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INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

REPORT OF THE PANEL

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<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R , adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, p. 1473
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / 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
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R , adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R , adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R , adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description
JPN-1/IND-1	Customs Tariff Act	Customs Tariff Act, 1975 (51 of 1975), as amended (18 August 1975)
JPN-2/IND-2	Safeguard Rules	Ministry of Finance (Department of Revenue), Notification No. 35/97-NT-Customs, Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, Gazette of India, Extraordinary, Part II, Section 3(i) (29 July 1997)
JPN-3/IND-3	Notification No. 19/2016-Customs (5 February 2016)	Ministry of Finance (Department of Revenue), Notification No. 19/2016-Customs (N.T.), superseding Notification No. 103/98-Customs, 14 December 1998, Gazette of India, Extraordinary, Part II, Section 3(i) (5 February 2016)
JPN-4/IND-4	Notice of Initiation	Directorate General of Safeguards Customs and Central Excise, Notice of Initiation of a Safeguard Investigation concerning imports of hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more, Gazette of India, Extraordinary, Part II, Section 3(i) (7 September 2015)
JPN-5/IND-5	Application	Petition for the initiation of safeguard investigation and imposition of safeguard duty on imports of hot-rolled flat products of alloy or non-alloy steel in coils (27 July 2015)
JPN-6/IND-20	Revised Application	Petition for the initiation of safeguard investigation and imposition of safeguard duty on imports of hot-rolled flat products of alloy or non-alloy steel in coils (24 August 2015)
JPN-7/IND-7	Preliminary Findings	Ministry of Finance, Director General (Safeguards), Notification, Safeguard investigation concerning imports of hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more into India, Preliminary Findings, Gazette of India, Extraordinary, Part II, Section 3(i) (9 September 2015)
JPN-8/IND-8	Notification imposing a provisional safeguard measure	Ministry of Finance (Department of Revenue), Notification No. 2/2015-Customs (SG), Gazette of India, Extraordinary, Part II, Section 3(i) (14 September 2015)
JPN-9/IND-9	Notification under Article 12.1(a) of the SA (15 September 2015)	WTO, Committee on Safeguards, Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reason for it: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/6/IND/41 (15 September 2015)
JPN-10/IND-10	Notification under Article 12.4 of the SA (28 September 2015)	WTO, Committee on Safeguards, Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/7/IND/10-G/SG/N/11/IND/14 and G/SG/N/7/IND/10/Suppl.1-G/SG/N/11/IND/14/Suppl.1 (28 September 2015)
JPN-11/IND-11	Final Findings	Ministry of Finance (Department of Revenue), Notification, Safeguard investigation concerning imports of hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more into India, Final Findings, Gazette of India, Extraordinary, Part II, Section 3(i) (15 March 2016)
JPN-12/IND-12	Notification under Article 12.1(b) of the SA (21 March 2016)	WTO, Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, Notification of a proposal to impose a measure, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/8/IND/28-G/SG/N/10/IND/19-G/SG/N/11/IND/14/Suppl.2 (21 March 2016)

