preserved Peaches*, para. 7.24

[10] Appellate Body Report, *US – Lamb*, para. 72

[11] Appellate Body Report, *US – Steel Safeguards*, para. 390 (emphasis in original).

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

depending on the choice of end points".[14] Rather, the Appellate Body emphasized the significance of the *trend* in imports over the entire POI and the need for "an *explanation* of how the *trend* in imports supports the competent authority's finding".[15] Similarly, the Appellate Body in *Argentina – Footwear* stated that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)".[16] This means that the investigating authority should examine both "the *rate* and *amount* of the increase in imports … in absolute and relative terms."[17]

15. Therefore, in Turkey's view, especially where there is an absolute decline in imports over the POI, an adequate and justified explanation is indispensable for a conclusion that imports in "such increased" quantities caused serious injury to the domestic industry. In the absence of that explanation, the safeguard measure would be inconsistent with Article 2.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

16. Thirdly, as it was highlighted by the Appellate Body in *Argentina – Footwear (EC)* the increase in imports must have resulted from an "unforeseen development" and the increase in imports should also be "unforeseen" or "unexpected".[18]

17. For the foregoing reasons, Turkey respectfully asks the Panel, to take into account the above mentioned conditions in analysing the consistency of the measure at issue with Article XIX:1(a) of the GATT 1994 and provisions of AoS.

IV. Serious Injury or Threat of Serious Injury

18. Both Article XIX of the GATT 1994 and Article 2 of the AoS provide that a safeguard measure may only be imposed if the increased imports are made "under such conditions as to cause or threaten to cause serious injury". Article 4 of the AoS lays down more detailed rules in regard to determination of serious injury or threat thereof.

19. In the case at hand, Turkey would like to draw the Panel's attention to requirement of Article 4.2(a) for the determination of serious injury and threat of serious injury. Article 4.2(a) necessitates investigating authorities to "evaluate *all relevant factors* of an objective and quantifiable nature having a bearing on the situation of the industry, in particular, the rate and *amount* of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment". (emphasis added)

20. Turkey would like to note that the Appellate Body has established that *all* but not some of the factors mentioned in Article 4.2(a) must be considered by the investigating authority during the investigation.[19] Moreover, the investigating authority's consideration of each listed factor must be "reasoned and adequate".[20] In this regard, an evaluation of each listed factor might not necessarily show that each such factor is "declining", in Turkey's view, however, they all - together with any other relevant factors- have to be evaluated by the investigating authority. Subsequently, the outcome of such evaluation has to demonstrate a significant overall impairment in the position of the domestic industry. Therefore, if one or some of the factors have not been evaluated by the investigating authority at all, or investigating authority's consideration of each listed factor is not "reasoned and adequate", then the measure would become inconsistent with the Article 4.2(a).

V. The causation requirement

21. Article XIX: 1(a) of the GATT 1994 and, Article 2.1 and 4.2(b) of the AoS require the demonstration of the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. Article 4.2(b) of the AoS further specifies that

[14] Appellate Body Report, *US – Steel Safeguards,* para. 354.
[15] Appellate Body Report, *US – Steel Safeguards*, para. 374 (emphasis in original).
[16] Appellate Body Report, *Argentina – Footwear*, para. 129.
[17] Appellate Body Report, *Argentina – Footwear*, para. 129, quoting with approval the panel finding in that dispute.
[18] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[19] Appellate Body Report, *Argentina – Footwear (EC),* para. 136.
[20] Appellate Body Report, *US – Lamb,* para. 103.

"when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".

22. Thus, in order to meet the causation requirement the investigating authority must demonstrate, first, the existence of the causal link between increased imports and serious injury or threat thereof and second, non-attribution of injury caused by factors other than the increased imports.[21]

23. In regard to causal link between increased imports and serious injury or threat thereof, the Appellate Body has clarified that "in an analysis of causation, 'it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[22] The Appellate Body further emphasized that there must be a "genuine and substantial relationship of cause and effect" between increased imports and serious injury.[23] Therefore, in Turkey's view, in order to comply with the requirements of Article 4.2(a), an investigating authority has to provide reasoned and adequate explanation that confirms the link, in terms of timing and movements, between increased imports and serious injury and/or threat of serious injury.

24. Concerning the non-attribution analysis, in *US – Lamb,* the Appellate Body clarified that an investigating authority has to separate and distinguish the injury caused as a result of increased imports from the injury caused as a result of other factors.[24] Accordingly, in order to make a proper non-attribution analysis, the investigating authority is required not only to identify the nature and extent of the injurious effects of the known factors other than increased imports, but also to separate and distinguish injurious effects of those other factors from the injurious effects of the increased imports.

VI. Conclusion

25. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review carefully the comments stated in this submission, in interpreting Article XIX of GATT 1994 and the AoS.

[21] Appellate Body Report, *US – Line Pipe,* para. 208.
[22] Appellate Body Report, *Argentina – Footwear*, para. 144.
[23] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[24] Appellate Body Report, *US – Lamb*, paras. 178-181.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. Views Expressed in the U.S. Third Party Submission

1. The report that must be published by the competent authorities pursuant to SGA Articles 3.1 and 4.2(c) serves an essential role in the review of safeguard measures. It allows other Members to understand why a safeguard measure has been adopted, and - in the event of a WTO dispute settlement proceeding - allows a WTO panel to assess whether a safeguard action complies with the substantive obligations contained in GATT Article XIX and the SGA. Not surprisingly then, published reports must address in considerable detail a broad range of issues, including unforeseen developments under GATT Article XIX:1(a), the rationale for finding the requisite increased imports based on consideration of the entire period of the investigation rather than simply comparing end points. The published report must set out in equal detail the competent authority's evaluation of all relevant factors and a reasoned explanation for concluding that the domestic industry suffered serious injury or the threat thereof, that the increased imports ***caused*** the serious injury or threat thereof, and that other factors causing injury to the domestic industry are not attributed to the increased imports.

2. The report published by Ukraine is concise in the extreme. Furthermore, in many instances, Ukraine's written submission provides justifications for its determinations that appear nowhere in its published report. The Appellate Body has rejected a panel's reliance on supplemental information provided during dispute settlement proceedings.

3. Having recognized the considerable importance of a thorough, reasoned published report, the United States notes that some conclusions and sets of facts require more explanation than others, and the length of an explanation with respect to any single issue should not be dispositive. Although panels should not be put in the position of having to infer the competent authority's reasoning, they also need not ignore reality or invent ambiguity or complexity where none exists.

4. The SGA does not specify how soon a safeguard measure must be put into place. If a Member were within its rights to impose a safeguard measure for four years, it would be odd to suggest that delaying application of the measure for a year and putting it in place for three years in and of itself creates an inconsistency. Delay following a decision to impose safeguard measures may in some instances reflect desirable behavior. A Member may be working to address concerns raised in consultations following notification of the proposed measures. Thus, requiring a Member to choose between (1) implementing a safeguard measure during a very short window after the decision is taken, or (2) losing the right to impose it at all, could cause a Member to take more restrictive measures than it would otherwise. On the other hand, significant delay in imposing safeguard measures tends to undercut the notion that such measures constitute an "emergency action" necessary to prevent or remedy serious injury and to facilitate adjustment. This is equally true where an investigation has resulted in a finding of a threat of serious injury, which requires that the anticipated serious injury be "imminent," or "on the very verge of occurring." Extended uncertainty as to the timing and degree of the final safeguard measure may disrupt trade more than actual imposition of a measure.

5. It is not clear that a Member can hold Article 12.3 consultations after sharing the ***information*** that Article 12.2 requires in notifications under Article 12.1(b) and (c), even if it has not actually submitted its Article 12.1(b) and (c) notifications. Article 12.2 allows the Council for Trade in Goods or the Committee on Safeguards to request such additional information as they may consider necessary. Thus, the "information provided under paragraph 2" presumably would include any information provided in response to such a request. However, Ukraine gives no indication of how any such request could be made in the absence of Article 12.1(b) and (c) notifications. Therefore, even if documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

6. In addition, Japan argues that the information shared by Ukraine prior to April 19, 2012, (*i.e.*, the Key Findings) lacked much of what is required under Article 12.2. Japan appears to be correct that neither Ukraine's written submission, nor the Key Findings that spurred the April 19, 2012, consultations, indicate that the proposed date of introduction of the safeguard, the expected duration of the safeguard, or the timetable for progressive liberalization was provided to Japan in advance of those consultations.

7. The United States has concerns with Japan's challenge to the validity of the April 19, 2012, consultations on the basis of the change in one duty rate from 15.1 percent (the rate for cars with larger engines proposed prior to consultations) to 12.95 percent (the rate for those cars that was eventually applied). The proposed measure on which the Members consult need not be identical in every respect to the one that is eventually applied. Prior consultations allow interested Members to seek, *inter alia*, modification of the measure. Indeed, Ukraine implies that it lowered the duty rate as a result of the consultations it held with Japan. Precluding modification of a measure in response to concerns expressed by interested Members (or always requiring one additional round of consultations that leads to no changes) would diminish rather than preserve or enhance the value to interested Members of Article 12.3 consultations. Because modification of a measure would subject the Member implementing the safeguard to either a finding that it breached its Article 12.3 obligations, or the delay and expense of additional consultations, Japan's interpretation would create a significant disincentive to modification of measures in the interested Member's favor, including a reduction of duty rates. Thus, the modification of the duty rate should not support a finding that the April 19, 2012, consultations were inconsistent with Article 12.3.

8. Japan claims that Ukraine breached its obligations under Article 7.4 because it did not provide for a progressive liberalization of the measure when the safeguard was initially imposed as reflected in the March 14, 2013, published notice of the decision. Japan relies on the same facts to claim that Ukraine breached its notification obligations under Article 12.2 of the SGA. Ukraine argues that the substantive obligation under Article 7.4 to progressively liberalize the safeguard measure is distinct from the procedural obligation under Article 12 to notify the timetable for liberalization. Ukraine maintains that it complied with its obligations under Article 12.1(b) and (c) through its March 21, 2013, notifications, but it acknowledges that it did not notify any timetable for progressive liberalization until March 2014. The United States notes that Article 12.2 explicitly states that notifications under Article 12.1(b) and (c) "shall include," *inter alia*, a "timetable for progressive liberalization." These requirements serve an import transparency and information purpose, including by allowing for meaningful consultations.

II. Views Expressed in the U.S. Oral Statement

9. The EU suggests that BCI procedures should be substantially similar across disputes under the AD Agreement, the SCM Agreement, and the SGA. These panel proceedings are not an appropriate forum for pursuing such an objective. Any systemic solution should be sought through the WTO bodies designed to solicit and reflect the views of all Members.

10. The critical point with respect to paragraph 1, sentence 3 of this Panel's BCI procedures is whether the competent authorities treated the information as BCI, either because they accepted the submitter's designation or because they resolved a challenge in favor of confidentiality. If that is the case, a panel should, in the first instance, follow the designations of the competent authorities. Accordingly, this sentence could be clarified by substituting the words "treated by" for the words "submitted to" so that it reads, in relevant part: "BCI shall include information that was previously treated by the investigating authorities of Ukraine…as BCI in the safeguard investigation at issue in this dispute."

III. Views Expressed in U.S. Responses to Questions from the Panel

11. The SGA sets out no explicit obligation that fixes a specific time, either relative to the data in the underlying investigation or the date the decision is taken, by which a safeguard measure must be put into force. However, the U.S. position does not imply that, because no explicit obligation on timing exists, any action, however far removed from the end of an investigation, is consistent with the SGA. It may well be that in a specific dispute, the complaining party will demonstrate that one or more SGA obligations has been breached under the particular facts and circumstances of that dispute.

12. For example, a Member's discretion to apply a safeguard measure is at all times limited by the requirement that such application be necessary to prevent or remedy serious injury and to facilitate adjustment. A long delay in applying a measure may be a relevant factor to consider in assessing whether it is necessary because the long absence of the measure undercuts the supposedly urgent nature of the safeguard measure, and it becomes more difficult to determine that a measure is necessary to prevent or remedy the particular serious injury that was previously found. Because the SGA does not establish a bright line rule as to the time for putting a safeguard into effect, it would not be appropriate to create such a rule through dispute settlement.

13. The SGA also does not explicitly require supplemental analyses or notices thereof after application of a safeguard measure has been postponed for a particular amount of time. Rather, any delay in the application of a safeguard measure, and any supplemental analysis relied upon as a basis for a safeguard measure, should be considered in the context of a particular dispute to the extent that such facts are relevant to the obligations contained in the covered agreements.

14. An unpublished report that otherwise meets the requirements of Articles 3.1 and 4.2(c) can serve as a basis for a panel's analysis of claims under the provisions of the SGA. The failure to publish a report would be inconsistent with these obligations, but in that situation, a reviewing panel would not be required to proceed as if the competent authorities undertook no analysis, which would effectively ensure consequential breaches of many substantive obligations. A fact-specific inquiry is required to determine whether a document genuinely served as a part of the report of the competent authorities.

15. There is no obligation under the SGA to continue to update information following the end of the period of investigation or more specifically following the conclusion of the investigation.

16. In the U.S. view, "promptly" in Article 4.2(c) is best understood as referring to the determination of whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the SGA. Whether publication is sufficiently prompt in any case is necessarily a fact-specific inquiry that must take account of the various circumstances of the dispute, including the potential need to undertake an analysis of whether a safeguard measure is necessary in conjunction with the serious injury determination.

17. The United States considers that figures that have been indexed to protect confidential information can be sufficient to meet the requirements of Articles 3.1 and 4.2(c).

18. A Member need not demonstrate that an increase in imports has resulted from an unforeseen development "modifying the competitive relationship between the imports and domestic products." Further, any corresponding decrease in domestic sales need not also have been caused by the change in the competitive relationship.

19. The requirement that the increased imports result from unforeseen developments stems from GATT Article XIX. Article XIX contains no requirement that the unforeseen developments modify the competitive relationship between the imports and domestic products. Because there is no requirement to demonstrate a change or modification in the competitive relationship as a separate element, there can be no requirement to demonstrate that "the decrease in domestic sales leading to injury also has been caused by the change in the competitive relationship." Indeed, there is not even a requirement in the SGA that there be a "decrease" in domestic sales.

20. "Unforeseen developments" must be unforeseen at the time the tariff concessions were made. Safeguard measures "are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."

21. Whether a POI was the recent past, and the implication of that inquiry for assessing an alleged breach under the covered agreements, depends on the facts and circumstances of a particular dispute. Any of the dates identified by the Panel—the date of the beginning of the investigation, the date of the completion of the investigation, the date of adoption of a safeguard measure, and the date of its entry into force—may be relevant to determining whether the POI was the recent past in a given dispute. The POI selected by the investigating authority must be sufficiently *recent* to provide a reasonable indication of *current* trends.

22. In the United States, after USITC makes a serious injury determination and, if the determination is in the affirmative, a recommendation regarding a remedy, the President decides whether a safeguard measure will be imposed. Under U.S. law, the safeguard measure generally shall take effect within 15 days after the President proclaims the action. However, where the President seeks to negotiate with foreign counterparts on limitations on exports from foreign countries of the subject product to the United States, the measure can take effect as much as 90 days after the President proclaims the action. Thus, under U.S. law, a safeguard measure would normally take effect between 15 and 90 days after the decision to impose the measure.

23. An increase in imports relative to consumption will not, alone, satisfy the increased imports condition in SGA Article 2.1. Rather, in the context of a determination on increased imports under Article 2.1, the competent authorities must find that imports have increased either in "absolute [terms] or relative to domestic production."

24. Separately, in the context of evaluating the relevant factors having a bearing on the situation of the industry, Article 4.2 contemplates evaluation, in particular, of *inter alia* "the share of the domestic market taken by increased imports." A change in domestic market share generally involves consideration of an increase in imports relative to domestic consumption. However, the United States allows for the possibility that a methodology could potentially exist in a given scenario that would allow for evaluation of the share of the domestic market taken by increased imports without considering an increase in imports relative to domestic consumption (*i.e.*, where the two are not one and the same). At the very least, because Article 4.2(a) requires competent authorities to evaluate "all relevant factors," it may be necessary to consider an increase in imports relative to domestic consumption where it is a relevant factor bearing on the situation of the industry.

25. The Panel's suspended application approach is a useful tool for assessing a scenario in which one year has elapsed between the taking of a decision to apply a safeguard measure and the effective date of the measure. However, the United States does not dismiss the possibility that the legal problems presented by these two scenarios may not be identical. For example, application of a safeguard measure following a suspension may be viewed as a *de facto* additional application of the measure. SGA Article 7 contains certain restrictions on re-applications of safeguard measures on the same products, including preclusion of application where a safeguard measure has been applied on the same product more than twice in the preceding five-year period.

26. Article 4.2(a) requires the competent authorities to "evaluate all factors of an objective and quantifiable nature having a bearing on the situation of that industry." "[A]n end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors." End points must be understood in context, and without evaluating the intervening data, there is no way of understanding the proper context, and no way of establishing confidence in the accuracy of the meaning or importance ascribed to the end points. Where evaluation of intervening data suggests a different conclusion than the one reached by solely evaluating the endpoints, a "reasoned conclusion" within the meaning of Article 3.1 would need to address the intervening data.

27. Neither the SGA nor GATT Article XIX: 1(A) provide any particular methodology that competent authorities must use in examining factors other than increased imports. The Appellate Body has not found the SGA to require that a competent authority "quantify" the extent of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b). The Appellate Body has stated that it leaves "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)," and it has recognized that the SGA leaves the development of appropriate analytical methodologies under Article 4.2(b) to the discretion of the competent authorities.

28. Article 7.4 requires progressive liberalization but does not reference the initial decision to impose a safeguard measure. Therefore, nothing in Article 7.4 precludes liberalization through a decision post-dating the initial decision to impose a safeguard measure. Articles 7.4 and 12.2 contain distinct obligations, and a breach of Article 12.2 does not necessarily result in a consequential breach of Article 7.4.

29. SGA Article 12.1(b) requires a Member to notify the Committee on Safeguards immediately upon making a finding of serious injury or threat thereof caused by increased imports. The

determination referenced in SGA Article 2.1 as a condition for applying a safeguard measure and further elaborated upon in Article 4 serves as the "finding" that must be notified pursuant to Article 12.1(b).

30. Members must make a finding of serious injury or threat thereof caused by increased imports in order to apply a safeguard measure. If such a finding has been made, a Member must separately decide to apply (or extend) a safeguard measure, which necessarily must consider to what extent, if at all, a safeguard measure is necessary to prevent or remedy serious injury and to facilitate adjustment. However, nothing prevents a Member from rendering these decisions in the same document or at the same time. Similarly, the Article 12.1(b) obligation to notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports is distinct from the Article 12.1(c) notification obligation upon taking a decision to apply or extend a safeguard measure. However, nothing prevents a Member from complying with both obligations in a single notification if that notification can be characterized as immediate with respect to both occurrences under the particular circumstances of the case.

31. The DSU contains no mention of estoppel or harmless error. Alleged breaches of the covered agreements must be assessed based on their text, and application of a concept of estoppel or harmless error, to the extent it led to a different result, would add to or diminish the rights and obligations provided in the covered agreements, contrary to DSU Article 3.2. Thus, it is not surprising that neither the Appellate Body nor any panel has previously applied the concept of estoppel as advocated by Ukraine in this proceeding. Indeed, previous panels have expressed skepticism about whether estoppel is applicable in the WTO dispute settlement context, noting that "it is not mentioned in the DSU or anywhere in the *WTO Agreement*." The lack of any textual basis for importing the principle of estoppel is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past, including in *EEC – Bananas I (GATT)* and *EC – Asbestos* and *Guatemala – Cement II*. These inconsistencies illustrate the dangers of seeking to import legal concepts not contained in the text of the DSU, which reflects the principles agreed to by all Members.