Exhibit	Short Title (if any)	Description
JPN-13/IND-13	Notification imposing a definitive safeguard measure	Excerpt from Ministry of Finance (Department of Revenue), Notification No. 1/2016-Customs (SG), Gazette of India, Extraordinary, Part II, Section 3(i) (29 March 2016)
JPN-14/IND-14	Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016)	WTO, Committee on Safeguards, 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: India Supplement (hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more), G/SG/N/8/IND/28/Suppl.1-G/SG/N/10/IND/19/Suppl.1-G/SG/N/11/IND/14/Suppl.3 (4 April 2016)
JPN-17/IND-17	Notification No. 12/2012-Customs (17 March 2012)	Ministry of Finance (Department of Revenue), Notification No. 12/2012-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (17 March 2012)
JPN-18/IND-18	Notification No. 12/2014-Customs (11 July 2014)	Ministry of Finance (Department of Revenue) Notification No. 12/2014-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (11 July 2014)
JPN-19/IND-19	Notification No. 10/2015-Customs (1 March 2015)	Ministry of Finance (Department of Revenue), Notification No. 10/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (1 March 2015)
JPN-20/IND-6	Notification No. 39/2015-Customs (16 June 2015)	Ministry of Finance (Department of Revenue), Notification No. 39/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (16 June 2015)
JPN-21/IND-16	Notification No. 45/2015-Customs (12 August 2015)	Ministry of Finance (Department of Revenue), Notification No. 45/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (12 August 2015)
JPN-26		Excerpt from The Customs Act, 1962, Section 28
JPN-28		Excerpt from Schedule of Concessions XII – India (15 March 2000)
IND-21		Excerpt from India's Schedule of Concessions with respect to customs heading 7208

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
API	American Petroleum Institute
CEPA	Comprehensive Economic Partnership Agreement
DSB	Dispute Settlement Body
DI	domestic industry
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FTA	free trade agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
Indian competent authority	Director General (Safeguards) of India's Ministry of Finance
INR	Indian Rupees
MFN	most-favoured nation
MT	metric tonne
POI	period of investigation
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 20 December 2016, Japan requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to certain measures imposed by India on imports of iron and steel products into India.¹

1.2. Consultations were held on 6 and 7 February 2017 but failed to resolve the dispute.²

1.2 Panel establishment and composition

1.3. On 9 March 2017, Japan requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXII:1 of the GATT 1994 and Article 14 of the Agreement on Safeguards, with standard terms of reference.³ At its meeting on 3 April 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS518/5, in accordance with Article 6 of the DSU.⁴

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/DS518/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁵

1.5. On 12 June 2017, Japan requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 22 June 2017, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Alexander Hugh McPhail

Members: Ms Enie Neri de Ross
Ms Ana Teresa Caetano

1.6. Australia, China, the European Union, Indonesia, Kazakhstan, Korea, Oman, Qatar, the Russian Federation (Russia), Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Ukraine, the United States and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures⁶ and timetable on 10 October 2017.

1.8. The Panel held a first substantive meeting with the parties on 31 January and 1 February 2018. A session with the third parties took place on 1 February 2018. The Panel held a second substantive meeting with the parties on 1 and 2 May 2018. On 3 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 23 August 2018. The Panel issued its Final Report to the parties on 11 October 2018.

¹ Request for consultations by Japan, WT/DS518/1-G/L/1172-G/SG/D49/1 (Japan's consultations request).

² Request for the establishment of a panel by Japan, WT/DS518/5 (Japan's panel request).

³ Japan's panel request.

⁴ DSB, Minutes of meeting held on 3 April 2017, WT/DSB/M/395, pp. 3-4.

⁵ Constitution note of the Panel, WT/DS518/6.

⁶ See the Panel's Working Procedures in Annex A-1.

1.9. In these panel proceedings, certain filings were made outside of the deadlines prescribed by the Working Procedures adopted by the Panel.⁷ The Panel stresses the importance of all parties and third parties adhering to the time limits for filing documents, in the interests of fairness and the orderly conduct of panel proceedings.

2 MEASURE AT ISSUE AND OTHER FACTUAL ASPECTS

2.1. This dispute concerns a safeguard measure imposed by India with regard to imports of hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more (product concerned). This measure was imposed following a safeguard investigation initiated on 7 September 2015 by the Director General (Safeguards) of India's Ministry of Finance (Indian competent authority).⁸

2.2. On 9 September 2015, the Indian competent authority issued its Preliminary Findings.⁹ On 14 September 2015, the Ministry of Finance, after considering the Preliminary Findings, imposed a provisional safeguard duty of 20% for 200 days.¹⁰

2.3. On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.¹¹ On 28 September 2015, India notified the Committee on Safeguards, pursuant to Article 12.4 and Article 9, footnote 2, of the application of the provisional safeguard measure.¹²

2.4. On 15 March 2016, the Indian competent authority issued its Final Findings.¹³ On 29 March 2016, after considering the Final Findings, the Ministry of Finance imposed a definitive safeguard duty at the following rate (minus anti-dumping duties, if any): 20% from 14 September 2015 to 13 September 2016; 18% from 14 September 2016 to 13 March 2017; 15% from 14 March 2017 to 13 September 2017; and 10% from 14 September 2017 to 13 March 2018.¹⁴

2.5. On 21 March 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(b), of the findings of serious injury or threat thereof caused by increased imports.¹⁵ On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c), of its decision to impose a safeguard measure.¹⁶

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel find that the measure at issue is inconsistent with India's obligations under the Agreement on Safeguards and the GATT 1994. Specifically, Japan requests the Panel to find that¹⁷:

- a. India acted inconsistently with Article XIX:1(a) of the GATT 1994 because it failed to demonstrate the existence of "unforeseen developments" and a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry;
- b. India acted inconsistently with Article XIX:1(a) of the GATT 1994 because it failed to demonstrate a "logical connection" between the effect of the obligations incurred under

⁷ The Panel notes that India's questions to third parties were received the next working day following the deadline specified by the Panel in accordance with paragraph 17(c) of the Panel's Working Procedures.

⁸ Notice of Initiation, (Exhibits JPN-4/IND-4).

⁹ Preliminary Findings, (Exhibits JPN-7/IND-7).

¹⁰ Notification imposing a provisional safeguard measure, (Exhibits JPN-8/IND-8).

¹¹ Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).

¹² Notification under Article 12.4 of the SA (28 September 2015), (Exhibits JPN-10/IND-10).

¹³ Final Findings, (Exhibits JPN-11/IND-11).

¹⁴ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13).

¹⁵ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

¹⁶ Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

¹⁷ Japan's first written submission, para. 536; second written submission, para. 287.

the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry;

- c. India acted inconsistently with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to determine the increase in imports as required by those provisions;
- d. India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it failed to determine the domestic industry constituting a "major proportion" of the total domestic production and, consequently, acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of whether the alleged increased imports have caused or are threatening to cause serious injury to the domestic industry;
- e. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to determine serious injury and threat thereof as required by those provisions;
- f. India acted inconsistently with Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry as well as failed to determine that the alleged serious injury and threat thereof caused by factors other than the increased imports was not attributed to increased imports;
- g. India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to impose the safeguard measures only to the extent and for such time as necessary to prevent or remedy serious injury;
- h. India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it failed to provide in the Preliminary Findings and the Final Findings, i.e. the published report of the competent authority, 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;
- i. India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because it imposed the safeguard measures in violation of Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1, and 7.1 of the Agreement on Safeguards as well as Article XIX of the GATT 1994;
- j. India acted inconsistently with Article 12.4 of the Agreement on Safeguards because it failed to notify the Committee on Safeguards before taking the provisional safeguard measure;
- k. India acted inconsistently with Article 12.1 of the Agreement on Safeguards because it failed to immediately notify the Committee on Safeguards upon initiating the investigation relating to serious injury or threat thereof; making a finding of serious injury or threat thereof caused by increased imports; and taking a decision to apply the safeguard measure;
- l. India acted inconsistently with Article 12.2 of the Agreement on Safeguards because, in making the notifications pursuant to Articles 12.1(b) and 12.1(c), it failed to provide the Committee on Safeguards with "all pertinent information";
- m. India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because it failed to provide Japan with an adequate opportunity for prior consultations in respect of the proposed action;
- n. India acted inconsistently with Article II:1(b) of the GATT 1994 because, through the measures at issue, India imposes "other duties or charges" in violation of the second sentence of Article II:1(b) of the GATT 1994; and

- o. India acted inconsistently with Article I: 1 of the GATT 1994 because the measures at issue are not applied to the products originating in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to like products originating in other WTO Members, including Japan.