32. Similarly, the United States is not aware of any application by a panel or the Appellate Body of the concept of harmless error as advocated by Ukraine in this proceeding. Indeed, previous panels have refused to apply a theory of harmless error. To the contrary, a panel has previously stated that, "if a Member has violated a WTO obligation which is phrased as a categorical rule, an assertion that the violation was merely a harmless error is irrelevant." Because these concepts are not provided for in the DSU or the covered agreements, they have no use with respect to this dispute, in particular.

33. Ukraine argues that, by virtue of having itself failed to comply with Article 12.5, Japan is estopped from claiming a violation on the part of Ukraine. Ukraine further argues that, because such notifications are meant for the non-consulting Members rather than the other consulting Member, who presumably is aware of the outcome of the consultations, a failure to notify the Committee constitutes harmless error with respect to Japan. There is no basis in the text of the DSU or the covered agreements for either argument.

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WORLD TRADE ORGANIZATION

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26 June 2015

(15-3267)

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UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS468/R.

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LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 29 July 2014

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Upon indication from either party that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel may, after consultation with the parties, adopt appropriate additional procedures. Such indication shall be given at the latest two weeks prior to the relevant information being provided.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Japan requests such a ruling, Ukraine shall submit its response to the request in its first written submission. If Ukraine requests such a ruling, Japan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that each party and third party considers that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by Japan.

If Ukraine chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. The integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four paper copies of all documents it submits to the Panel, except for exhibits and executive summaries submitted in accordance with paragraphs 19 and 20. Exhibits may be filed in four copies on CD-ROM or DVD and two paper copies. Executive summaries may be filed in one single paper copy. The DS Registrar shall stamp the filed documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and such other WTO Secretariat staff as may be notified to parties and third parties. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 6 August 2014

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the party. In this regard, BCI shall include information that was previously submitted to the investigating authorities of Ukraine, the Ministry of Economic Development and Trade's Department for WTO Cooperation and Trade Remedies, as BCI in the safeguard investigation at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. These procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute.

3. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI.

8. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

10. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 11 below.

11. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body.

12. At the request of a party, the Panel may apply these working procedures or an amended form of these working procedures to protect information that does not fall within the scope of the information set out in paragraph 1. The Panel may, with the consent of the parties, waive any part of these procedures.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. INTRODUCTION

1. Japan has initiated the present proceedings in order to demonstrate that the safeguard measures imposed by Ukraine manifestly violate various procedural and substantive requirements under the Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994. First, the competent authorities imposed the safeguard measures in fundamental misunderstanding of the core requirements for their application and, in particular, the logical connection between them. Second, Ukraine failed to conduct a careful and thorough examination of the facts as reflected in the published report. Third, it violated a number of procedural requirements under the GATT 1994 and the Agreement on Safeguards.

2. THE APPLICABLE STANDARD OF REVIEW

2. **First**, Japan submits that the objective assessment of the matter at hand pursuant to Article 11 of the DSU requires the Panel to examine whether the conclusions and analysis of the competent authorities are reasoned and adequate by reference to their published report within the meaning of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[1] This is in the present case the Notice of 14 March 2013. Any explanations in other documents, such as the Key Findings or Ukraine's written submissions, are not relevant for this assessment.

3. In the course of the proceedings Ukraine appeared to argue that the Key Findings are part of the published report. However, the word "publish" in Articles 3.1 and 4.2(c) must be interpreted as meaning "to make generally available through an appropriate medium", rather than simply "making publicly available".[2] A document, such as the Key Findings, which has only been provided to interested parties, cannot be regarded as being "published" within the meaning of Article 3.1. It is even doubtful whether the Key Findings can be said to have been "made publicly available", since they were only sent to the representatives of the affected exporting countries and thus, not even to all interested parties. The Key Findings were not explicitly referred to in the Notice of 14 March 2013 either. There is no evidence that clarifies the relationship with the Key Findings and "a report and materials" mentioned in the Notice of 14 March 2013 and so Ukraine's allegation that the Key Findings were a non-confidential extract from the report of the Ministry is irrelevant.

4. Thus, Japan considers that the Panel should limit its assessment to the only published report in this case, that is the Notice of 14 March 2013. However, even by reference to the Key Findings, the explanations given by the authorities were not reasoned and adequate.

5. **Second**, Japan notes that, in its first written submission Ukraine included information on the imports and the injury factors from unidentified documents and developed *ex post* explanations or analyses on various issues, none of which can be found in the Notice of 14 March 2013 or in the Key Findings. Such *ex post* data cannot be used *a posteriori* to explain determinations made during the investigation and to justify the application of the safeguard measures.

6. Moreover, the Panel may take into account the evidence on the record of the investigation but only to assess the complexities of the facts of the case, examine whether there were other alternative explanations and ultimately determine whether the explanation provided in the published report is reasoned and adequate.[3] The Key Findings, as part of the record of the

[1] Appellate Body Report, *US – Steel Safeguards*, para. 299.
[2] Panel Report, *Chile – Price Band System*, para. 7.128.
[3] Appellate Body Report, *US – Lamb*, paras. 105-106, and Appellate Body Report, *US – Tyres (China)*, para. 123.

investigation, may therefore be useful to the Panel's examination as to whether the conclusions reached by the authorities in their published report are reasoned and adequate. For instance, the Key Findings confirm that other factors causing injury had been identified during the investigation but were not analysed by the authorities in their published report.

7. **Third**, to the extent that the Panel finds that the report of the competent authorities fails to provide a reasoned and adequate explanation of the authorities' determinations, these determinations should be found inconsistent with the specific requirements of the relevant provisions of the Agreement on Safeguards, in particular its Articles 2 and 4.[4]

3. LEGAL CLAIMS: SUBSTANTIVE REQUIREMENTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

8. Japan submits that Ukraine failed to make proper determinations concerning the two circumstances, namely the unforeseen developments and the effect of the obligations incurred under the GATT 1994, and the three conditions, namely an increase in imports, a serious injury or threat thereof of the domestic industry and a causal link between the increase in imports and the serious injury (or threat thereof), that must be met before a safeguard measure can be applied in accordance with Article XIX:1(a) of the GATT 1994 the Agreement on Safeguards.

3.1 Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

9. **First**, Japan argues that Ukraine violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards since the Notice of 14 March 2013, i.e. the "published report", does not set forth the competent authorities' findings and reasoned conclusions reached on all pertinent issues of fact and law and does not contain a detailed analysis of the case, as well as a demonstration of the relevance of the factors examined with respect to various issues.

10. The failure of the competent authorities to adequately address in the published report each pertinent issue of fact and law violates their obligation under Article 3.1, last sentence to give an account of a judgement or statement reached in a logical manner or expressed in a logical form, distinctly or in detail.[5] Article 4.2(c) is an elaboration of this requirement.[6] The absence of such "reasoned and adequate explanation" in the published report with regard to any relevant issue of law or fact entails a violation of Articles 2 and 4 of the Agreement on Safeguards.[7]

11. Furthermore, Ukraine failed to publish its report and its detailed analysis "promptly": the temporal parameter regulating the Article 3.1 publication requirement that has to be examined by reference to the time of conclusion of the investigation, i.e. at the time of the determinations.[8] Since Ukraine's decision on the application of the safeguard measures was taken on 28 April 2012, a publication of its report in the form of a Notice one year later cannot be viewed as "prompt" and therefore constitutes a violation of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

12. Finally, Ukraine's failure cannot be remedied by its claim of confidentiality. Information "by nature confidential" in the meaning of Article 3.2 of the Agreement on Safeguards refers to data confidential by reason of its content, in most cases business-sensitive information.[9] Also, "information" means data and/or evidence that is submitted by a party to the investigation or collected by the investigating authorities. Thus, Article 3.2 cannot be invoked in relation to entire reports, documents or analyses for the sole reason that they were issued by the authorities or designated as confidential by the Government.

[4] Appellate Body Report, *US – Steel Safeguards*, para. 302.
[5] Appellate Body Report, *US – Steel Safeguards*, para. 287.
[6] Appellate Body Report, *US – Steel Safeguards*, para. 289.
[7] Appellate Body Report, *US – Lamb*, para. 107.
[8] European Union's third-party response to Panel question No. 12, para. 17.
[9] Appellate Body Report, *EC – Fasteners*, para. 536, and Panel Report, *US – Wheat Gluten*, para. 8.24.

13. In any event, neither the protection of confidential information nor Ukraine's domestic law, notably Article 12(3) thereof, can dispense the authorities from the obligation to provide a reasoned and adequate explanation of how the facts support their conclusions in a published report.[10]

14. **Second**, Japan submits that Ukraine failed to conduct an investigation as required by Article 3.1, in particular, by failing to "seek out pertinent information", and to provide appropriate means through which Japan could present evidence and its views.

15. Japan observes that the meaning and scope of the obligation to carry out an "investigation" under Article 3.1, first sentence should be determined in light of its broader context, in particular Articles 2.1 and 4.2, as well as the urgent nature of the safeguard measures.

16. Article 3.1, second and third sentences set forth those investigative steps that the competent authorities must include in order to seek out pertinent information.[11] Moreover, in accordance with Article 4.2(a) as part of their "investigation" the competent authorities "must actively seek out pertinent information"[12] about the recent past and must evaluate "all relevant factors of an objective and quantifiable nature having bearing on the situation of that industry". The use of the present tense in Article 2.1 indicates not only that the increase in imports must be both sudden and recent, but also that the entire investigation period should be the recent past.[13] Similarly with respect to serious injury, Article 4.2(a) refers to the evaluation of all factors "having a bearing" on the situation of the industry and for causation, Article 4.2(b) refers to the demonstration of the "existence" of a causal link and the exclusion of other factors which are also "causing injury." The use of the present tense further supports the need for the determination to be based on the recent past.[14]

17. As for the urgent nature of the safeguard measures, these are emergency actions which, if justified, should be applied immediately. The remedy is in itself extraordinary because it involves the suspension of WTO obligations or withdrawal of concessions, and does not depend upon "unfair" trade actions.[15] Situations arising in the distant past do not deserve an urgent response and do not justify the adoption of "emergency" measures.

18. In light of the above legal standard, Japan argues that Ukraine failed to conduct a proper "investigation" as required by Article 3.1, since it failed to seek out pertinent information for the most recent period prior to application of the safeguard measures in April 2013, i.e. the period 2011 – 2012.

19. The context of Articles 3.1 and 4.2(c) clearly shows that the obligation to conduct an "investigation" requires a "careful study" of recent data. If there is a significant delay between the end of the period of investigation, the determinations and the application of the safeguard measures, it would no longer be possible to presume that the conditions required in order to apply the safeguard measures, i.e. that the imports are increasing and that current injury or threat thereof exists, are still fulfilled. Safeguard measures must be based on an investigation that determines the existence of recent "increased imports" and the existence of "serious injury".

20. It follows that Ukraine had the obligation under Article 3.1 to actively seek out relevant information in order to ensure that there was a sufficiently relevant nexus between the data examined and the determinations of "increased imports" and "serious injury".

21. Finally, Japan claims that Ukraine did not provide appropriate means through which Japan could present evidence and its views and the opportunity to respond to the presentations of other

[10] Panel Report, *US – Steel Safeguards*, para. 10.275.
[11] Appellate Body Report, *US – Wheat Gluten*, para. 54.
[12] Appellate Body Report, *US – Wheat Gluten*, para. 53.
[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130 and fn. 130.
[14] Panel Report, *US – Wheat Gluten*, para. 8.81.
[15] Appellate Body Report *Argentina – Footwear (EC)*, paras. 93-94.

parties. Very few and strictly procedural communications were sent by Ukraine to Japan during the investigation. Moreover, given the opaque and contradictory requirements in Ukraine's domestic law, Ukraine failed to ensure that the parties did have meaningful opportunities to present evidence, to submit their views and to respond to the presentations of other parties in accordance with Article 3.1 of the Agreement on Safeguards.

22. As to the March 2012 meeting, Japan was not provided with a meaningful opportunity to present evidence and its views given the very limited information concerning the elements of the investigation that had been provided beforehand and in view of the time constraints of the hearing.

3.2 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments

23. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to establish the existence of "unforeseen developments" – a legal requirement which must be demonstrated "as a matter of fact" in order for a safeguard measure to be applied lawfully.[16]

24. The Agreement on Safeguards and Article XIX of the GATT 1994 are to be considered in conjunction and any safeguard measure must be in conformity with both.[17] Furthermore, a panel would not be in a position to assess objectively the compliance with the prerequisites that must be present before a safeguard measure can be applied, if the competent authorities are not required to provide a "reasoned and adequate explanation" of how the facts support the determination of those prerequisites, including "unforeseen developments".[18] Therefore, the existence of unforeseen developments must logically be demonstrated before the safeguard measure is applied and it is the published report that must offer an explanation as to why any identified changes could be regarded as unforeseen developments.[19]

25. Ukraine failed to demonstrate this. The sole reference to "unforeseen developments" in the Notice of 14 March 2013 and in the Key Findings is the increase in imports. However, the fact that the increase in imports must be the result of unforeseen developments necessarily means that they are two distinct things.[20]

26. It was only in Ukraine's first written submission that it claimed for the first time that the "global economic crisis" was the unforeseen development. However, any identification of "unforeseen developments" after the imposition of the measure cannot lead to the consistency of the safeguard measures with Article XIX:1(a) of the GATT 1994.

27. **Second**, Ukraine failed to establish a logical connection between the alleged unforeseen developments and the increase in imports, although the competent authorities are required by Article XIX:1 to demonstrate that the unforeseen developments have "resulted" in increased imports.[21] The Notice of 14 March 2013 and the Key Findings provide no such explanation.

28. Ukraine appears to argue in its first written submission that the tariff reduction made to implement its tariff concessions resulted in an increase in imports, which coincided with the unforeseen development. However, the tariff reduction cannot be an "unforeseen development" at the time of Ukraine's accession to the WTO.

[16] Appellate Body Report, *US – Lamb*, para. 72.
[17] Appellate Body Report, *Argentina – Footwear (EC)*, para. 84.
[18] Appellate Body Report, *US – Steel Safeguards*, para. 298.
[19] Appellate Body Report, *US – Lamb*, para. 73.
[20] Panel Report, *Argentina – Preserved Peaches*, para. 7.17.
[21] Appellate Body Report, *US – Steel Safeguards*, para. 316.

29. Even if the "global economic crisis" had been recognised by the authorities as the "unforeseen development", *quod non*, it must still be demonstrated that the crisis caused a change in the competitive relationship between imported and domestic products to the detriment of the latter, thereby resulting in a sharp and sudden increase in imports. Ukraine does not demonstrate such "logical connection". In fact, the contraction in demand resulting from the global crisis cannot constitute the reason why imports increased in relative terms during 2010.

30. But even assuming that the global economic crisis may have reduced the demand for domestic products more sharply than for imported products, thereby giving rise to a relative increase in imports, any serious injury to the domestic industry would still have been the direct result of the overall fall in demand and not of the relative increase in imports.

31. Ukraine's *ex post* justifications are further undermined by the imposition in March 2009 and subsequent withdrawal towards the end of 2009 of the 13% additional duty rate on imports of cars, which appears to have caused, at least partly, the decrease in imports in 2009 and the slow increase in imports that followed in 2010.

32. **Third**, Ukraine failed to provide in its published report any reasoned and adequate explanations concerning the alleged unforeseen developments, as required by Articles 3.1 and 4.2(c). The demonstration of "unforeseen developments" must feature in the published report.[22] Thus, there must be at least some discussion by the competent authorities as to why the developments were unforeseen at the time the relevant GATT obligation was negotiated and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances described in the first clause.[23]

33. Both the Notice of 14 March 2013 and the Key Findings fail to identify any unforeseen developments, apart from the increase in imports, and *a fortiori* fail to provide any discussion or explanation as to why such events should be considered as "unforeseen" and why they resulted in an increase in imports.

34. Furthermore, there is no support whatsoever to the contention that the analysis of the unforeseen developments was confidential and that only its results were provided in the Key Findings. Clearly the Key Findings do not even contain the "results" of such an analysis. Moreover, nothing in the Notice of 14 March 2013 or any evidence in the record of the Panel indicate that Ukraine's investigating authorities treated their entire analysis as confidential pursuant to Article 3.2 of the Agreement on Safeguards. Therefore, as a matter of law, Ukraine's confidentiality treatment of its analysis or any relevant information contained therein is improper.

35. In any event, regardless of whether Ukraine properly treated the analysis (or relevant information) as confidential, the competent authorities were still required to provide a reasoned and adequate explanation on how the facts supported their determination.[24] The need to protect confidential information cannot simply dispense the competent authorities from the obligation to publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law, including the issue of unforeseen developments.

3.3 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT 1994

36. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to demonstrate that it incurred obligations under the GATT 1994 and how the effect of these obligations resulted in the increase in imports.

[22] Appellate Body Report, *US – Lamb*, para. 76.
[23] Panel Report, *Argentina – Preserved Peaches*, para. 7.23.
[24] Appellate Body Report, *US – Steel Safeguards*, para. 298.

37. The effect of the obligations incurred under the GATT constitutes a legal requirement. Whether qualified as a "circumstance" or "prerequisite", this demonstration must be made as a matter of fact before a safeguard measure can be applied consistently with Article XIX of the GATT 1994.[25] Moreover, it is for the importing Member to identify in its report the existence of the obligations under GATT and the link with the increase in imports causing serious injury to its domestic industry.[26] Finally, under Article XIX:1 it is the relevant tariff concession, rather than the tariff reduction made to implement it, that must exist and prevent the importing Member from taking WTO-consistent measures, in order to offset the change in the competitive relationship caused by the unforeseen development.

38. Ukraine failed to identify the relevant obligations incurred by it under the GATT 1994. Indeed, the Notice of 14 March 2013 does not identify and *a fortiori* does not analyse the effect of any obligations incurred by Ukraine. Likewise, the Key Findings are silent on this issue, in particular as regards Ukraine's tariff concessions.

39. Furthermore, Ukraine failed to demonstrate a logical connection between the effect of the obligations incurred under the GATT 1994 and the increase in imports. Article XIX:1(a) clearly requires an explanation as to how the effect of these obligations "resulted" in the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury. Specifically, it must be explained how these obligations had the effect of preventing the Member concerned from taking WTO-consistent measures, such as an increase in import duties.

40. The Notice of 14 March 2013 and the Key Findings provide no such assessment. Contrary to Ukraine's assumptions, it is the existence of unforeseen developments that must have resulted in the increase in imports while the obligations under GATT must prevent the importing Member from taking appropriate measures to limit the increased imports that resulted from "unforeseen developments". Moreover, Ukraine appears to acknowledge that the increase in imports was principally due to the tariff reduction made at the time of Ukraine's accession to the WTO and that the decrease in demand resulting from the global economic crisis merely coincided in time.

41. **Second**, Ukraine did not provide in its published report any reasoned and adequate explanations concerning the effect of the obligations incurred under the GATT 1994. Japan does not challenge the fact that upon its accession to the WTO in 2008, Ukraine has made tariff concessions of 10% *ad valorem* with respect to passenger cars. However, the effect of obligations incurred under the GATT 1994 constitutes a pertinent issue of fact and law that must be reflected in the authorities' published report.[27] Since neither the Notice of 14 March 2013 nor the Key Findings contain any analysis to that effect, Ukraine violated Articles 3.1 and 4.2(c).

3.4 Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports

42. **First**, Japan argues that Ukraine failed to demonstrate that the increased imports were the result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994.

43. Article XIX of the GATT 1994 and the Agreement on Safeguards constitute "an inseparable package" and must be read harmoniously.[28] Since the Notice of 14 March 2013 and the Key Findings do not contain any analysis of the alleged unforeseen developments and of the effect of the GATT obligations, the competent authorities have also necessarily failed to establish the "logical connection" between these conditions and the increase in imports. Thereby, Ukraine

[25] Appellate Body Report, *Korea – Dairy*, para. 85.
[26] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[27] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[28] *See* e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para.81.

violated Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.2(a) and 11.1(a) of the Agreement on Safeguards.

44. **Second**, Ukraine failed to demonstrate an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

45. In the first place, Ukraine failed to demonstrate a "recent" increase in imports. The phrase "is being imported" in Article 2.1 implies that the increase in imports must have been sudden and recent.[29] However, the alleged increase in imports found by the competent authorities over the period 2008 – 2010 can hardly be regarded as being "recent" for the application of a safeguard measure as of April 2013.

46. If at the time the safeguard measures are applied, the product is no longer being imported "in such increased quantities" or the imports are not causing or threatening to cause serious injury, there is nothing to prevent or remedy by safeguard measures. Moreover, safeguard measures are "matters of urgency"[30], linked to an extraordinary remedy to be imposed only within strict limits. Understood in this context, safeguard measures should be applied immediately after the conclusion of an investigation finding serious injury or a threat thereof, caused by imports "in such increased quantities".

47. A two-year gap between the end of the investigation period and the actual imposition of the safeguard measures is manifestly excessive. In particular, it is clear that the increase in imports relied upon by Ukraine was not "recent enough" at the time of the application of the safeguard measures. Furthermore, a one-year gap between the conclusion of the investigation and the actual imposition of the safeguard measure is also too long. Even if such a delay could in principle be justified by good-faith efforts on the part of a WTO Member to conduct negotiations, no such efforts were made in the present case.

48. In the second place, Ukraine failed to demonstrate that the increase in imports was "sudden, sharp and significant enough". The increase was not sudden, since the authorities ignored the fact that in 2005, 2006 and 2007 imports of the product concerned were already steadily increasing. There is also no evidence in the Notice of 14 March 2013 or in the Key Findings that the alleged increase in imports was sharp and significant.

49. In its first written submission, Ukraine provided data relating to the absolute volume of imports per year and to the change of imports in relative terms, which were not included in the Notice of 14 March 2013 or in the Key Findings and are therefore irrelevant. Moreover, with regard to the ratio of imports to domestic consumption, this factor is not directly relevant for determining whether a product is being imported in such increased quantities absolute or relative to domestic production.

50. In the third place, Ukraine failed to conduct a complete "qualitative analysis" of the data concerning imports, as it failed to examine the intervening trends as well as the "amounts" of imports, failed to demonstrate the "unexpected" nature of the increase in imports and failed to examine "such conditions" under which the imports occurred.

51. Japan submits first that Ukraine failed to examine the intervening trends with regard to the data of imports. In both the Notice of 14 March 2013 and in the Key Findings, Ukraine focused its analysis on an end-to-end point comparison between a starting point, 2008, and an end point, 2010. No data have been provided and analysed for 2009. Ukraine's *ex post* analysis in its written submissions is not relevant for the Panel's assessment, since it is the explanation in the published

[29] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[30] Appellate Body Report, *Korea – Dairy*, para. 86.

report that allows competent authorities to demonstrate that a product is being imported "in such increased quantities".[31]

52. In any event, the data provided by Ukraine in the course of the proceedings confirm the relevance of the analysis of the intervening trends. Indeed, the data concerning the imports in relation to domestic production shows first an 8.9% decrease between 2008 and 2009 followed by an increase in 2010. The competent authorities should have provided an explanation of how these trends support the finding that the requirement of "such increased quantities" was fulfilled. Otherwise, since no clear and uninterrupted upward trend in imports existed, the simple end-point-to-end-point analysis could easily be manipulated.[32]

53. Moreover, both the Notice of 14 March 2013 and the Key Findings only indicate a "rate" of decrease in absolute terms and a "rate" of increase in relative terms but not the "amounts" – a factor expressly required under Article 4.2(a). The overview in the Notice of hypothetical increase in imports after 2010 for a number of countries is not relevant, since Article 2.1 requires actual increase in imports.

54. In addition, Ukraine did not provide an explanation as to why the increased imports were "unforeseen" or "unexpected", given that its commitment in respect of cars upon accession to the WTO would logically entail such an increase.

55. Finally, Ukraine did not examine "such conditions" under which the imports occurred. In particular, it is highly relevant that while the imports in relative terms increased, the volume of imports in absolute terms substantially decreased by 71%. The analysis was important in order to properly evaluate whether the increased quantities were such as to qualify as "increased imports" under Article 2.1.[33]

56. **Third**, although the condition that there must be "increased imports" constitutes a pertinent issue of fact and law within the meaning of Article 3.1, the Notice of 14 March 2013 does not set forth any findings and reasoned conclusions on this issue. The Notice also fails to provide any "detailed analysis" of the conditions under which increased imports occurred and "a demonstration of the relevance of the factors examined", as required by Article 4.2(c).

3.5 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of serious injury and/or threat of injury

57. **First**, Ukraine's failure to clearly identify in its published report whether the determination made was one of serious injury and/or of threat thereof constitutes in itself a violation of the relevant provisions of the Agreement on Safeguards. Even in its first written submission, Ukraine still failed to expressly clarify whether the competent authorities made a finding of serious injury and/or threat thereof. It only resolved the ambiguity and confirmed that it made a determination of "threat of serious injury" upon explicit request of the Panel.[34] Japan claims that the requirement to make an adequate and reasoned explanation as to why the facts on the record support a determination of serious injury and/or threat thereof necessarily implies that the determination made (that is a determination of serious injury and/or threat of serious injury) must be clearly identified in the published report. In Japan's view, the fact that the Notice of 14 March 2013 does not clearly provide whether the determination is one of serious injury and/or one of threat thereof should in itself lead the Panel to conclude that the competent authorities did not provide an adequate and reasoned explanation as to why the facts supported their determination of serious injury and/or threat of serious injury.

[31] Appellate Body Report, *US – Steel Safeguards*, para. 374.
[32] Appellate Body Report, *US – Steel Safeguards*, para. 354.
[33] Appellate Body Report, *US – Steel Safeguards*, para. 351.
[34] Ukraine's response to Panel question No. 4.

58. **Second**, Japan submits that Ukraine failed to evaluate all relevant factors, as the competent authorities failed to provide the "amounts" of the increase in imports while this is one of the factors listed under Article 4.2(a) of the Agreement on Safeguards. Indeed, they only provided the rate of the decrease in imports in absolute terms during the POI as well as the relative rate of increase in imports in comparison to domestic production. What is relevant, however, is not only the rate of increase but also the amounts which Ukraine failed to evaluate. Without completely analysing both the rate and the amounts for imports both in absolute and relative terms, Ukraine was not in a position to reasonably conclude that the product was being imported in such increased quantities as to cause or threaten to cause serious injury to its domestic industry. The same applies to changes in various injury factors listed in Article 4.2(a) which need to be evaluated in both relative and absolute terms. Japan notes that only a relative evaluation of the changes may be misleading since large relative variations may actually reflect minor changes in absolute figures. For this reason, and in order to adequately evaluate the overall position of the domestic industry, investigating authorities were required to examine not only relative changes in the relevant factors but also the absolute amounts.

59. **Third**, Ukraine failed to provide a reasoned and adequate explanation of how the facts support their determination of threat of serious injury. The relevant section on injury in the Notice of 14 March 2013 and the Key Findings are not reasoned and adequate to demonstrate how the facts support a determination of threat of serious injury.

60. In the first place, Ukraine failed to "evaluate" the injury factors and, in particular, it did not examine the intervening trends over the period of investigation. Indeed, the Notice of 14 March 2013 does not contain any "evaluation", namely any "process of analysis and assessment, requiring the exercise of judgment on the part of the investigating authorities"[35] of the injury factors. Furthermore, the Notice of 14 March 2013 and the Key Findings only indicate the rate of increase/decrease between the beginning and the end of the period of investigation in defiance of the case law requiring intervening trends to be "systematically considered and factored into the analysis"[36]. The charts and explanations included in Ukraine's first written submission constitute *ex post* justifications which are therefore entirely irrelevant for the Panel's assessment of the matter before it.

61. In the second place, Ukraine failed to demonstrate the existence of a "significant overall impairment" that is "clearly imminent" in accordance with "the very high standard of [threat of serious] injury" [37] under the Agreement on Safeguards. Since in both the Notice of 14 March 2013 and the Key Findings there is no analysis based on "data relating to the most recent past"[38] and, in particular, no analysis of the data for 2010 in comparison to 2009, Ukraine did not provide an evaluation of and reasoned conclusions based on the most recent data pertaining to the existence of a threat of serious injury. Moreover, Ukraine neither demonstrated "that the anticipated 'serious injury' […] [is] on the very verge of occurring" nor that there is "a high degree of likelihood that the anticipated serious injury will materialize in the very near future."[39] The Notice of 14 March 2013 and the Key Findings do not contain a "prospective analysis" as to why the injury factors examined indicate that there is a high degree of likelihood that "serious injury" will materialize in the very near future.

62. In the third place, Ukraine also failed to make a determination of "threat of serious injury" which is based on the "recent past" [40] by relying on data of the period 2008 – 2010 while the safeguard measures were decided in 2012 and applied in April 2013. Indeed, for the purposes of making a fact-based determination in a future threat analysis "data relating to the most recent

[35] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.
[36] Panel Report, *Argentina – Footwear (EC)*, para. 8.216.
[37] Appellate Body Report, *US – Lamb*, para. 126.
[38] Appellate Body Report, *US – Lamb*, para. 137.
[39] Appellate Body Report, *US – Lamb*, para. 125.
[40] Panel Report, *US – Wheat Gluten*, para. 8.81.

past will provide competent authorities with an essential, and usually, the most reliable, basis for a determination of a threat of serious injury."[41]

63. **Fourth**, it clearly follows from the above that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, as it failed to provide a reasoned and adequate explanation as to how the facts support a determination of threat of serious injury in its published report. Contrary to Ukraine's claims, neither the Notice of 14 March 2013 nor the Key Findings contain "the indexed results of the conducted analysis of injury factors."[42] In particular, in the Notice of 14 March 2013 the competent authorities do not provide the explanations "to fullest extent possible"[43], since it does not even contain any data concerning 2009 or any absolute figures "in a modified form (e.g. aggregation or indexing)."[44] The protection of confidential information cannot be a justification for not complying with the requirements laid down in Articles 3.1 and 4.2(c) of the Agreement on Safeguards, considering that "even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation."[45]

3.6 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the threat of serious injury

64. **First**, since Ukraine failed to demonstrate the existence of unforeseen developments and, *a fortiori*, any change in the competitive relationship between the domestic and imported products, it could not correctly perform the causation analysis. According to Article 2.1 a safeguard measure may be applied only if it has been determined that a product is being imported, *inter alia*, "under such conditions" as to cause or threaten to cause serious injury. Thus, in the demonstration of causation the nature of the interaction between the imported and domestic products in the domestic market of the importing country must be examined.[46] In the present case, the Notice of 14 March 2013 and the Key Findings do not, however, contain any assessment of the conditions of competition in the domestic market for the product in question that would explain the interaction of the imported and domestic product.

65. Therefore, the competent authorities failed to establish an impact on the competitive relationship between domestic and imported products that resulted in the increase in imports, thereby causing threat of serious injury to the domestic industry.

66. Moreover, a coincidence in time between the increase in imports and the impairment of the domestic industry cannot prove causation. Its absence, however, creates serious doubts as to the existence of a causal link.[47] In the present case a *prima facie* contradiction exists between the import volumes which substantially decreased in absolute terms and the alleged threat of serious injury. Furthermore, the imports increased relative to domestic production only between 2009 and 2010 but decreased even in relative terms between 2008 and 2009. Conversely, while the injury indicators deteriorated between 2008 and 2009, most of them actually improved between 2009 and 2010. There is thus no clear coincidence in time between the movements in imports and the movements in injury factors.

67. The absence of a coincidence would have required a very compelling analysis of why causation could still be considered to be present. By contrast, the examination of the competent

[41] Appellate Body Report, *US – Lamb*, para. 137.
[42] Ukraine's first written submission, para. 147.
[43] Panel Report, *US – Steel Safeguards*, para. 10.274.
[44] Panel Report, *US – Steel Safeguards*, para. 10.274.
[45] Panel Report, *US – Steel Safeguards*, para. 10.275.
[46] Panel Report *Argentina – Footwear (EC)*, para. 8.250, confirmed in Appellate Body Report, Argentina – *Footwear (EC)*, para. 145.
[47] Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

authorities does not contain any analysis of the relationship between the movements in imports (volume and market share) and the movements in injury factors.

68. **Second**, Ukraine failed to make the non-attribution analysis as required by Article 4.2(b) of the Agreement on Safeguards, although, undisputedly, the competent authorities acknowledged in their Key Findings the existence of four other factors with possible injurious effects on the domestic industry at the same time as the alleged increased imports: the global financial and economic crisis, the non-competitiveness of the domestic industry, the 13% additional duty rate and the end of the government support granted to the automobile industry between 1997 and 2008.

69. Under Article 4.2(b), second sentence, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. To this end the competent authorities must identify the nature and extent of the injurious effects of the other known factors and distinguish them explicitly, through a reasoned and adequate explanation, from the effects of the increased imports.[48]

70. The Notice of 14 March 2013, while accepting that interested parties had claimed that the deterioration of the domestic industry was due to other factors, contains no further assessment. As the Key Findings are not part of the "published report", the Panel should not examine whether the competent authorities provided a reasoned and adequate explanation therein. In any event, this document contains only a very brief analysis that manifestly fails to comply with the requirements of the Agreement on Safeguards.

71. The global financial and economic crisis was recognised in the Key Findings as having a negative impact on the domestic industry as it resulted in decreased consumption. However, no analysis was carried out separating the injurious effects of the crisis from those of the increased imports. Ukraine's *ex post* justifications, while irrelevant to the Panel's analysis, are also unable to explain what injurious effects the crisis had on the domestic industry, or the process by which the competent authorities would have separated the injurious effects of the crisis from the other injurious effects.

72. Although the termination of the Government support that existed between 1997 and 2008 was referred to in the Key Findings as a factor that could have negatively impacted the domestic industry's financial condition, the authorities refused to analyse it, as it was a factor outside the period of investigation. The fact that the Government programme ended on 1 January 2008 means, however, that between 1997 and 2008 the domestic car industry was enjoying significant support from which it could no longer benefit during the investigation period. Therefore, the alleged deterioration of the domestic industry situation between 2008 and 2010 could quite likely flow from the absence of this support and the authorities were required to distinguish its injurious effects from those of the increased imports.

73. The 13-percent additional duty rate, introduced in 2009 on *inter alia* cars, was a third factor identified in the Key Findings. However, contrary to the statement therein and based on the text of the relevant law, the 13-percent additional duty covered all non-critical imports irrespective of their country of origin, including imports from countries with which Ukraine has free trade agreements. Furthermore, the fact that, according to the Key Findings, this additional duty did not rule out imports does not constitute a reasoned and adequate explanation as to why the injury caused by the termination of this duty was not attributed to the increased imports.

74. The non-competitiveness of the domestic products is the fourth factor identified by the competent authorities in the Key Findings for which no analysis was provided.

[48] Appellate Body Report, *US – Line Pipe*, para. 215.

75. **Third**, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, since the published report does not contain reasoned and adequate explanations regarding the existence of the causal link between the increased imports and the alleged threat of serious injury, nor does it include a proper non-attribution analysis.

3.7 Ukraine violated Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it applied safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment

76. **First**, Ukraine failed to apply safeguard measures only to the extent necessary to prevent or remedy serious injury. As already mentioned above, Ukraine failed in its causation and non-attribution analysis by setting the duty rate and the duration of the safeguard measure in such a manner that it addresses also injury attributed to other factors. Since the compliance with Article 5.1 is linked with the observance of the causation requirement established in Article 4.2(b), it can be presumed that the safeguard measures have not been applied only to the extent necessary under Article 5.1.[49] Furthermore, Ukraine did not clarify why and how its tariff concession prevented it from taking measures to offset the change generated by the unforeseen development and therefore failed to establish that the safeguard measure was applied only to the extent necessary to prevent or remedy such serious injury. Japan also notes that since Ukraine applied its safeguard measures only in April 2013 on the basis of an analysis of imports and of the situation of the industry concerning the period prior to 2011, such measures cannot be regarded as having been applied "only to the extent necessary to prevent or remedy serious injury."

77. **Second**, Ukraine failed to progressively liberalize the safeguard measures and failed to apply them only to the extent necessary to facilitate adjustment. In the present case, Ukraine introduced the safeguard measures for a period of three years. It was therefore under the legal obligation to progressively liberalize these measures at regular intervals during the period of their application. Ukraine failed to meet this obligation since it did not provide for the progressive liberalization in the initial decision imposing the safeguard measure as reflected in the Notice of 14 March 2013 and an *a posteriori* decision which became effective on 28 March 2014 does not render the measures consistent with Article 7.4 of the Agreement on Safeguards. Indeed, the requirement to provide for a progressive liberalization, by submitting a relevant timetable, has to be satisfied before the safeguard measures are applied as confirmed by Article 12.2 of the Agreement on Safeguards which provides that in the notification made pursuant to Articles 12.1(b) and 12.1(c) the Member proposing to apply the safeguard measure must provide the "timetable for progressive liberalization." Moreover, Ukraine also defied progressive liberalization as a means to achieve the purpose of facilitating adjustment in accordance with Article 7.4 and, therefore, failed to apply the safeguard measures only "to the extent necessary to facilitate adjustment" in violation of Article 7.1 and 5.1.

78. **Third**, Japan considers that by failing to provide a timetable for progressive liberalization in its Notice of 14 March 2013, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards since a timetable for progressive liberalization constitutes a "pertinent issue of fact and law" within the meaning of Article 3.1 and therefore should be part of the report published by the competent authorities. Likewise, the lack of a timetable for progressive liberalization constitutes a violation of Article 4.2(c) which requires the publication of a detailed analysis of the case and a demonstration of the relevance of the factors examined.

3.8 Ukraine violated Article II:1(b) of the GATT 1994

79. Japan claims that the unlawfulness of Ukraine's safeguard measures has been demonstrated beyond all doubt. Therefore, it must be concluded that Ukraine imposed duties which are in excess of those set forth in its schedule, thereby violating Article II:1(b) of the GATT 1994.

[49] Appellate Body Report, *US – Line Pipe*, para. 261.

4. LEGAL CLAIMS: PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS

80. Japan claims that Ukraine has violated Articles 12.1 and 12.2 of the Agreement on Safeguards, since it has failed to immediately notify the Committee on Safeguards in accordance with the requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards. Furthermore, Japan submits that Ukraine violated Articles 12.3, 12.5 and 8.1 of the Agreement on Safeguards.