3.2. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its WTO obligations by revoking its measures.¹⁸

3.3. India requests that the Panel reject Japan's claims in this dispute in their entirety.¹⁹

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, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, the European Union, Chinese Taipei, Ukraine, 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, C-3, C-4, and C-5). China, Indonesia, Kazakhstan, Korea, Oman, Qatar, Russia, Singapore, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 23 August 2018, we issued our Interim Report to the parties. On 11 September 2018, Japan and India each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested for an interim review meeting. On 25 September 2018, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-2.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns a measure applied by India on imports of certain steel products. Japan claims that the measure is inconsistent with various provisions of the Agreement on Safeguards and the GATT 1994. Before addressing Japan's claims in this dispute, we first set out the relevant principles guiding our review, including the relevant principles regarding standard of review, treaty interpretation, and burden of proof in WTO dispute settlement proceedings. We then address India's request that since the measure has expired, Japan's complaint is not "fruitful" in terms of Article 3.7 of the DSU. After that, we consider whether Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute.

7.2 General principles regarding standard of review, treaty interpretation, and burden of proof

7.2.1 Standard of review

7.2. Panels are bound by the standard of review set forth in Article 11 of the DSU, which provides that:

The 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

¹⁸ Japan's first written submission, paras. 537-538; second written submission, para. 288.

¹⁹ India's first written submission, para. 352; second written submission, para. 20.

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 for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

7.3. 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. 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 1994.²⁰ In *US – Cotton Yarn*, the Appellate Body examined the scope of this general rule provided in Article 11 regarding the standard of review applicable to disputes under the Agreement on Safeguards and summarized its views as follows:

[P]anels 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.²¹

7.4. Thus, a panel's examination of a competent authority's determination in a safeguard proceeding must involve neither a *de novo* review nor "total deference" to the competent authority's determination.²² Rather, a panel is required to assess whether the competent authority has examined all relevant facts and provided a reasoned and adequate explanation as to how the facts support its determination.²³ A panel can make this assessment:

[O]nly 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.²⁴

7.5. Although 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, the Appellate Body in *US – Steel Safeguards* clarified 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 1994.²⁵

7.6. 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.²⁶ Article 3.1, last sentence, requires

²⁰ 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.

²¹ 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).

²² Appellate Body Reports, *US – Lamb*, para. 101; *US – Tyres (China)*, para. 123; *US – Cotton Yarn*, para. 69; and *Argentina – Footwear (EC)*, para. 119.

²³ Appellate Body Reports, *US – Lamb*, para. 103; *US – Line Pipe*, para. 217; and *US – Steel Safeguards*, paras. 296-297.

²⁴ Appellate Body Report, *US – Lamb*, para. 106. (emphasis original)

²⁵ 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 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").

²⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.26. (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 299; and *US – Lamb*, para. 105; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.9).

competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Similarly, Article 4.2(c) requires 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 panel in *US – Steel Safeguards* noted that:

It 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. ... **[A] panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.** Therefore, 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 1994.²⁷

7.7. Panels should not be "left to 'deduce for themselves' from the report of that competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority'".²⁸ The explanations contained in a competent authority's published report must be "explicit", "clear and unambiguous", and must not "merely imply or suggest an explanation".²⁹

7.8. Where there is no reasoned and adequate explanation apparent in the published report to support a competent authority's determinations "the panel has no option but to find that the competent authority has not performed the analysis correctly".³⁰ This 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.³¹

7.2.2 Treaty interpretation

7.9. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". The principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are generally accepted as such customary rules.³²

7.2.3 Burden of proof

7.10. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.³³ Therefore, as the complaining party, Japan bears the burden of demonstrating that the challenged measures are inconsistent with the Agreement on Safeguards and the GATT 1994. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.³⁴ Generally, each party asserting a fact shall provide proof thereof.³⁵

²⁷ Appellate Body Report, *US – Steel Safeguards*, para. 299. (fn omitted)

²⁸ Appellate Body Report, *US – Steel Safeguards*, para. 288.