4.1 Ukraine failed to comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards

81. **First**, Ukraine failed to notify "immediately" the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply safeguard measures, thereby violating Article 12.1 of the Agreement on Safeguards. Article 12.1 of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards at three points: a) when initiating an investigatory process; b) when making a finding of serious injury; and c) when taking a decision to apply or extend a safeguard measure. In all three cases, the notification must be made "immediately." An "immediate" notification is to be made "without delay, at once, instantly"[50] in order to allow "the Committee on Safeguards, and Members, *the fullest possible period* to reflect upon and react to an ongoing safeguard investigation."[51] Article 12.1 sets out "three separate obligations" to make notification to the Committee on Safeguards, "each of which is triggered 'upon' the occurrence of an event specified in one of the three subparagraphs."[52]

82. In the first place, Ukraine failed to "immediately" notify the Committee on Safeguards upon initiating the safeguard investigation. In the present case, the decision to initiate the safeguard investigation published in the Official Journal on 2 July 2011 was only notified on 13 July 2011, i.e. 11 days after its publication. Japan does not dispute that the need for translation into one of the WTO's working languages, invoked as a justification for the delay by Ukraine, is a factor that may be taken into account to determine the degree of urgency required under Article 12.1 of the Agreement on Safeguards. However, Japan does not agree with Ukraine that this factor claimed to have a bearing on the degree of immediacy in this case, justifies a notification period of 11 days and would, as a result, allow to consider a notification made in that period of time to be "immediate" under Article 12.1(a). In particular, in light of the "the character of the information supplied"[53], the need to prepare a document counting 604 words in one of the WTO's working languages cannot justify a delay of 11 days, especially with regard to a Member's obligation under Article 12.1 to limit the amount of time taken to prepare a notification to a "minimum".[54]

83. In the second place, Ukraine violated its obligation to notify "immediately" upon making a finding of a serious injury or threat thereof pursuant to Article 12.1(b) of the Agreement on Safeguards and upon taking a decision to apply a safeguard measure pursuant to Article 12.1(c). It follows from the text of Article 12.1 and the intention of the drafters that the relevant date by reference to which the Panel should assess the existence of any delay in notifying the relevant information pursuant to Articles 12.1(b) and 12.1(c) is respectively the moment of making a finding of injury for the purposes of Article 12.1(b) and the moment of taking a decision to apply a safeguard measure for the purposes of Article 12.1(c). Indeed, the aforementioned triggering event under Articles 12.1(b) and 12.1(c) gives "the (…) Members, *the fullest possible period* to reflect upon and react"[55] to the corresponding stage in the investigation given the imminence of the application of the measure entailing the opportunity for WTO Members to exercise their rights under the Agreement on Safeguards, in particular Article 12.3, and to require the imposing

[50] Panel Report, *Korea – Dairy*, para. 7.128 confirmed by Appellate Body Report, *US – Wheat Gluten*, para. 105.
[51] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).
[52] Appellate Body Report, *US – Wheat Gluten*, para. 102.
[53] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[54] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[55] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).

Member's compliance with the substantive obligations under the Agreement on Safeguards. In the present case, the "decision" to impose safeguard measures taken by Ukraine on 28 April 2012 which was published in the Official Journal on 14 March 2013 has been notified to the Committee on Safeguards on 21 March 2013. Since, as noted above, the triggering event is the "taking" of the decision which took place on 28 April 2012, the notification was made almost one year after the taking of the decision and is therefore clearly inconsistent with the requirement of "immediate" notification under Article 12.1(b) and (c) of the Agreement on Safeguards.

84. **Second**, Ukraine violated Article 12.2 of the Agreement on Safeguards. Article 12.2 requires the Member proposing to apply a safeguard measure to provide the Committee on Safeguards with "*all* pertinent, not just *any* pertinent, information."[56] The notifications under Article 12.1(b) and 12.1(c) must "*at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."[57]

85. In the first place, the notification made by Ukraine pursuant to Article 12.1(b) and Article 12.1(c) of the Agreement on Safeguards on 21 March 2013 does not include evidence of serious injury or threat thereof caused by the increased imports, as the following mandatory information is absent from the notification: the amounts of the decrease in imports in absolute terms and the amounts of the increase in imports in relative terms over the investigation period, the intervening trends for 2008-2009 and for 2009-2010 in relation to each injury factor, the absolute figures for each injury factor and "the causal link between increased imports of the product concerned and serious injury or threat thereof".

86. In the second place, in violation of Article 12.2, Ukraine did not provide any "timetable for progressive liberalization" in its initial notification made on 21 March 2013. The fact that Ukraine's notification made on 28 March 2014, i.e. more than a year after its notification on 21 March 2013, includes a timetable for progressive liberalization cannot render the previous notification made by Ukraine on 21 March 2013 consistent with Article 12.2 of the Agreement on Safeguards. In that respect, it should be underlined that "the notification serves essentially a transparency and information purpose,"[58] enabling in particular exporting Members to "be in a better position to engage in meaningful consultations, as envisaged by Article 12.3"[59]. The absence of the required information, including the timetable for progressive liberalization, defeats this fundamental goal of "transparency and information".

4.2 Ukraine failed to comply with the requirements of Article 12.3 of the Agreement on Safeguards

87. **First**, Ukraine did not provide an adequate opportunity for prior consultations with Japan after Ukraine notified the Committee on Safeguards under Article 12.1(c) and 12.2 of the Agreement on Safeguards on 21 March 2013. Despite the repeated requests of Japan and other WTO Members for consultations under Article 12.3 after Ukraine's notification on 21 March 2013, no consultations were held with a view to reviewing the information provided by Ukraine in its notification pursuant to Article 12.2 of the Agreement on Safeguards made on 21 March 2013.

88. It follows from the wording of the Agreement on Safeguards and the findings of previous panels and the Appellate Body that the requirements under Article 12.3 cannot be satisfied, if consultations took place on the basis of all the information under Article 12.2 provided by different means than the notifications under Articles 12.1(b) or 12.1(c). Indeed, Article 12.3 provides that an adequate opportunity for prior consultations are to be provided "with a view to, *inter alia*, reviewing the information ***provided under paragraph 2***" of Article 12. The information "provided under paragraph 2" is the information that has been provided "in making the notifications" under

[56] Appellate Body Report, *Korea – Dairy*, para. 107.
[57] Appellate Body Report, *Korea – Dairy*, para. 109.
[58] Appellate Body Report, *Korea – Dairy*, para. 111 referring to Panel Report, *Korea – Dairy*, para. 7.126.
[59] Appellate Body Report, *Korea – Dairy,* para. 111.

Article 12.1(b) and 1(c) to the Committee on Safeguards. Thus, the wording clearly confirms that the opportunity for prior consultations must be given once the notification has been made pursuant to Articles 12.1(c) and 12.2 of the Agreement on Safeguards. Furthermore, the "information provided under paragraph 2" covers not only "all pertinent information" but also any "additional information" provided upon the request of the Council for Trade in Goods or the Committee on Safeguards. In the absence of any notification under Articles 12.1(b) and 12.1(c), it would appear impossible to provide the "additional information" at the request of the Council for Trade in Goods or the Committee on Safeguards.

89. **Second**, in any event, the consultations held on 19 April 2012 do not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards. Article 12.3 requires that the Member proposing to apply the safeguard measure provide exporting Members with sufficient time and sufficient information for meaningful consultations. [60]

90. The Key Findings sent by the Ministry of Economic Development and Trade of Ukraine on 11 April 2012 to the Embassy of Japan in Ukraine did not provide sufficient information to enable meaningful consultations, as they did not contain a proposed date of application, any precise details, such as the rate of the safeguard measure or any pertinent information of essential nature concerning injury, causation and other elements mentioned in Article 12.3.

91. Furthermore, Ukraine did not provide Japan with "sufficient time" to enable meaningful consultations since the Key Findings was only provided to Japan 8 days prior to the date of the consultations.

4.3 Ukraine violated Article 12.5 of the Agreement on Safeguards

92. Japan claims that even if it were to be found that consultations were held between Ukraine and Japan, the results of these consultations have not been notified, and *a fortiori* not notified "immediately" to the Council for Trade in Goods. Thereby, Ukraine violated Article 12.5 of the Agreement on Safeguards.

93. Indeed, it is the Member "proposing to apply or extend a safeguard measure" under Article 12.3 who is obliged to make the notification as a "Member concerned" within the meaning of Article 12.5.

94. Neither the alleged failure of Japan to notify the results of the consultations under Article 12.5 nor the alleged harmless nature of the violation has any bearing on the fact that Ukraine did not comply with the requirement stated in Article 12.5 of the Agreement on Safeguards.

95. If the Panel were to hold that consultations within the meaning of Article 12.3 were held, the Panel must sustain Japan's claim under Article 12.5, since it is not contested that any result of alleged consultations under Article 12.3 in this case has ever been notified to the Council for Trade in Goods.

4.4 Ukraine violated Article 8.1 of the Agreement on Safeguards

96. Japan claims that Ukraine failed to comply with Article 8.1 of the Agreement on Safeguards since it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994 in accordance with Article 12.3 of the Agreement on Safeguards.

97. As pointed out above, Ukraine has failed to "provide an adequate opportunity for prior consultations" within the meaning of Article 12.3. For that reason alone, Ukraine should therefore be found to violate Article 8.1 of the Agreement on Safeguards. Indeed, "[i]n view of the explicit

[60] Appellate Body Report, *US – Wheat Gluten*, para. 136.

link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot […] 'endeavor to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure."[61]

98. In this regard, Article 8.2 does not serve as a rectification of a violation of Article 8.1. Article 8.2 does not address the breach of Article 8.1, since it is concerned with a temporary relief to the harm of a safeguard measure as a consequence of the failure to reach an agreement on adequate means of trade compensation under Article 8.1.

5. CONCLUSIONS

99. Japan respectfully requests the Panel to find that Ukraine acted inconsistently with its obligations under the Agreement on Safeguards and the GATT 1994, and in particular, that the safeguard measures adopted by Ukraine are in violation of the following provisions:

- Articles 3.1 and 4.2(c) of the Agreement on Safeguards because Ukraine failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

- Article 3.1 of the Agreement on Safeguards because Ukraine failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and the alleged "unforeseen developments"; and failed to provide reasoned and adequate findings and conclusions with regard to such "unforeseen developments";

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide reasoned and adequate findings and conclusions with regard to the increase in imports;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to examine all relevant injury factors; and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of threat of serious injury;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged threat of serious injury; failed to make a proper non-attribution analysis; and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link

[61] Appellate Body Report, *US – Wheat Gluten*, para. 146.

between the increased imports and the alleged threat of serious injury and non-attribution of other factors;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards because Ukraine has failed to apply safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measures by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measures are necessary to prevent or remedy the alleged threat of serious injury;

- Article II:1(b) of the GATT 1994 because Ukraine imposes duties which are in excess of those set forth in its schedule through the unlawful safeguard measures at issue;

- Articles 12.1 and 12.2 of the Agreement on Safeguards because Ukraine did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

- Article 12.3 of the Agreement on Safeguards because Ukraine did not provide adequate opportunities for prior consultations on the proposed safeguard measures and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;

- Article 12.5 of the Agreement on Safeguards because Ukraine did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards;

- Article 8.1 of the Agreement on Safeguards because Ukraine did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994, in accordance with Article 12.3 of the Agreement on Safeguards.

100. Japan also respectfully requests the Panel to recommend that the DSB requests Ukraine to bring its measures into conformity with the Agreement on Safeguards and the GATT 1994 by revoking its safeguard measures.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

LIST OF ABBREVIATIONS

This document uses abbreviations as follows:

- **The Agreement**: Agreement on Safeguards;
- **The Commission:** the Interdepartmental International Trade Commission;
- **The Key Findings:** the Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export;
- **The Law**: Law of Ukraine "On Application of Safeguard Measures against Imports to Ukraine";
- **The Ministry:** the Ministry of Economic Development and Trade of Ukraine;
- **The Notice**: the Notice on the application of safeguard measures on the imports of motor cars into Ukraine regardless of the country of origin or export published on 14 March 2013.

I. Introduction

1. This dispute concerns a safeguard measure on certain passenger cars, one of the first safeguards adopted by Ukraine as a newly-acceded Member who liberalized its tariff from 25 per cent to 10 per cent and was hit hard by the 2008 global crisis immediately after its accession.

2. The safeguard measure grants such Members the ability to escape from otherwise inflexible obligations under the WTO. In the event of unforeseen developments threatening domestic industry, only the safeguard measures may guarantee the stability of Member's commitments and enable the Member to restore competitiveness of domestic industry facing a surge of imports and the resulting serious injury. It is clear that domestic industries protected by safeguard measures gain the benefit of a temporary respite from competition with imports to build-up its competitiveness.

3. The global financial crisis had a severe impact on the economy of Ukraine and especially its motor car industry. The referred crisis resulted in a 15% decrease in Ukrainian GDP and rapid depreciation of the national currency. Its effect on the passenger car industry was even more severe.

4. The impact of 2008 global financial crisis and liberalized trade as a result of accession to the WTO caused an increase in imports relatively to the domestic production and consumption was an unforeseen development that called for emergency action on imports given that there was a surge in imports relative to domestic production during that same period.

5. All of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 were evident. Therefore, Ukraine had the right to impose the challenged safeguard measure on certain passenger cars.

6. The measure was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The safeguards measure was significantly liberalized during the period of its application.

7. Finally, Ukraine also complied with the procedural obligations contained in Articles 3, 8 and 12 of the Agreement, as well as Article XIX:2 of GATT 1994, regarding the consultations at certain stages of the process, notifications, and publications. These procedural obligations are different from the substantive obligation set forth in Article 2 which determines the right to impose safeguard measures and still were complied fully.

8. Thus Japan's claims to the contrary must therefore be rejected.

II. Arguments of Ukraine

1. Japan's claim that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it did not conduct a proper "investigation" and did not publish a sufficiently detailed report is flawed

a. Introduction

9. Ukraine conducted a proper investigation under Article 3.1 of the Agreement and published a sufficiently detailed report under Articles 3.1, last sentence, and 4.2(c) of the Agreement.

b. Legal argument

10. First, Ukraine maintains that the investigation was conducted in accordance with the limited obligations of Article 3.1 of the Agreement. The Agreement does not stipulate any particular requirement to investigation determination period. According to the Article 8.2 of the domestic Law the "period of investigation shall be normally from one to three years". As it was made clear in the Notice and appropriate notification to the WTO, during the investigation period in 2010 compared to 2008 import of cars in Ukraine increased relative to the domestic production and consumption that threaten to cause serious injury to domestic industry. Thus, the conclusions were based on the period in 2010 compared to 2008. Furthermore, the investigating authority also presented some more recent data that was available before the investigation was concluded for the 1st half of 2011 compared to 2008 and 2010 in the Key Findings, particularly, about the further increase in import volumes in relative terms.

11. Ukraine set the period of investigation as 2008 through 2010 when it initiated the safeguard investigation on 2 July 2011 and carefully investigated the information inside this period. The investigating authority is not obliged to review the data outside the period of investigation as erroneously claimed by Japan.

12. Therefore, the investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected. There is no obligation in the Agreement to continue to update the information following the end of the period of investigation and certainly not following the end of the investigation.

13. Moreover, it was generally accepted by the parties and the third parties that a delay before the imposition of safeguard measures could possibly be justified by good faith efforts to negotiate safeguard measures. It is important that a number of consultation and meetings between the Ukrainian officials and the representatives of other exporting Members were held to discuss the possible imposition of safeguard measure before the application of the measures.

14. Second, Japan complains about the fact that there was a gap between the date of the termination of the investigation and the date of application of the measure. However, there is nothing in the Agreement that provides that the application of the measure must follow the finish of the investigation within a certain period of time. Moreover, this matter does not concern the investigation but only the application of the measure and does not invoke the substantive norms of Article 3.1 and Article 4.2 that are limited to the actions of the investigating authority in the investigation, which was finished on 28 April 2012. Therefore, Ukraine was not obliged in any way to consider any additional factors or periods after the safeguard investigation was finished.

15. Furthermore, Article 3.1 of the Agreement does not prescribe any deadline for the publication requirement. It merely provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". In the context of Article 3.1 and especially Article 4.2 that requires the Member to publish such report "promptly", this publication obligation arises only at the time of adoption of the measure, and not before that time.

16. Third, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defence of their interests, in accordance with the procedural obligation of Article 3.1.

17. Ukraine contacted the Embassy of Japan during the investigation and provided it and all the other registered interested parties with a summary of their rights and obligations as an interested party of the safeguard investigation, as well as the relevant procedures and a mechanism to actively participate in the investigation according to the Law and the Agreement.

18. In the Notice on initiation the interested parties were provided a 45-day period to send the comments and views to the investigating authority for a consideration. A number of the interested parties used the right to present their position regarding whether or not the application of a safeguards measure was necessary. The arguments of the interested parties were taken into consideration by the investigating authority. Japan, however, did not send its comments to the investigating authority.

19. As for the hearings, all of the interested parties had a notice of and an ample opportunity to participate in the hearings held on 22 March 2012 and to present evidence and its views and arguments. A number of the interested parties used the right to participate actively in the hearings and to present their positions, which were taken into consideration by the investigating authority.

20. Japan did not request to have access to the information provided by other interested parties, particularly the application by the domestic industry, and did not complain about not being provided such information by these parties automatically. It was concluded by the investigating authority during the investigation that Japan was fully informed by the other interested parties, supplied with all the available evidence, views, submissions, and presentations.

21. It is important that the Member is obliged only to provide an opportunity for the participation, but obviously cannot force the interested parties to present their interests. Japan was able to participate much more actively in the investigation like the other interested parties did, but did not fully exercise its rights at that moment. It is highly doubtful that Japan's limited participation by providing only declarative statements during the investigation was the fault of the Ukrainian investigating authorities in the light of all of the above facts. If such arguments are taken for granted, any interested party in any future investigation that ignored its right to communicate with others interested parties and authorities can question the safeguard measure afterwards on a similar premise.

c. Conclusion

22. The investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's apparent argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected.

23. Ukraine published its detailed analysis of the investigation promptly upon adoption of measure and therefore complied with the publication-related obligations of Articles 3.1 and 4.2(c) of the Agreement. There is no set of rules in the Agreement or Article XIX of GATT 1994 concerning the format of published report.

24. Similarly, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defense of their interests, in accordance with the procedural obligation of Article 3.1. Japan's claim to the contrary is not supported by the facts on the record.

25. Therefore, Ukraine requests that all of Japan's claims under Article 3.1 and 4.2 (c) of the Agreement be rejected.

2. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments is flawed

a. Introduction

26. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement is not justified because Ukraine properly demonstrated the existence of "unforeseen developments", their logical connection to the increase in imports relatively to the domestic production, and consequently fulfilled its obligations under Articles 3.1 and 4.2(c) of the Agreement.

b. Legal argument

27. Unforeseen developments are a circumstance that is found in Article XIX of GATT 1994 and must be demonstrated as a matter of fact. Moreover, the unforeseen developments can only be viewed together with the binding effect of the obligations under the GATT. As the injury to the domestic industry or threat thereof has to be caused by the significant increase of imports, but not by the unforeseen developments or the obligations incurred under GATT 1994 directly. It is the causal relationship between the increase in imports and the injury to the domestic industry or threat thereof that is the prerequisite for the application of safeguard measures and need to be analysed during the safeguard investigation. The unforeseen developments and the obligations incurred under GATT 1994 are the circumstances that shall cause the significant increase of imports.

28. In the present case the global financial and economic crisis that was neither foreseen nor expected by Ukraine earlier during its trade negotiations on concessions, and the obligations assumed during Ukraine's accession caused the increase in imports relatively to the domestic production. One of these circumstances alone could not result in a significant enough change in competitive relationship between imports and domestic products.

29. The facts confirm that the increased imports can only be associated with the combination of a global economic crisis just after the liberalization and other major changes in the Ukrainian economy as a result of the WTO accession. These circumstances existed as a matter of fact and were identified in the Key Findings, the Notice, and the notification to the WTO even though the latter included only a reference to the results of these circumstances.

30. As the 2008 global financial and economic crisis is a widely accepted and an uncontested fact, it does not indeed require any additional evidence to prove its existence. Moreover, as this circumstance was not questioned by the interested parties, it was concluded by the investigating authority that it existed as a matter of fact and did not need any confirmation.

31. The investigating authority explained that it was unforeseen that imports would increase by 37.9 per cent relative to domestic automobile production in Ukraine in 2010 compared to 2008, despite the decrease in import volumes in absolute terms. This relative increase in imports decreased the market share of the domestic industry by 35.45 per cent. The significant increase in market share of imports came on the heels of the global financial crisis, which had a significant impact on the Ukrainian passenger car industry. Japan was obviously aware of the global crisis during the period of investigation.

32. Ukraine did provide an analysis of the consequences of the global financial and economic crisis. Moreover, Ukraine also analysed other factors that were caused directly by the crisis, namely the consequent decrease in consumption in the non-attribution section of the Key Findings. It was determined that this effect of the global economic crisis could not be responsible for the injury to the domestic industry.

c. Conclusion

33. Ukraine established a clear relationship between the unforeseen developments that existed as a matter of fact and the increase in imports that threatened to seriously injure the domestic industry.

34. Japan's argument Ukraine did not provide sufficient "reasoned conclusions" on "all pertinent issues" including the unforeseen developments in violation of the requirement to provide a report on these issues is not supported by the evidence on the record.

35. Therefore, Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement must fail.

3. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT is without merit

a. Introduction

36. Contrary to Japan's claim, Ukraine's determination was conducted in accordance to Article XIX:1(a) in context of the "effect of obligations incurred under the GATT". Ukraine mentioned the effect of its GATT obligation under Article II:1(b) to maintain tariffs on these products at no more than 10 percent, did address the logical connection of those obligations to the increase in imports, and reported on these "pertinent" elements under Articles 3.1 and 4.2 of the Agreement.

b. Legal argument

37. To accede to the WTO, Ukraine committed to reduce the import duty on passenger cars in 2008 from 25 percent to 10 percent with no phase-down period. Unfortunately, after the tariffs decreased as a result of Ukraine's obligations the global financial and economic crisis started. Due to these circumstances the imports of passenger cars into Ukraine relative to domestic production increased in the same time as the absolute amount of imports decreased as referred to in the Notice.

38. The reduction of the tariff to 10 percent was analysed in the non-attribution section of the Key Findings. It was concluded that its effect on the imports of passenger cars into the Ukraine market during the period of investigation was limited though and could not cause the significant increase in imports by itself.

39. Furthermore, there is no need for any detailed conclusions and other explanation when as a matter of fact it is uncontested that Ukraine made significant tariff commitments in respect of passenger cars when it joined the WTO in 2008. Of all countries, Japan cannot seriously deny that as a matter of fact this is the case given its active involvement in the Ukraine's accession negotiations.

40. It is a fact that Ukraine made significant tariff concession on passenger cars when it joined the WTO on 16 May 2008. This is a fact Japan cannot deny given its active involvement in the Ukraine's accession negotiations. Moreover, Ukraine mentioned the obligations in the Key Findings incurred under the GATT in a specific context clearly presenting the results of the analysis of causality between the obligations and the increase in imports.

c. Conclusion

41. Ukraine therefore requests the Panel to reject Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement.

Claim 4: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports must fail

a. Introduction

42. Ukraine obviously fulfilled its obligations in regard to its determination of the increased imports. Japan's claims must fail because Ukraine showed that the increased imports were caused by unforeseen developments and the effect of its GATT 1994 obligations, and the investigating authority did examine all the elements relating to increased imports, that is:

the evidence of import increase is recent;
the increase was sufficiently recent, sudden, sharp and significant;
the qualitative analysis of the imports increase was conducted;
the unforeseen or unexpected aspects of the increase were obvious;
the conditions of the increase in imports were analysed.

43. Therefore, Ukraine acted in accordance to Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Moreover, Ukraine reported these elements pursuant to Articles 3.1 and 4.2(c) of the Agreement. Japan's claims are not supported by the facts on the record and are without merit.

b. Legal argument

44. First, as explained in the prior section, Ukraine demonstrated that the increased imports were the result of unforeseen developments and the effect of the tariff commitments it made on passenger cars. The first argument of Japan, which is a purely consequential argument that is based on its flawed claims relating to Article XIX of GATT 1994, is thus without merit.

45. Second, Ukraine met its obligations under the Agreement by examining all elements related to the increase in imports. The data used by Ukraine in its analysis was the most recent data available as was explained above.

46. Third, the increase in imports that caused a threat of serious injury was sufficiently recent, sudden, sharp and significant. Although the volume of passenger car imports into Ukraine decreased by 71 percent, there was a significant increase in imported passenger cars in relative terms. In 2010, the most recent year of data, imports of passenger cars relatively to domestic consumption and domestic production showed a sudden and significant increase. In 2010, they sharply increased by 37.1 and 37.9 percent respectively from 2008. The increase by over 30 percentage points is obviously sudden, sharp and significant.

47. Ukraine analyzed the amounts and rates of the increase in imports and taking into account the non-disclosure requirements of Article 3.2 provided the non-confidential summary of such analysis in the Key Findings, Notice and notification to the WTO.

48. Japan aims to add to the obligations of Ukraine under Article 4.2 of the Agreement a responsibility that would be simultaneously a violation of Article 3.2 provision which explicitly states that: "such information shall not be disclosed without permission of the party submitting it". As explained by the Panel in *US – Steel Safeguards*, the non-disclosure requirement is more important as far as the authority is able to resort to "ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality".

49. However, by providing not only the rates, but also the amounts, hence, the absolute figures of the import increase or any of other relevant factors having a bearing on the situation of that industry Ukraine would violate its obligations under Article 3.2 and invalidate all the efforts it took to protect confidential data of the domestic industry by making the confidentiality of the indexed data vulnerable to a simple numerical analysis.

50. In its Key Findings, Notice, and WTO notification Ukraine managed to present a sufficiently detailed picture of the increased imports and oblige its non-disclosure obligations by indicating that "the volume of imports of motor cars into Ukraine in quantitative terms decreased by 71%, the share of imports increased by 37.1% to domestic consumption and by 37.9% to domestic production". It is obvious that the rates of increase in imports were based on the absolute figures.

51. As discussed in more detail when addressing Japan's injury related claims, this sudden increase in imports relative to domestic production and consumption threatened to cause further serious injury. The domestic industry's market share decreased by 35 percent in 2010 over 2008 levels.

52. This analysis was fully conducted by the investigating authority during the investigation and was properly summarized in the Key Findings, the Notice and the WTO notification. The absolute figures, however, were confidential and were therefore not disclosed.

c. Conclusion

53. Japan's claims regarding the determination of increased imports under Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected.

Claim 5: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of injury and/or threat of injury is flawed

a. Introduction

54. Ukraine conducted a comprehensive investigation of injury under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Japan's arguments fail for the following reasons:

Ukraine evaluated the injury factors properly;
Ukraine did determine that there was a significant overall impairment to the domestic industry;
Ukraine based the investigation on the most recent data available;
Ukraine determined a threat of serious injury pertaining to the most recent past; and
Ukraine conducted the qualitative examination of all injury factors properly.

55. Moreover, as Ukraine fulfilled its obligations in the above context, Japan's consequential claims that the failure to sufficiently explain these elements in the Notice violates Articles 3.1 and 4.2(c) of the Agreement must fail as well.

b. Legal argument

56. Serious injury is defined in Article 4.1 of the Safeguards Agreement as "a significant overall impairment in the position of the domestic industry". The same provision states that "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, adding that a determination of the existence of a threat shall be based on facts and not merely on allegation, conjecture or remote possibility.

57. Ukraine analysed all the injury factors including the market shares and provided a reasoned and adequate explanation of how the facts supported its final determination. Contrary to Japan's arguments, Ukraine conducted a full analysis of the serious injury or threat of injury factors. Ukraine summarized its confidential analysis of the factors required by the Agreement taking into account the non-disclosure requirements of Article 3.2 and the guidance of the Panel in *US – Steel Safeguards*.

58. As the public summary makes clear, Ukraine analysed the data trends over the course of the period of investigation for each factor indicated in Article 4.2 and provided a result of such analysis in the Key Findings, Notice and the WTO Notification. Each factor evidences the "the worsening financial and economic condition of the domestic producers" over the course of the period investigation. The potential for significant injury is shown in each factor that decreased significantly from 2008 to 2010.

59. Nevertheless, it was found by investigating authorities that while all the factors confirm the worsening condition of the domestic industry, the high standards of material deterioration due to the increase in imports put by the wording of the "serious injury" criterion established by the Agreement could not be met incontestably.

60. The standards concerning the current deterioration of the domestic industry under the "threat of serious injury" are lower if such threat is shown to be imminent. Appellate Body stated in its report in *US – Line Pipe* that "defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure."

61. Ukraine did find that the worsening of all the relevant factors of an objective and quantifiable nature coupled with a significant export potential of the notable exporters of motor cars into Ukraine can qualify as a "threat of serious injury".

62. As was concluded by the investigating authority, the significant worsening of domestic industry (including the major increase in the market share) was a consequence of the increasing imports at that moment. Ukraine analysed the capacity in the exporting countries, they had significant available productive capacity ready to be exported to Ukraine.

63. The significant export potential of the exporting countries led the investigating authority to believe that the import trends then present would continue and cause even more significant deterioration of the domestic industry. The foreign industries referred to in the Notice are responsible summarily for more than 90 per cent of Ukrainian motor car imports; their orientation on exports and free additional capacity could be directed to Ukraine.

64. As the share of specific importing countries in the total imports was not expected to change notably and the total exports from these countries was supposed to increase, the amount of exports from these countries to Ukraine was supposed to grow majorly as well.

65. Therefore, Ukraine not only analysed the injury factors to conclude the fact of imminent serious injury, but also included the export potential of the exporting countries in its analysis.

66. Ukraine provided an adequate public summary of its reasoned and adequate explanation of how the seven injury factors were examined and applied in the injury investigation. Ukraine's analysis of the domestic passenger car industry in absolute figures, however, was confidential. In its Key Findings, Notice and notification to WTO Ukraine provided a public summary of its confidential analysis. Ukraine followed the guidance of the Panel in *US – Steel Safeguards*, which discussed a way to provide the relevant explanations while addressing the confidentiality issues.

67. In order to protect the domestic passenger car industry's confidential information about sensitive technological, productive, managerial, financial and aspects of its activity that may cause a damage to the commercial interests of the company if disclosed, the results of the quantitative and qualitative evaluation of threat of serious injury to the domestic industry were not presented by the investigating authority in absolute terms. Acknowledging the need to disclose as much relevant information as possible, the investigating authority published the indexed results of the conducted analysis of injury factors. Therefore, Ukraine addressed the requirements of both Articles 3.1 and 4.2(c) of the Agreement as much as it was possible in these circumstances.

c. Conclusion

68. For all of the reasons above, it is clear that a proper determination of threat of serious injury was made and that all relevant factors were examined. All of Japan's claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of GATT 1994 must therefore be rejected.

6. Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the serious injury or threat of injury is flawed.

a. Introduction

69. Ukraine fulfilled its obligations as it demonstrated the existence of a causal link between increased imports and serious injury or threat thereof and ensured that the injury caused by factors other than the increased imports is not attributed to the increased imports.

70. Alleged violations of Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement claimed by Japan are without merit. Consequential arguments that the lack of reasoned conclusions on this issue is a violation of Articles 3.1 and 4.2(c) of the Agreement must therefore fail as well.

b. Legal argument

71. Ukraine conducted the causation analysis required by Article 4.2(b). During the investigation, Ukraine "established that the volume of the Product under investigation imported into Ukraine has been growing throughout the period of investigation in relation to production volume of the domestic industry". Ukraine also recognized that although imports of passenger cars decreased by 71 percent from 2008 to 2010 in absolute terms, imports increased by 38 percent relative to the Ukrainian domestic passenger car production. These data demonstrated that, although there was a decline in the passenger car across the market, imports were still able to increase in relation to domestic production.

72. During the investigation, Ukraine found that although the imports decreased in absolute terms, the volume of the product under investigation imported into Ukraine has been growing throughout the period of investigation relatively to the production volume of the domestic industry and the domestic consumption.

73. Ukraine recognized that although imports of passenger cars decreased by 71 per cent from 2008 to 2010 in absolute terms, imports increased by 37.9 per cent relatively to the Ukrainian domestic passenger car production and by 37.1 relatively to domestic car consumption. These data demonstrated that imports were still able to increase in relative terms.

74. Ukraine found that the consumption of passenger cars fell by 78.8 per cent between 2008 and 2010 while the domestic producers' market share fell by 35 per cent over the same period and concluded that, in light of the increase in imports relative to production volumes and the conditions of such imports, the domestic passenger car industry was driven out of the Ukrainian market by imports. The growing market share of imports resulted in "a worsening of the poor state of the domestic industry and a threat of serious injury in the future".

75. It was for Japan to demonstrate that despite this clear correlation, the causation analysis of Ukraine was lacking. In addition, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. The genuine and substantial relationship of cause and effect between the increase in imports and the threat of serious injury cannot be in doubt.

76. The investigating authority concluded that the domestic product has characteristic features that are very similar to the characteristic features of the product that was the subject of investigation, and therefore can be considered to be a "similar good" within the meaning of the provisions of the Agreement and the Law. Moreover, the relatively narrow definition of the good under investigation and its high similarity to the imported good led the investigating authority to believe that the imports and the domestic production are engaged in a clear direct competitive relationship and can be easily substituted for each other.

77. Such a relationship means that because the importers and domestic industry are competing for a contracting domestic market, any change in market share taken by imports has an obvious and direct influence on the demand for the production of the domestic industry, its financial and economic state. Therefore, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. Japan has failed to provide evidence that imported and domestic passenger cars covered by the investigation were not in direct competition.

78. Moreover, as far as it concerns the other claims of Japan Ukrainian investigating authorities conducted a proper non-attribution analysis.

79. As such, Ukraine recognized that the decrease in consumption caused by global financial crisis was an objective factor that influenced every industry in Ukraine and abroad. As the deterioration of automotive industry is more significant than it was expected from Ukrainian industry or a car producer in any other country, it was concluded that the decrease in consumption could be responsible for only a limited part of the injury to the national industry.

80. Regarding the abolition of government support in 2008 and the corresponding deficient competitiveness of the domestic products, the investigating authority noted that these factors could cause the deterioration of the domestic industry, but cannot explain the coinciding increase

of imports. It was also noted that the government support of motor car producers ended before 2008 and the investigation authority did not consider earlier data. The deterioration of the domestic industry could be attributed to the sudden lack of competitiveness caused by abolition of government support if the investigation period included 2007, but the claim that it could influence the domestic industry negatively after 3 years later is presumptuous.

81. As for the imposition of the additional 13 % import surcharge imposed on the imports of motor cars under the WTO Balance of Payments mechanism, Ukraine has noted that this surcharge could have influenced the extent of injury caused to the domestic industry only in a limited way as it was in force only during a short period from March till September 2009 and therefore could not be attributed to the trends in 2008 and 2010. The countries unaffected by this duty were the Members of CIS FTA, the Russian Federation with a 30 % share of total imports in 2009.

c. Conclusion

82. For all of these reasons, Japan's claim of violation of Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected. Ukraine determined that there was a clear causal link between the increase in imports and the injury to the directly competitive domestic industry and ensured that any injury caused by other factors was not attributed to the increased imports.

7. Japan's claim that Ukraine violated Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its imposition of the measures to the extent necessary to prevent or remedy serious injury and to facilitate adjustment is without merit

a. Introduction

83. Ukraine acted in accordance to Article XIX:1(a) of the GATT 1994 and Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement by applying the safeguard measures only to the extent necessary to prevent the threat of serious injury: the duty level and the length of the application was appropriate, as well as the progressive liberalization of the measure.

b. Legal argument

84. Ukraine clearly took into account the level of causal impact of the increase in imports on the serious injury to the domestic industry when it set the level of duty, the duration of the measure, and the scheme for progressive liberalization of the measure allowing the domestic industry to adjust.

85. Ukraine's measure is imposed strictly to the extent necessary to remedy the serious injury. It was therefore appropriate to apply a rate of duty sufficient to remedy the entirety of the serious injury that was threatened to be caused by the increased imports.

86. The investigation of the injury revealed that the level of duty requested by the domestic industry (33.4 to 47 per cent), which is comparable to the deterioration of the domestic industry, was excessive in light of the effect on the imports and the possibility of imposing a lesser duty sufficient to remedy and prevent the serious injury. Therefore, a level of duty of only 6.46 to 12.95 per cent was imposed.

87. Japan claimed that this level of duties is excessive as it was seemingly understood by Japan that to prevent the whole deterioration to the domestic industry.

88. However, Ukraine wants to recall the explanations of the Appellate Body in US — Line Pipe, which concluded that although the "serious injury" in Article 5.1 and Article 4.2 was "one and the same", the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied "only to the extent that they address serious injury attributed to increased imports", not "all serious injury".

89. It must be emphasised that these duties were imposed on such a level that was intended only to prevent the imminent serious injury. That was the reason why Ukraine did apply safeguard

measures only 6.46 to 12.95 per cent, but not the requested 33.4 to 47 per cent: the latter duty could stop the deterioration of the domestic industry but would definitely be in excess of the extent necessary to prevent the serious injury caused by the increase in imports.

90. Thus, Ukraine acted in accordance with Article XIX:1(a) of the GATT 1994 and Article 5.1 of the Agreement.

91. Second, the duration of the measure was determined to be strictly necessary to remedy the amount of serious injury. Due to the high level of serious injury a safeguard measure of sufficient duration to remedy the injury and to allow the industry to adjust was required.

92. Importantly, Ukraine once again did not go to the maximum of what it was entitled to do. It did not impose a measure for four years as possible under Article 7.4 of the Agreement, but imposed a measure of a shorter duration of three years only. In addition, it provided for a rapid and steep liberalization of the measure, again going well beyond what it is required to do. Thus the measure is in line with Article XIX:1(a) of the GATT 1994 and Article 7.1 of the Agreement, and is not more restrictive than necessary.

93. Third, the three-year measure triggered the requirement to progressively liberalize the measure over its full duration. Ukraine satisfied that requirement by implementing a plan of progressive liberalization that provided for a step-wise reduction in the duty level after 12 months and then after 24 months of the application of the safeguard measures.

94. Article 7.4 of the Agreement stipulates that a Member imposing a safeguard measure "shall progressively liberalize it at regular intervals during the period of application". This substantive obligation to liberalize a safeguard measure of greater than three years duration is of course related to the procedural requirement to notify a timetable for liberalization to the WTO Committee on Safeguards. However, the obligations are different. In this context, the substantive obligation to liberalize a measure at regular intervals requires a plan that is put into place and then implemented. The timing for notification of the timetable to the WTO is a separate obligation that must be addressed separately under Article 12.2.

95. Hence, Ukraine satisfied the Article 7.4 requirement by implementing a plan of progressive liberalization. The plan provided for a step-wise reduction in the duty level by the third after 12 months of implementation and then 24 months. By devising, implementing and notifying this plan, Ukraine has satisfied its obligation under Article 7.4 of the Agreement.

c. Conclusion

96. The safeguard measure was applied by Ukraine to facilitate adjustment in its every relevant aspect: level and duration, and scheduled progressive liberalization. The measure eases the process of economic adjustment to the competition of the domestic industry.

97. Thus, by taking into account all of these factors, Ukraine's investigation and determination are in line with Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement.

8. Japan's claim that Ukraine violated Article II:1(b) of the GATT 1994 is a merely consequential claim that has to be rejected

98. Japan claimed that that Ukraine violated Article II:1(b) of the GATT 1994 by applying an unjustified safeguard measure and therefore imposing a tariff higher than the bound rate is not supported by the evidence.

99. A safeguard measure, implemented in accordance with Article XIX of the GATT 1994 and the Agreement, are permitted as "emergency action on imports of particular products".

100. As Ukraine's measure is a lawful safeguard measure applied under XIX of GATT 1994 and the Agreement that appropriately applies a separate form of duty on particular products to prevent or remedy serious injury or threat thereof caused by increased imports, it does not violate Article II:1(b) of the GATT 1994. Because Japan's predicate claims above must fail, so must fail this consequential claim.

101. Therefore Ukraine acted in accordance to Article II:1(b) of the GATT 1994 by imposing a safeguard measure according to Article XIX of GATT 1994 and the Agreement.

9. Japan's claim that Ukraine did not comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards is in error

a. Introduction

102. Ukraine notified the Committee on Safeguards "immediately" under Article 12.1 of the Agreement upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply measures. Japan's claims are not supported by the evidence and should be rejected.

b. Legal argument

103. All notifications made by Ukraine were as immediate as possible in the light of the Ukrainian language not being an official WTO language. Ukraine has satisfied its notification obligations under the Agreement and Japan's claims to the contrary must be rejected.

104. As to the Article 12.1(a) requirement to notify the initiation of the investigation, Ukraine took the decision to initiate the investigation on 30 June 2011, published that decision on 2 July 2011, and notified the WTO on 13 July 2011. Ukraine submits that eleven days after publication of the notice about the decision to initiate is clearly "immediate" notification in accordance with Article 12.1 (a).

105. As to the Article 12.1(b) requirement to notify the injury determination and the Article 12.1(c) requirement to notify the decision to impose a measure, Ukraine took a decision on 28 April 2012, published the Notice about that decision on 14 March 2013, notified the WTO on 21 March 2013, and made the measure effective on 14 April 2013.

106. Ukraine considers that the 28 April 2012 date cannot be viewed to be the triggering event of taking a decision. According to the Ukrainian Safeguard Law, the investigation is finished after the relevant decision of the Commission is taken. The decision itself, however, is the document of internal use and cannot be viewed as an appropriate legal document until the official publication of the notice about the decision is made. Thus, it is the decision to publish the notice (and thus to allow its entry into force thirty days later) that is the key decision for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

107. The publication of the Notice, which provides findings and reasoned conclusions reached on all pertinent issues of fact and law under Articles 3.1 and 4.2 of the Agreement that makes the subsequent application of the safeguard measure imminent, is a key event for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

108. Thus, given the triggering event occurred on 14 March 2013 and the notification to the Committee on Safeguards came on 21 March 2013, the notification seven days later is "immediate" in the sense of Article 12.1.

109. Regarding the requirement to give all pertinent information in the Article 12.1(b) notification of injury/threat determination, the Appellate Body has focused on the need to provide the information listed in Article 12.2 as well as information concerning the injury factors in Article 4.2(a). The Appellate Body in *Korea – Dairy* described "an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification".

110. These notifications sufficiently described the measure, which had not yet entered into force. Ukraine also notes that it is relevant that it had also provided Japan with the Key Findings, which provided it with information to undertake consultations, as is the stated purpose of the Article 12.1 notification requirements before the consultations and sent a number of letters over the period of 25 August 2011 to 25 March 2013. This is important given that, as confirmed by the Appellate Body in *Korea – Dairy*, another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions with a view to

allowing "any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation". Japan had the information it needed and did consult with Ukraine back in 2012 based on the information that was made available.

c. Conclusion

111. Ukraine's notifications relating to the investigation on passenger cars to the WTO Committee on Safeguards were timely and of sufficient content so as to be found consistent with its WTO obligations. For all of the above reasons, Ukraine considers that Japan's notification claims under Articles 12.1 and 12.2 of the Agreement must fail.

10. Japan's claim that Ukraine did not comply with the requirements of Article 12.3 of the Agreement on Safeguards is without merit.

a. Introduction

112. Japan's claims under Article 12.3 of the Agreement that Ukraine's consultations process violated its obligations must fail for two reasons: Ukraine did provide an adequate opportunity for prior consultations after its notification to the Committee on Safeguards, and the consultations that Ukraine held with Japan on 19 April 2012 were clearly sufficient to fulfil the requirements of the Agreement.

b. Legal argument

113. The requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, then that is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation and Article XIX:2 of GATT 1994.

114. Contrary to Japan's claims the wording of the Appellate Body in *US – Wheat Gluten* clearly states that the information required to be provided under Article 12.2 is not a simple equivalent to the notifications under Article 12.1 of the Agreement, but the information that is needed to enable meaningful consultations to occur under Article 12.3.

115. Ukraine argues that Japan's focus on the Article 12.1 notification of the pertinent information given in Article 12.2 is misplaced. Ukraine provided Japan with the relevant information on its proposed measure prior to either the decision taken on 28 April 2012 or to the decision to publish that measure on 14 March 2013.

116. This requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, it is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation.

117. Japan and Ukraine held substantive consultations under Article 12 on 19 April 2012, after which the originally proposed level of 15.1 per cent duty for cars with engine volumes in the range of 1500 cm^3 – 2200 cm^3 was reduced to 12.95 per cent. Japan's claims that the information provided before the consultation was incorrect due to this liberalization and thus does not provide an opportunity to hold a meaningful consultations are faulty.

118. Ukraine also notes that additional consultations (after the Notice was published and before the safeguard measures entered into force) on this issue between the Ukrainian officials and the representative of the Ministry of Economy, Trade and Industry of Japan took place on the 09 April 2013.

c. Conclusion

119. In light of these facts which confirm that the substance of the information obligation of Article 12.3 was met, and the lack of any harm or prejudice to Japan in undertaking effective consultations given the positive result of the 19 April 2012 consultations with Japan, Ukraine has fulfilled its obligation under Article 12.3 of the Agreement. Ukraine therefore requests the Panel to reject all of Japan's claims under Article 12.3 of the Agreement.

11. Japan's claim that Ukraine violated Article 12.5 of the Agreement on Safeguards is to be rejected

120. Japan's argument that Ukraine did not notify immediately the results of the consultations to the Committee on Safeguards, thereby violating Article 12.5 of the Agreement, is faulty.

121. However, Ukraine asserts that this provision imposes an obligation on the "Members concerned" in the plural. A Member, like Japan, that has not itself complied with this obligation is estopped from complaining about an alleged violation of this notification obligation.

122. If Ukraine decided to provide any kind of concessions to compensate for the safeguard measures and thus noticeably influencing its trade regime, such concessions would be notified to the Council for Trade in Goods.

12. Japan's claim that Ukraine did not endeavour to maintain a substantially equivalent level of concessions and therefore violated Article 8.1 of the Agreement on Safeguards is in error

a. Introduction

123. Ukraine has always endeavoured to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and Japan as well as with the other exporting Members and acted in accordance to Article 8.1 of the Agreement.

b. Legal argument

124. It is important that consultations took place in April 2012 already well before the implementation of the measure and the Members concerned were properly informed about the proposed measure beforehand. Japan's claim must be rejected for that reason alone.

125. In addition, Article 8 must be read in a holistic manner. There is no "violation" of a legal provision requirement, if the legal provision itself provides for a balancing mechanism as does Article 8. Indeed, Article 8.2 provides that, if there was no agreement following consultations, the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure.

126. Unlike other WTO Members Japan took a passive stance and did not execute its right to balance the influence of the safeguard measure.

c. Conclusion

127. Ukraine considers that sufficient consultations were held and that it always endeavoured to maintain an equivalent level of concessions with Japan such that Article 8.1 cannot be said to have been violated. In addition, given the available option of approved self-help, Japan's claim of a violation of Article 8.1 is without merit.

III. Conclusions

128. As was just presented, the imposition of the challenged safeguard measures and the respective safeguard investigation were conducted by Ukrainian investigating authorities in full compliance with the substantive and procedural requirements for the adoption of safeguard measures in the Agreement and Article XIX of GATT 1994.

129. Specifically, all of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 existed as a matter of fact. Moreover, all the procedural obligations concerning the safeguard investigation under Article 3 and 4 of the Agreement were met. Therefore, Ukraine had a right to impose the challenged safeguard measure on certain passenger cars.

130. Furthermore, Ukraine correctly applied the measure in the context that it was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The decrease of the proposed safeguard duty level following the April 2012 consultations and the subsequent 2014 liberalization of the measure are evidence of Ukraine's good faith.

131. Finally, a number of procedural obligations relating to the notification and publication of the measure and consultations at certain stages of the process imposed by the Agreement were also duly met by Ukraine during the investigation.

132. Therefore, Ukraine applied the safeguard measures on the imports of passenger cars into Ukraine in strict accordance with the Agreement, Articles XIX and II of GATT 1994. While some aspects and procedures are not explicitly or implicitly stipulated by the relevant WTO jurisprudence the investigating authority used a guidance of Ukrainian domestic regulations or acted in good faith on its own discretion.

133. For all of the above reasons, Ukraine requests that all of Japan's claims be rejected.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. DELAY IN APPLYING A SAFEGUARD MEASURE SUGGESTS THAT "SUCH INCREASED QUANTITIES" OF IMPORTS DO NOT EXIST RECENTLY ENOUGH AS TO CAUSE OR THREATEN TO CAUSE SERIOUS INJURY

1. The *Agreement on Safeguards* and Article XIX of the *General Agreement on Tariffs and Trade 1994* (GATT) together establish that safeguard measures are temporary emergency actions that can only be taken where necessary to prevent or remedy serious injury caused by a surge in imports.[1] Safeguard measures give domestic industry the opportunity to adjust to different economic conditions by temporarily restricting import competition.

2. If an investigation finds that a safeguard measure is necessary, a delay in applying the safeguard measure following that investigation may raise doubt as to whether the imposition of the measure is justified. A delay may mean that the increase in imports that originally supported the imposition of the measure is no longer recent enough to justify an emergency measure to remedy "increased imports".

3. Australia accepts that the *Agreement on Safeguards* does not establish a specific timeframe for the imposition of a safeguard measure once the requisite determinations have been made. However, the conclusion that a delay may render the safeguard measure inconsistent with the *Agreement on Safeguards* is implicit in the requirements that the increased imports be recent, that such imports have caused or threatened to cause serious injury and that a safeguard measure is imposed only to the extent necessary to remedy this injury.

4. The Appellate Body in *Argentina – Footwear (EC)* found that the language "such increased quantities" in Article 2.1 of the *Agreement on Safeguards* requires that the increase in exports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[2] The Appellate Body also noted that "the phrase, 'is being imported' implies that the increase in imports must have been sudden and recent."[3] Australia agrees with these findings.

5. In Australia's view, the language of Article XIX:1(a) of the GATT, Article 4.2(b) of the *Agreement on Safeguards* and Appellate Body jurisprudence[4] support the view that the injury suffered, or threat thereof, must be recent in order to justify the imposition of safeguard measures. That is, the serious injury must have been caused by a recent increase in imports, and must therefore logically also be recent itself. This is consistent with the Appellate Body's finding in *Argentina – Footwear (EC)* that safeguard measures be "emergency actions".[5]

6. Similarly, suspending the application of a safeguard measure following a determination of serious injury would indicate that there was no longer a need to prevent or remedy serious injury or to facilitate adjustment. The subsequent reapplication of the safeguard measure after one year would also raise doubts as to whether the same serious injury (or threat thereof) still existed.

7. In addition, if the serious injury or the threat thereof is not recent, it may be difficult to show that the measure is still "necessary" to prevent or remedy serious injury or facilitate adjustment within the meaning of Articles 5.1 and 7.1 of the *Agreement on Safeguards.* In particular, noting that safeguard measures are intended to be *emergency* actions to prevent or remedy injury, a delay before the safeguard measure is applied suggests that there may no longer be the urgency that previously necessitated such a measure.

[1] Appellate Body Report, *United States – Steel Safeguards*, para. 331.
[2] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[3] Ibid., para. 130.
[4] Ibid.
[5] Ibid., paras. 93-94.

8. If a Member decides to extend a safeguard measure during its four year application period, the authorities must show that it continues to be necessary under Article 7.2 and in conformity with the procedures set out in Articles 2, 3, 4 and 5. That is, the authorities must demonstrate that the emergency measures continue to be justified due to a serious injury or threat thereof caused by increased imports.

9. Finally, Australia notes that the extent to which a delay in application of the safeguard measure renders it inconsistent with the requirements of the *Agreement on Safeguards* will largely depend on the facts of each case.

II. NOTIFICATION OF SAFEGUARD MEASURES

10. Article 12.1 of the *Agreement on Safeguards* creates three discrete obligations for Members to immediately notify the initiation of a safeguard investigation and the reasons for initiation; any findings of serious injury or threat of serious injury caused by increased imports; and any decision taken to apply or extend a safeguard measure. Australia understands a "finding" under Article 12.1(b) to mean a determination within the meaning of Article 2 of the *Agreement on Safeguards* made pursuant to an investigation under Article 3 that a 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.

11. Article 12.2 of the *Agreement on Safeguards* sets out further requirements for Members when making notifications referred to in Article 12.1, including the provision of a "timetable for progressive liberalization." Australia notes that the Appellate Body in *United States – Wheat Gluten* specifically clarified that the notification obligations set out in Articles 12.1(b), 12.1(c) and 12.2, although related, are discrete.[6]

12. Australia emphasises the importance of not conflating the requirements of Articles 12.1(a), 12.1(b) and 12.1(c). The initiation of an investigation, the making of a finding that domestic industry has suffered a serious injury or is suffering from the threat of a serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are three discrete matters. Immediate notification of each of these actions to the Committee on Safeguards is important in order to preserve the transparency of emergency safeguard measures and to ensure that WTO Members are able to monitor the progress of safeguard investigations and measures.

13. In Australia, the Productivity Commission is the competent authority that undertakes safeguard investigations following referral from the Australian Government. The Productivity Commission's report on its findings and recommendations is submitted to the Australian Government upon completion of its investigation. Under the *Productivity Commission Act 1998* (Cth), the Productivity Commission must table and make public its report within 25 sitting days of Parliament. Australia's practice has been to publish the report within a timeframe ranging between the same day or up to three days with notification to the WTO on the same day.

14. The Productivity Commission's findings and recommendations are not legally binding. As such, the Australian Government may choose not to accept the Productivity Commission's recommendation to impose a measure.

III. REQUIREMENTS FOR THE PUBLICATION OF A REPORT CONTAINING THE FINDINGS OF THE SAFEGUARD INVESTIGATION

15. Together, Articles 3.1 and 4.2(c) establish that the report of the competent authorities, setting out the findings and reasoned conclusions resulting from the investigation, must be published promptly and should include a detailed analysis of the investigation and the factors examined. Australia emphasises that these two requirements cannot be read in isolation from one another.

16. Given that Article 12 contains discrete obligations to notify both the findings of the competent authority and the government's decision to apply a safeguard measure, the obligation

[6] Appellate Body Report, *United States – Wheat Gluten*, para. 124.

to publish a report in Article 3.1 is clearly distinct from the timing of any subsequent decision to apply a safeguard measure and related notification requirements. It is important not to conflate the obligations to publish a report of the findings of the safeguard investigation; to notify the Committee on Safeguards; and to notify Members with a substantial interest as exporters of the relevant product if a safeguard measure is actually adopted under Article 12.1 and 12.3. For instance, WTO Members are still required to publish the findings of their investigation where these findings reflect that a safeguard measure is not justified.

IV. ADDITIONAL OBSERVATIONS AS TO THE SCOPE OF THE SAFEGUARD MEASURE

17. In addition to the conditions of Article 2.1, Australia notes the more detailed requirements of Article 4.2(a) and (b) of the *Agreement on Safeguards* in relation to injury and causation.

18. Following the initial application of the safeguard measure, Ukraine appears to have removed the measure from a subset of the products on which its original determination was based.[7] This raises the question of whether injury caused by the increase in imports of the remaining products would have, by itself, justified the imposition of the measure.

[7] Ukraine's Notification to the WTO, G/SG/N/10/UKR/3/Suppl.1, 22 May 2013.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The EU welcomes the adoption of BCI procedures in this case. We consider that BCI procedure should be broadly similar in all trade remedy cases and that ADA and ASCM BCI procedures should be aligned on those adopted in the present case. Members submitting BCI are not required to obtain prior written authorisation from any firm. They should not be obliged – merely encouraged – to follow the confidentiality designation given by the investigating authority. Not only parties, but also panels and third parties should have the right to challenge BCI designation.

2. Art. 3.1 AoS, first sentence, does not contain any express obligation that the investigation be objective. However, the term "investigation" implies objectivity, and this is confirmed by the use of the term "objective" in other provisions of the AoS. Art. 3.1, first sentence, does not contain any express obligation regarding the time between the end of an investigation period and the entry into force of a safeguard measure. Investigating authorities thus have a discretion with respect to this matter, albeit not one that is unfettered. There should not be an excessive period between the end of an investigation period and the initiation of an investigation, the determination, or the application of the measure, particularly given the emergency nature of safeguard measures. Up-dated data should be accepted as long as this remains possible, subject to the requirements of due process. The determination and application of a measure should be based on sufficiently recent data. In this respect, the ADA and ASCM provide relevant context.

3. There is a difference between determination and application, but they are not clinically isolated. As a gap opens up, the investigation and determination may no longer support the application. The situation is not analogous to a Member deciding to apply or not to apply a bound tariff rate. In the case of a contingent trade remedy a Member only has a right to apply the duty if certain conditions are present. If those conditions are not present, there is no right to apply the relevant duty. There is a textual connection between investigation and application in Art. 5(1) of the AoS, which refers to "the last three representative years".

4. For example, assume a data-lag of three months. Imports of the relevant product are: 2010 (95), 2011 (0), 2012 (105), 2013 (100). There is a sudden increase in imports in the first six months of 2014. An investigation is initiated on 1 July 2014 (based on data for January to March 2014). The record closes on 1 October 2014 (with data for the first six months of 2014 confirming the sudden increase). The measure is adopted and applied on 1 January 2015. The quantitative restriction is 100 based on "the average of the last three representative years". 2011 (where there was an unrelated exogenous shock) is rejected as unrepresentative. The first six months of 2014 are not representative, because they constitute the sudden increase being investigated. Data for the second six months of 2014 is, quite properly, not on the record. The measure is consistent with the AoS. Now assume there is a gap of one year between adoption (1 January 2015) and application (1 January 2016). At the moment of application (1 January 2016) the quantitative restriction must be based on the last three representative years. Otherwise, there may be a breach of Art. 5.1, but also a breach of Art. 3.1, contextually informed by Art. 5.1. We would apply the same logic to suspension and un-suspension.

5. The EU observes that the AoS does not contain any further elaboration of the term "reasonable public notice". It may reasonably be understood in light of the context provided by the ADA and the ASCM. One would expect the publication of a document providing reasonable notice of the investigation to all interested parties. The term "interested parties" in the AoS should be understood to include the exporting Member. The EU doubts that Ukraine's notice complied with these requirements. Further, we observe that the obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law, in conjunction with the obligation of notification under Art. 12.2, should also serve the purpose of Art. 12.3 of providing an adequate opportunity for prior consultations with those Members having a substantial interest as exporters, including with respect to the compensation provided for in Art. 8.1. The EU is not persuaded that these requirements were satisfactorily complied with in this case.

6. A failure to publish the report/analysis constitutes a breach of the procedural obligations in Arts. 3.1 and 4.2(c). The EU suggests that the Panel also assess the WTO consistency of the report/analysis. If the Panel determines that the report/analysis is inconsistent with one or more other procedural or substantive obligations, it would be appropriate to include such findings in the Panel's report.

7. The temporal parameter regulating the publication obligation is the term "promptly" in Art. 4.2(c) of the AoS. This term refers to publication after some other event. Such other event is not the application of a safeguard measure, because that would imply an element of retroactivity. We suggest an harmonious reading with Art. X of the GATT. Pursuant to Art. X:1 of the GATT publication must be made "promptly", meaning promptly following the determination itself. However, under Art. X:2, enforcement can only occur on or after publication. Consequently, Art. 4.2(c) of the AoS requires publication promptly following the determination that the conditions justifying the use of a safeguard measure are present, and the form that such safeguard measure would take.

8. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. The measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. This may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. However, there is no express reference to the global financial crisis.

9. The measure at issue must contain a reasoned and adequate explanation regarding the existence of unforeseen developments, sufficient for the importing Member to understand and contest if it so wishes. In the municipal proceedings, such unforeseen developments must be demonstrated to have existed pursuant to evidence on the record. Such evidence should be referenced in the measure or be on the record and adduced by the importing Member to the Panel, at its own initiative or on request.

10. The term "result" in Art. XIX:1(a) of the GATT 1994 supports the view that there must be a logical connection or causal link between the unforeseen developments and the increase in imports. One way of getting at the question of whether or not there is such a link is to look at the question of whether or not the unforeseen developments have modified the competitive relationship between imported and domestic products, causing a decrease in domestic sales. The causal link should be genuine and substantial. Non-attribution factors, including foreseen or foreseeable developments, should be discounted.

11. The unforeseen developments must be unforeseen at the time of the negotiations, and specifically when they close. In the event of a difference, we would agree that the latter date provides a better guide.

12. The obligations in Art. 12 to notify and provide opportunities for consultations are an integral part of the transparency process related to the adoption of safeguards. The Appellate Body has clarified that the notification obligations set out in Arts. 12.1(b), 12.1(c) and 12.2, although related, are discrete. The action of initiating an investigation, the action of an investigatory authority coming to a finding that a domestic industry has suffered serious injury or is suffering from the threat of serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are separate matters. Each of these actions must be immediately notified to the Committee on Safeguards.

13. Ukraine did not make an immediate notification of the initiation of a safeguard investigation under Art. 12.1(a). Furthermore, Ukraine also notified its safeguard investigation findings and measure under Art. 12.1(b) at the same time as its notification under Art. 12.1(c). As a third party joined in the consultations, the EU participated in the consultations between Japan and Ukraine. Like Japan and the United States, we think that the information shared by Ukraine prior to 19 April 2012, (i.e., the Key Findings) lacked much of what is required under Art. 12.2. Ukraine had to provide "all pertinent information," not just the listed mandatory components in Art. 12.2. The Appellate Body has clarified that "all pertinent information" is assessed objectively and should include, at a minimum, the items listed in Art. 12.2 as well as the factors evaluated pursuant to Art. 4.2. This would include at least the proposed date of introduction of the safeguard measure,

the expected duration of the safeguard, and the timetable for progressive liberalization. Neither Ukraine's written submission, nor the Key Findings that spurred the 19 April 2012 consultations, indicate that any of this information was provided to Japan in advance of those consultations. The EU therefore agrees that Ukraine failed to provide adequate opportunity for prior consultations under Art. 12.3.

14. A Member cannot hold Art. 12.3 consultations after sharing the information that Art. 12.2 requires in notifications under Art. 12.1(b) and (c), even if it has not actually submitted its Art. 12.1(b) and (c) notifications. Art. 12.2 provides that "[t]he 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." Thus, the "information provided under paragraph 2" would include any information provided at the request of the Council for Trade in Goods or the Committee on Safeguards. However, Ukraine gives no indication of how any such request could be made in the absence of Art. 12.1(b) and (c) notifications. Therefore, even if the documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

15. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. We note that the measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. As we understand it, this may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. We consider that the measure at issue does not demonstrate that the increase in imports was recent enough, sudden enough, sharp enough or significant enough to justify the measure; and that there is a lack of persuasive qualitative analysis of the data in the measure at issue.

16. The EU considers that publication of indexed figures in relation to the injury requirements may comport with the requirements of Arts 3.1 and 4.2(c) of the AoS, provided that it is possible, on such basis, to properly assess the measure against the obligations in the AoS. The EU further considers that, in the context of panel proceedings, in which confidential information is protected, the investigating authority (that is, the defending Member) is required to adduce such confidential information as is necessary for the assessment of consistency. Failure to do so may justify the drawing of reasonable inferences and reliance on the facts available.

17. Art. 2.1 of the AoS refers to an increase in imports relative to domestic production, not consumption. By contrast Art. 3.2 of the ADA and Art. 15.2 of the ASCM refer to an increase in imports relative to production or consumption. Certain items are included in production but not consumption, such as exports. Thus, when comparing with domestic production, a decrease in exports could give the impression of a relative increase in imports, when none would in fact exist. However, given that the terms of the different agreements are clearly precise and different on this point, the EU would conclude that there is no obligation, in Art. 2.1 of the AoS, to make the comparison with domestic consumption, or with domestic production and domestic consumption.

18. However, Art. 4.2(a) of the AoS refers expressly to the "share of the domestic market taken by increased imports" and Art. 4.2(b) requires a causation and non-attribution analysis. Therefore, even if the issue of consumption may not be relevant for the determination of increased imports, it will be relevant for the assessment of whether or not serious injury has been caused.

19. Art. 4.2(a) requires an investigating authority to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. The term "changes" indicates that all changes during the period of investigation may be relevant. In the example given above one would ideally expect the domestic industry indicators to be positive and stable during 2010 to 2013, but to deteriorate during the first six months of 2014, as a result of the unforeseen developments and the imports. However, if, during each of the nine six month periods making up the investigation period, the domestic industry indicators simply toggle between negative and positive, that could undermine the proposition that the unforeseen developments and the imports have caused the negative indicators in the first six months of 2014. It might rather suggest, for example, that there is a seasonal variation, with a downward turn in the first six months of each year.

20. One approach to injury and causation is to assess them, at least initially, separately, in a so-called bifurcated analysis. First one determines whether or not there is serious injury. Second, one determines its cause. This can work for some kinds of serious injury, where the existence of the injury is determined by reference to historical data and trends. For other types of serious injury (such as price suppression or impedance) a unitary analysis is necessary, because it is not possible to distinguish between the existence of the injury and what is causing it. Ultimately all injury and causation analysis must be unitary, in the sense that the analysis must eventually be made on a holistic basis. Although Art. 4.2(a) focuses on injury and Art. 4.2(b) focuses on causation and non-attribution, they are part of a single and continuous process of analysis designed to ascertain whether or not the unforeseen developments and the imports have explanatory force for the serious injury. Thus, if, in the context of Art. 4.2(a), an investigating authority ignores intervening trends in the data, it is just "kicking the can down the road" to Art. 4.2(b). Rather than such a compartmentalised approach, a better approach is to see the two provisions as related and as requiring a logical progression of analysis.

21. Art. 4.2(b) requires objective evidence of a causal link between the imports and the serious injury; and that injury caused by other factors shall not be attributed to the imports. As we see it, the question is whether or not the other factors are such as to sever any genuine and substantial relationship of cause and effect between the imports and the serious injury. For example, the facts might demonstrate that the state of the domestic industry is rather the result of a very large debt incurred to make an investment that has failed. Perhaps a licence was revoked, or an envisaged market did not materialise. We believe that an investigating authority is required to examine and assess such alleged non-attribution factors when they are brought to the notice of the investigating authority, and particularly when they are put to the investigating authority during the course of the municipal proceedings by one or more of the interested parties.

22. Assessing causation and non-attribution is rarely an easy or an exact science. Qualitative methods involve weighing all the evidence and assessing the temporal relationship between different events, in order to come to a rational and reasonable conclusion about what caused what. Quantitative methods, which are not required by the AoS, would involve setting up a model of the market; testing and calibrating the model in order to ensure that it provides a reasonable picture of how the market actually works; and then shocking the model by eliminating the putative cause and analysing the results.

23. Art. 7.4 of the AoS does not preclude liberalisation through decisions post-dating the initial determination or the initial application. However, it is difficult to reconcile the obligation of liberalisation with the proposition that, following the determination, during an initial period the measure should be relatively more permissive (that is, not applied at all) and in a subsequent period relatively more restrictive (that is, applied). Viewed over time, such a measure does not progressively liberalise. It does the opposite: it progressively protects.

24. Art. 12.2 of the AoS mandates that the notification shall include a timetable for progressive liberalisation. If this is not done, and the measure at issue is silent, the evidence would support the view that no progressive liberalisation is provided for, has occurred, or is occurring. If the Panel's assessment reveals that there is a measure before it with a duration of three or four years, and that one or more regular intervals has passed without any progressive liberalisation, then the Panel would be in a position to determine a breach not only of Art. 12.2, but also of Art. 7.4. What amounts to a regular interval would need to be assessed on a case-by-case basis, but any period in excess of one year would generally be difficult to justify. In such circumstances, if the defending Member wishes to avoid an adverse finding under Art. 7.4, it would be for the defending Member to adduce evidence pertinent to the question of progressive liberalisation.

25. In the case of initial application, the determination must be duly supported by a finding that increased imports have caused serious injury or threat thereof, as detailed in the investigation. If there is an excessive period of time between the determination and the application, the results of the investigation may no longer objectively support the application. This could be cured by re-opening the record and up-dating the data, subject to due process. In the case of extension, Art. 7(2) of the AoS requires a separate finding that the safeguard measure continues to be necessary to prevent or remedy serious injury. In the case of remedy, this means that there will be a separate finding of serious injury to justify the extension. In the case of prevention, there will have to be a separate finding that removal of the measure would result in serious injury.

26. There are circumstances in which the concept of estoppel can serve as a useful analytical tool, particularly when the actions or the conduct of a Member may reasonably be taken to imply a particular conclusion.

27. In principle, pursuant to Art. 3.8 of the DSU, an infringement is considered prima facie to constitute a case of nullification or impairment. Members have occasionally attempted to rebut that presumption, but none has ever succeeded. It would be particularly problematic for a WTO adjudicator to step into a municipal proceeding and substitute its own judgment for the future judgment of an investigating authority as to what other consequences a breach might or might not have in the specific context of the municipal proceedings. It is for the defending Member, in the first place, to decide how it wishes to pursue the objective of compliance. Should a panel wish to do so, it can make suggestions pursuant to Art. 19(1) of the DSU.

ANNEX C-3

ORAL STATEMENT OF KOREA, REPUBLIC OF

Mr. Chairman, Members of the Panel,

1. The Republic of Korea appreciates this opportunity to present its views to the Panel as a third party. While several important issues are raised in this dispute, Korea would like to focus its statement on the meaning of "explanation" presented in the Agreement on Safeguards.

2. As has been previously confirmed by the Appellate Body, the importing Member's safeguard measures amount to "extraordinary measures"[1]. This is true in part because safeguards "do not depend on 'unfair' trade action, as is the case with anti-dumping or countervailing measures."[2] Rather, an importing Member may impose a safeguard measure when the increase in imports is caused by developments which were not foreseen at the time that the WTO commitments were made.

3. The extraordinary nature of safeguards requires that a high standard be met when it is imposed. The measure must be temporary and carefully administered. Appropriate compensation needs to be provided. And importantly for this argument, explanation that details the measure's rationale is required.

4. "Explanation" is not language that explicitly appears in the Safeguards Agreement. This is a departure from other trade remedy agreements, such as the Subsidies Agreement and the Anti-Dumping Agreement. Nevertheless, Korea is convinced that the Safeguards Agreement obligates a Member seeking to impose a safeguard measure to provide adequate explanation as to why the extraordinary measure was necessary.

5. Specifically, Articles 3.1 of the Safeguards Agreement states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) states that "[t]he 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." An examination of the Agreement's provisions reveals that the competent authorities' obligation to explain its measures is clearly laid out.

6. Moreover, the Appellate Body has established a high standard for meeting the obligation of explanation stipulated in the Agreement. In *US – Lamb*, the Appellate Body stated that "in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, "establishing explicitly" implies that the competent authorities must provide a 'reasoned and adequate explanation of how the facts support their determination.'"[3] The Appellate Body further noted that "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."[4] In *US – Steel Safeguard*, the Appellate Body stated that "a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and in a way that leaves nothing merely implied or suggested, that imports from sources covered by the measure, alone, satisfy the requirements for the application of a safeguard measure."

7. The Safeguards Agreement is an acknowledgement of the importing Member's interest in protecting its industry from increased imports. At the same time, the WTO seeks to balance the importer's interest with that of the exporter by placing the onus on the importing Member to provide detailed explanation for imposing the safeguard measure.

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[1] Appellate Body Report, *US – Line Pipe*, para. 80.
[2] Appellate Body Report, *US – Line Pipe*, para. 81 (quoting *Argentina – Footwear (EC)*, paras. 93-95.)
[3] Appellate Body Report, *US – Line Pipe*, para. 181.
[4] Appellate Body Report, *US – Line Pipe*, para. 194.

8. Detailed explanation that satisfies a certain standard also holds transparency implications. A competent authority is required to provide information as to the unforeseen developments that causes or threatens serious injury to its domestic industry. Transparency in administering safeguard measures is all the more significant given the extraordinary and exceptional nature of the measure.

9. Detailed explanation is important for due process purposes as well. It allows the exporter an opportunity to review the competent authority's decision and, if necessary, to plead the illegality of the measure before the importing Member's domestic courts or the WTO.

10. Korea posits, in light of the object and purpose of Articles 3.1 and 4.2(c) of the Safeguards Agreement, as well as relevant decisions by the Appellate Body, that a high standard of explanation has been established which needs to be met when imposing a safeguard measure. A competent authority that provides insufficiently detailed explanations for its measure would have failed to clear that standard.

11. Thank you.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. Introduction

1. Turkey is participating in this Panel not only because of its systemic interest in the interpretation and implementation of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards (AoS), but also its substantial trade interests as it is one of the major exporter countries and has been an interested party during the investigation process.

2. In the present dispute, Turkey wishes to contribute to the Panel's analysis by expressing its opinion on four issues, namely i) requirement of *unforeseen developments* within the meaning of Article XIX of the GATT 1994, ii) the analysis of increase in imports iii) serious injury or threat of serious injury and iv) the causation requirement.

II. The Requirement of Unforeseen Developments within the Meaning of Article XIX of the GATT 1994

3. In their submissions, the parties of the present dispute take different views on whether the determination of unforeseen developments is a prerequisite for imposition of a safeguard measure. While Japan asserts that the existence of unforeseen developments is a prerequisite for imposition of a safeguard, Ukraine rejects such claims.[1]

4. Article XIX:1(a) of the GATT 1994 provides that:

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

5. First of all, as underlined in the previous Appellate Body and Panel Reports, Article XIX of the GATT 1994 and the Safeguards Agreements are to be applied cumulatively.[2] Thus, in order to impose a WTO-consistent safeguard measure, a Member must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.[3]

6. Regarding the effects and the requisite nature of the circumstances in the first clause of Article XIX:1(a), the Appellate Body provided useful guidelines, which, in Turkey's view, should be followed. According to the Appellate Body, the first clause of Article XIX:1(a), which includes i) *unforeseen developments* and ii) *the effect of the obligations incurred by a [Member] under the GATT*, do not establish independent conditions, additional to the conditions set forth in the second clause of Article XIX:1(a), which are reiterated in Article 2.1 of the AoS.[4] However the circumstances in the first clause must be demonstrated as a matter of fact, in order for a safeguard measure to be applied consistently with Article XIX of the GATT 1994.[5]

7. As the Appellate Body use the word "circumstances" instead of a singular form, in reference to the situations in the first clause, a Member wishing to apply a safeguard measure must

[1] Japan's first written submission, para. 75; Ukraine's first written submission, para. 73.
[2] *See*, for example, Appellate Body Reports in *Argentina – Footwear (EC),* para. 92; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71; and Panel Reports in *Argentina – Preserved Peaches*, para. 7.12; *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.
[3] Appellate Body Reports, *Argentina – Footwear (EC),* para. 84.
[4] Appellate Body Report, *Korea – Dairy*, para. 85
[5] Appellate Body Report, *Korea – Dairy*, para. 85 and Appellate Body Report, *US – Lamb*, para. 71.

demonstrate that increase in imports is not only the result of "unforeseen developments" but also the result of "the effect of the obligations incurred by the Member under the GATT 1994", as well.[6] It should also be noted that such circumstances must be established through a reasoned and adequate explanation in the document that put the measure in effect.[7]

8. Moreover, increase in imports should be the result of the factual circumstances referred to in the first clause of the Article XIX of the GATT 1994 and cannot be regarded as the unforeseen development itself. In this regard, as indicated by the Panel in *Argentina — Preserved Peaches,* "[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.*[8]

9. Thus, Turkey considers that the existence of absolute or relative increase in imports cannot amount to a demonstration of the presence of unforeseen developments. Such an interpretation of the unforeseen developments requirement has been previously rejected by a WTO Panel[9] and would be inconsistent with Article XIX:1(a) of the GATT 1994.

10. Furthermore, as emphasized by the Appellate Body in *US-Lamb*, demonstration of the existence of unforeseen developments must be made before the safeguard measure is applied.[10] Therefore, in Turkey's view, any identification of "unforeseen developments" after the imposition of the measure, cannot make the measure consistent with Article XIX:1(a) of the GATT 1994.

III. The Analysis of Increase in Imports

11. Article 2.1 of the AoS states 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 to the domestic industry that produces like or directly competitive products." (emphasis added).

12. Accordingly, increased imports, in absolute or relative terms, is a condition for the application of a safeguard measure. As the jurisprudence of WTO confirms, Turkey notes that "the increased imports requirement *can* be met not only if there is an absolute increase in imports, but also if there is an increase relative to domestic production".[11]

13. However, in Turkey's view, certain conditions should be met in order to be in compliance with the Article XIX of the GATT 1994 and AoS. First of all, as the Appellate Body explained, "the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination."[12] Instead, 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".[13] This means that a simple determination of increase in imports either in absolute or relative terms do not make the measure consistent with Article XIX and AoS. On the contrary, Turkey considers that an investigating authority should make a detailed and reasoned analysis both quantitatively and qualitatively for establishing that increase in imports is sudden, recent, sharp, and significant enough to cause or threaten to cause serious injury.

14. Secondly, it should be noted that a simple comparison of imports levels at the start and the end of the period of investigation (POI) is not acceptable. According to the Appellate Body in *US – Steel Safeguards*, such a determination "could easily be manipulated to lead to different results,

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[6] Appellate Body Report, *Korea – Dairy*, para. 85

[7] Appellate Body Report, *US – Lamb*, para. 76. *See* also Panel Report, *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.

[8] Panel Report, *Argentina – Preserved Peaches*, para. 7.24 (emphasis in original).

[9] Panel Report, *Argentina – Preserved Peaches*, para. 7.24

[10] Appellate Body Report, *US – Lamb*, para. 72

[11] Appellate Body Report, *US – Steel Safeguards*, para. 390 (emphasis in original).

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

depending on the choice of end points".[14] Rather, the Appellate Body emphasized the significance of the *trend* in imports over the entire POI and the need for "an *explanation* of how the *trend* in imports supports the competent authority's finding".[15] Similarly, the Appellate Body in *Argentina – Footwear* stated that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)".[16] This means that the investigating authority should examine both "the *rate* and *amount* of the increase in imports … in absolute and relative terms."[17]

15. Therefore, in Turkey's view, especially where there is an absolute decline in imports over the POI, an adequate and justified explanation is indispensable for a conclusion that imports in "such increased" quantities caused serious injury to the domestic industry. In the absence of that explanation, the safeguard measure would be inconsistent with Article 2.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

16. Thirdly, as it was highlighted by the Appellate Body in *Argentina – Footwear (EC)* the increase in imports must have resulted from an "unforeseen development" and the increase in imports should also be "unforeseen" or "unexpected".[18]

17. For the foregoing reasons, Turkey respectfully asks the Panel, to take into account the above mentioned conditions in analysing the consistency of the measure at issue with Article XIX:1(a) of the GATT 1994 and provisions of AoS.

IV. Serious Injury or Threat of Serious Injury

18. Both Article XIX of the GATT 1994 and Article 2 of the AoS provide that a safeguard measure may only be imposed if the increased imports are made "under such conditions as to cause or threaten to cause serious injury". Article 4 of the AoS lays down more detailed rules in regard to determination of serious injury or threat thereof.

19. In the case at hand, Turkey would like to draw the Panel's attention to requirement of Article 4.2(a) for the determination of serious injury and threat of serious injury. Article 4.2(a) necessitates investigating authorities to "evaluate *all relevant factors* of an objective and quantifiable nature having a bearing on the situation of the industry, in particular, the rate and *amount* of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment". (emphasis added)

20. Turkey would like to note that the Appellate Body has established that *all* but not some of the factors mentioned in Article 4.2(a) must be considered by the investigating authority during the investigation.[19] Moreover, the investigating authority's consideration of each listed factor must be "reasoned and adequate".[20] In this regard, an evaluation of each listed factor might not necessarily show that each such factor is "declining", in Turkey's view, however, they all - together with any other relevant factors- have to be evaluated by the investigating authority. Subsequently, the outcome of such evaluation has to demonstrate a significant overall impairment in the position of the domestic industry. Therefore, if one or some of the factors have not been evaluated by the investigating authority at all, or investigating authority's consideration of each listed factor is not "reasoned and adequate", then the measure would become inconsistent with the Article 4.2(a).

V. The causation requirement

21. Article XIX: 1(a) of the GATT 1994 and, Article 2.1 and 4.2(b) of the AoS require the demonstration of the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. Article 4.2(b) of the AoS further specifies that

[14] Appellate Body Report, *US – Steel Safeguards,* para. 354.
[15] Appellate Body Report, *US – Steel Safeguards*, para. 374 (emphasis in original).
[16] Appellate Body Report, *Argentina – Footwear*, para. 129.
[17] Appellate Body Report, *Argentina – Footwear*, para. 129, quoting with approval the panel finding in that dispute.
[18] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[19] Appellate Body Report, *Argentina – Footwear (EC),* para. 136.
[20] Appellate Body Report, *US – Lamb,* para. 103.

"when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".

22. Thus, in order to meet the causation requirement the investigating authority must demonstrate, first, the existence of the causal link between increased imports and serious injury or threat thereof and second, non-attribution of injury caused by factors other than the increased imports.[21]

23. In regard to causal link between increased imports and serious injury or threat thereof, the Appellate Body has clarified that "in an analysis of causation, 'it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[22] The Appellate Body further emphasized that there must be a "genuine and substantial relationship of cause and effect" between increased imports and serious injury.[23] Therefore, in Turkey's view, in order to comply with the requirements of Article 4.2(a), an investigating authority has to provide reasoned and adequate explanation that confirms the link, in terms of timing and movements, between increased imports and serious injury and/or threat of serious injury.

24. Concerning the non-attribution analysis, in *US – Lamb,* the Appellate Body clarified that an investigating authority has to separate and distinguish the injury caused as a result of increased imports from the injury caused as a result of other factors.[24] Accordingly, in order to make a proper non-attribution analysis, the investigating authority is required not only to identify the nature and extent of the injurious effects of the known factors other than increased imports, but also to separate and distinguish injurious effects of those other factors from the injurious effects of the increased imports.

VI. Conclusion

25. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review carefully the comments stated in this submission, in interpreting Article XIX of GATT 1994 and the AoS.

[21] Appellate Body Report, *US – Line Pipe,* para. 208.
[22] Appellate Body Report, *Argentina – Footwear*, para. 144.
[23] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[24] Appellate Body Report, *US – Lamb*, paras. 178-181.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. Views Expressed in the U.S. Third Party Submission

1. The report that must be published by the competent authorities pursuant to SGA Articles 3.1 and 4.2(c) serves an essential role in the review of safeguard measures. It allows other Members to understand why a safeguard measure has been adopted, and - in the event of a WTO dispute settlement proceeding - allows a WTO panel to assess whether a safeguard action complies with the substantive obligations contained in GATT Article XIX and the SGA. Not surprisingly then, published reports must address in considerable detail a broad range of issues, including unforeseen developments under GATT Article XIX:1(a), the rationale for finding the requisite increased imports based on consideration of the entire period of the investigation rather than simply comparing end points. The published report must set out in equal detail the competent authority's evaluation of all relevant factors and a reasoned explanation for concluding that the domestic industry suffered serious injury or the threat thereof, that the increased imports ***caused*** the serious injury or threat thereof, and that other factors causing injury to the domestic industry are not attributed to the increased imports.

2. The report published by Ukraine is concise in the extreme. Furthermore, in many instances, Ukraine's written submission provides justifications for its determinations that appear nowhere in its published report. The Appellate Body has rejected a panel's reliance on supplemental information provided during dispute settlement proceedings.

3. Having recognized the considerable importance of a thorough, reasoned published report, the United States notes that some conclusions and sets of facts require more explanation than others, and the length of an explanation with respect to any single issue should not be dispositive. Although panels should not be put in the position of having to infer the competent authority's reasoning, they also need not ignore reality or invent ambiguity or complexity where none exists.

4. The SGA does not specify how soon a safeguard measure must be put into place. If a Member were within its rights to impose a safeguard measure for four years, it would be odd to suggest that delaying application of the measure for a year and putting it in place for three years in and of itself creates an inconsistency. Delay following a decision to impose safeguard measures may in some instances reflect desirable behavior. A Member may be working to address concerns raised in consultations following notification of the proposed measures. Thus, requiring a Member to choose between (1) implementing a safeguard measure during a very short window after the decision is taken, or (2) losing the right to impose it at all, could cause a Member to take more restrictive measures than it would otherwise. On the other hand, significant delay in imposing safeguard measures tends to undercut the notion that such measures constitute an "emergency action" necessary to prevent or remedy serious injury and to facilitate adjustment. This is equally true where an investigation has resulted in a finding of a threat of serious injury, which requires that the anticipated serious injury be "imminent," or "on the very verge of occurring." Extended uncertainty as to the timing and degree of the final safeguard measure may disrupt trade more than actual imposition of a measure.

5. It is not clear that a Member can hold Article 12.3 consultations after sharing the ***information*** that Article 12.2 requires in notifications under Article 12.1(b) and (c), even if it has not actually submitted its Article 12.1(b) and (c) notifications. Article 12.2 allows the Council for Trade in Goods or the Committee on Safeguards to request such additional information as they may consider necessary. Thus, the "information provided under paragraph 2" presumably would include any information provided in response to such a request. However, Ukraine gives no indication of how any such request could be made in the absence of Article 12.1(b) and (c) notifications. Therefore, even if documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

6. In addition, Japan argues that the information shared by Ukraine prior to April 19, 2012, (*i.e.*, the Key Findings) lacked much of what is required under Article 12.2. Japan appears to be correct that neither Ukraine's written submission, nor the Key Findings that spurred the April 19, 2012, consultations, indicate that the proposed date of introduction of the safeguard, the expected duration of the safeguard, or the timetable for progressive liberalization was provided to Japan in advance of those consultations.

7. The United States has concerns with Japan's challenge to the validity of the April 19, 2012, consultations on the basis of the change in one duty rate from 15.1 percent (the rate for cars with larger engines proposed prior to consultations) to 12.95 percent (the rate for those cars that was eventually applied). The proposed measure on which the Members consult need not be identical in every respect to the one that is eventually applied. Prior consultations allow interested Members to seek, *inter alia*, modification of the measure. Indeed, Ukraine implies that it lowered the duty rate as a result of the consultations it held with Japan. Precluding modification of a measure in response to concerns expressed by interested Members (or always requiring one additional round of consultations that leads to no changes) would diminish rather than preserve or enhance the value to interested Members of Article 12.3 consultations. Because modification of a measure would subject the Member implementing the safeguard to either a finding that it breached its Article 12.3 obligations, or the delay and expense of additional consultations, Japan's interpretation would create a significant disincentive to modification of measures in the interested Member's favor, including a reduction of duty rates. Thus, the modification of the duty rate should not support a finding that the April 19, 2012, consultations were inconsistent with Article 12.3.

8. Japan claims that Ukraine breached its obligations under Article 7.4 because it did not provide for a progressive liberalization of the measure when the safeguard was initially imposed as reflected in the March 14, 2013, published notice of the decision. Japan relies on the same facts to claim that Ukraine breached its notification obligations under Article 12.2 of the SGA. Ukraine argues that the substantive obligation under Article 7.4 to progressively liberalize the safeguard measure is distinct from the procedural obligation under Article 12 to notify the timetable for liberalization. Ukraine maintains that it complied with its obligations under Article 12.1(b) and (c) through its March 21, 2013, notifications, but it acknowledges that it did not notify any timetable for progressive liberalization until March 2014. The United States notes that Article 12.2 explicitly states that notifications under Article 12.1(b) and (c) "shall include," *inter alia*, a "timetable for progressive liberalization." These requirements serve an import transparency and information purpose, including by allowing for meaningful consultations.

II. Views Expressed in the U.S. Oral Statement

9. The EU suggests that BCI procedures should be substantially similar across disputes under the AD Agreement, the SCM Agreement, and the SGA. These panel proceedings are not an appropriate forum for pursuing such an objective. Any systemic solution should be sought through the WTO bodies designed to solicit and reflect the views of all Members.

10. The critical point with respect to paragraph 1, sentence 3 of this Panel's BCI procedures is whether the competent authorities treated the information as BCI, either because they accepted the submitter's designation or because they resolved a challenge in favor of confidentiality. If that is the case, a panel should, in the first instance, follow the designations of the competent authorities. Accordingly, this sentence could be clarified by substituting the words "treated by" for the words "submitted to" so that it reads, in relevant part: "BCI shall include information that was previously treated by the investigating authorities of Ukraine…as BCI in the safeguard investigation at issue in this dispute."

III. Views Expressed in U.S. Responses to Questions from the Panel

11. The SGA sets out no explicit obligation that fixes a specific time, either relative to the data in the underlying investigation or the date the decision is taken, by which a safeguard measure must be put into force. However, the U.S. position does not imply that, because no explicit obligation on timing exists, any action, however far removed from the end of an investigation, is consistent with the SGA. It may well be that in a specific dispute, the complaining party will demonstrate that one or more SGA obligations has been breached under the particular facts and circumstances of that dispute.

12. For example, a Member's discretion to apply a safeguard measure is at all times limited by the requirement that such application be necessary to prevent or remedy serious injury and to facilitate adjustment. A long delay in applying a measure may be a relevant factor to consider in assessing whether it is necessary because the long absence of the measure undercuts the supposedly urgent nature of the safeguard measure, and it becomes more difficult to determine that a measure is necessary to prevent or remedy the particular serious injury that was previously found. Because the SGA does not establish a bright line rule as to the time for putting a safeguard into effect, it would not be appropriate to create such a rule through dispute settlement.

13. The SGA also does not explicitly require supplemental analyses or notices thereof after application of a safeguard measure has been postponed for a particular amount of time. Rather, any delay in the application of a safeguard measure, and any supplemental analysis relied upon as a basis for a safeguard measure, should be considered in the context of a particular dispute to the extent that such facts are relevant to the obligations contained in the covered agreements.

14. An unpublished report that otherwise meets the requirements of Articles 3.1 and 4.2(c) can serve as a basis for a panel's analysis of claims under the provisions of the SGA. The failure to publish a report would be inconsistent with these obligations, but in that situation, a reviewing panel would not be required to proceed as if the competent authorities undertook no analysis, which would effectively ensure consequential breaches of many substantive obligations. A fact-specific inquiry is required to determine whether a document genuinely served as a part of the report of the competent authorities.

15. There is no obligation under the SGA to continue to update information following the end of the period of investigation or more specifically following the conclusion of the investigation.

16. In the U.S. view, "promptly" in Article 4.2(c) is best understood as referring to the determination of whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the SGA. Whether publication is sufficiently prompt in any case is necessarily a fact-specific inquiry that must take account of the various circumstances of the dispute, including the potential need to undertake an analysis of whether a safeguard measure is necessary in conjunction with the serious injury determination.

17. The United States considers that figures that have been indexed to protect confidential information can be sufficient to meet the requirements of Articles 3.1 and 4.2(c).

18. A Member need not demonstrate that an increase in imports has resulted from an unforeseen development "modifying the competitive relationship between the imports and domestic products." Further, any corresponding decrease in domestic sales need not also have been caused by the change in the competitive relationship.

19. The requirement that the increased imports result from unforeseen developments stems from GATT Article XIX. Article XIX contains no requirement that the unforeseen developments modify the competitive relationship between the imports and domestic products. Because there is no requirement to demonstrate a change or modification in the competitive relationship as a separate element, there can be no requirement to demonstrate that "the decrease in domestic sales leading to injury also has been caused by the change in the competitive relationship." Indeed, there is not even a requirement in the SGA that there be a "decrease" in domestic sales.

20. "Unforeseen developments" must be unforeseen at the time the tariff concessions were made. Safeguard measures "are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."

21. Whether a POI was the recent past, and the implication of that inquiry for assessing an alleged breach under the covered agreements, depends on the facts and circumstances of a particular dispute. Any of the dates identified by the Panel—the date of the beginning of the investigation, the date of the completion of the investigation, the date of adoption of a safeguard measure, and the date of its entry into force—may be relevant to determining whether the POI was the recent past in a given dispute. The POI selected by the investigating authority must be sufficiently *recent* to provide a reasonable indication of *current* trends.

22. In the United States, after USITC makes a serious injury determination and, if the determination is in the affirmative, a recommendation regarding a remedy, the President decides whether a safeguard measure will be imposed. Under U.S. law, the safeguard measure generally shall take effect within 15 days after the President proclaims the action. However, where the President seeks to negotiate with foreign counterparts on limitations on exports from foreign countries of the subject product to the United States, the measure can take effect as much as 90 days after the President proclaims the action. Thus, under U.S. law, a safeguard measure would normally take effect between 15 and 90 days after the decision to impose the measure.

23. An increase in imports relative to consumption will not, alone, satisfy the increased imports condition in SGA Article 2.1. Rather, in the context of a determination on increased imports under Article 2.1, the competent authorities must find that imports have increased either in "absolute [terms] or relative to domestic production."

24. Separately, in the context of evaluating the relevant factors having a bearing on the situation of the industry, Article 4.2 contemplates evaluation, in particular, of *inter alia* "the share of the domestic market taken by increased imports." A change in domestic market share generally involves consideration of an increase in imports relative to domestic consumption. However, the United States allows for the possibility that a methodology could potentially exist in a given scenario that would allow for evaluation of the share of the domestic market taken by increased imports without considering an increase in imports relative to domestic consumption (*i.e.*, where the two are not one and the same). At the very least, because Article 4.2(a) requires competent authorities to evaluate "all relevant factors," it may be necessary to consider an increase in imports relative to domestic consumption where it is a relevant factor bearing on the situation of the industry.

25. The Panel's suspended application approach is a useful tool for assessing a scenario in which one year has elapsed between the taking of a decision to apply a safeguard measure and the effective date of the measure. However, the United States does not dismiss the possibility that the legal problems presented by these two scenarios may not be identical. For example, application of a safeguard measure following a suspension may be viewed as a *de facto* additional application of the measure. SGA Article 7 contains certain restrictions on re-applications of safeguard measures on the same products, including preclusion of application where a safeguard measure has been applied on the same product more than twice in the preceding five-year period.

26. Article 4.2(a) requires the competent authorities to "evaluate all factors of an objective and quantifiable nature having a bearing on the situation of that industry." "[A]n end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors." End points must be understood in context, and without evaluating the intervening data, there is no way of understanding the proper context, and no way of establishing confidence in the accuracy of the meaning or importance ascribed to the end points. Where evaluation of intervening data suggests a different conclusion than the one reached by solely evaluating the endpoints, a "reasoned conclusion" within the meaning of Article 3.1 would need to address the intervening data.

27. Neither the SGA nor GATT Article XIX: 1(A) provide any particular methodology that competent authorities must use in examining factors other than increased imports. The Appellate Body has not found the SGA to require that a competent authority "quantify" the extent of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b). The Appellate Body has stated that it leaves "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)," and it has recognized that the SGA leaves the development of appropriate analytical methodologies under Article 4.2(b) to the discretion of the competent authorities.

28. Article 7.4 requires progressive liberalization but does not reference the initial decision to impose a safeguard measure. Therefore, nothing in Article 7.4 precludes liberalization through a decision post-dating the initial decision to impose a safeguard measure. Articles 7.4 and 12.2 contain distinct obligations, and a breach of Article 12.2 does not necessarily result in a consequential breach of Article 7.4.

29. SGA Article 12.1(b) requires a Member to notify the Committee on Safeguards immediately upon making a finding of serious injury or threat thereof caused by increased imports. The

determination referenced in SGA Article 2.1 as a condition for applying a safeguard measure and further elaborated upon in Article 4 serves as the "finding" that must be notified pursuant to Article 12.1(b).

30. Members must make a finding of serious injury or threat thereof caused by increased imports in order to apply a safeguard measure. If such a finding has been made, a Member must separately decide to apply (or extend) a safeguard measure, which necessarily must consider to what extent, if at all, a safeguard measure is necessary to prevent or remedy serious injury and to facilitate adjustment. However, nothing prevents a Member from rendering these decisions in the same document or at the same time. Similarly, the Article 12.1(b) obligation to notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports is distinct from the Article 12.1(c) notification obligation upon taking a decision to apply or extend a safeguard measure. However, nothing prevents a Member from complying with both obligations in a single notification if that notification can be characterized as immediate with respect to both occurrences under the particular circumstances of the case.

31. The DSU contains no mention of estoppel or harmless error. Alleged breaches of the covered agreements must be assessed based on their text, and application of a concept of estoppel or harmless error, to the extent it led to a different result, would add to or diminish the rights and obligations provided in the covered agreements, contrary to DSU Article 3.2. Thus, it is not surprising that neither the Appellate Body nor any panel has previously applied the concept of estoppel as advocated by Ukraine in this proceeding. Indeed, previous panels have expressed skepticism about whether estoppel is applicable in the WTO dispute settlement context, noting that "it is not mentioned in the DSU or anywhere in the *WTO Agreement*." The lack of any textual basis for importing the principle of estoppel is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past, including in *EEC – Bananas I (GATT)* and *EC – Asbestos* and *Guatemala – Cement II*. These inconsistencies illustrate the dangers of seeking to import legal concepts not contained in the text of the DSU, which reflects the principles agreed to by all Members.

32. Similarly, the United States is not aware of any application by a panel or the Appellate Body of the concept of harmless error as advocated by Ukraine in this proceeding. Indeed, previous panels have refused to apply a theory of harmless error. To the contrary, a panel has previously stated that, "if a Member has violated a WTO obligation which is phrased as a categorical rule, an assertion that the violation was merely a harmless error is irrelevant." Because these concepts are not provided for in the DSU or the covered agreements, they have no use with respect to this dispute, in particular.

33. Ukraine argues that, by virtue of having itself failed to comply with Article 12.5, Japan is estopped from claiming a violation on the part of Ukraine. Ukraine further argues that, because such notifications are meant for the non-consulting Members rather than the other consulting Member, who presumably is aware of the outcome of the consultations, a failure to notify the Committee constitutes harmless error with respect to Japan. There is no basis in the text of the DSU or the covered agreements for either argument.

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