²⁹ Appellate Body Reports, *US – Steel Safeguards*, paras. 296-297; *US – Line Pipe*, para. 217.

³⁰ Appellate Body Report, *US – Steel Safeguards*, para. 303.

³¹ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.7.

³² Appellate Body Reports, *US – Gasoline*, DSR 1996:1, p. 16; *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104, section D.

³³ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 337.

³⁴ Appellate Body Report, *EC – Hormones*, para. 104.

³⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 335.

7.3 Whether the Panel should make findings despite the expiry of the measure at issue

7.3.1 Introduction

7.11. The DSB established this Panel at its meeting on 3 April 2017 at the request of Japan. On 22 June 2017, the Director-General composed the Panel, pursuant to Article 8.7 of the DSU.³⁶

7.12. The safeguard measure at issue in this dispute was imposed by the Indian Ministry of Finance on 29 March 2016.³⁷ According to the terms of the measure as published in the Gazette of India, the duties resulting from the measure would be in force, at different rates and subject to a schedule of progressive liberalization, until 13 March 2018.³⁸ During the proceedings India declared that it had no intention to extend the measure beyond the date of its expiration.³⁹

7.13. Notwithstanding the expiration of the measure, in accordance with the relevant legislation if a duty resulting from the safeguard measure was not levied or was not paid for any reason *other than* collusion, wilful misstatement, or suppression of facts, such duty may still be claimed within two years from the date on which the customs officer made an order for the clearance of goods. In case the duty was not levied or was not paid by reason of collusion, wilful misstatement, or suppression of facts, such duty may be claimed within a period of five years.⁴⁰

7.14. Considering that the measure at issue would only be in force until 13 March 2018, India has requested the Panel to determine whether the panel procedure initiated by Japan complies with the requirement in Article 3.7 of the DSU that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under [the DSU] procedures would be fruitful".⁴¹ India has added that it does not have any intention to extend the measure beyond the date of its expiration.⁴² India has also indicated that, in accordance with Article 7.5 of the Agreement on Safeguards, there is no possibility for the safeguard measure to be easily reimposed by India on the same products concerned.⁴³ India notes that, in accordance with Article 3.7 of the DSU, in the absence of a mutually agreed solution and if a measure is found to be inconsistent with provisions of the covered agreements, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure at issue. In India's view, considering that the measure expired on 13 March 2018, "no useful purpose would be served if Japan pursues with its claims".⁴⁴

7.15. Japan has asked the Panel to reject India's request and to make findings and recommendations with respect to the measure at issue, even if the measure has expired.⁴⁵ Japan has referred to the previous statements by the Appellate Body indicating that (i) a Member enjoys broad discretion in deciding whether to bring a case against another Member under the DSU; (ii) the language of Article 3.7 of the DSU suggests that Members are expected to be "largely self-regulating" in deciding whether any action under the DSU procedures would be "fruitful"; and (iii) Article 3.7 neither requires nor authorizes a panel to look behind a Member's decision and to question its exercise of judgement.⁴⁶ Japan has added that it has initiated these panel proceedings

³⁶ See paras. 1.3-1.5 above.

³⁷ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.

³⁸ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 6. See also Japan's first written submission, paras. 42 and 416; and India's first written submission, para. 44.

³⁹ India's second written submission, para. 2.

⁴⁰ Excerpt from The Customs Act, 1962, Section 28, (Exhibit JPN-26). See also Japan's opening statement at the second meeting of the Panel, para. 19 and fn 28; closing statement at the second meeting of the Panel, para. 3; comments on India's response to Panel question No. 76; and India's response to Panel question No. 76.

⁴¹ India's opening statement at the first meeting of the Panel, para. 45; second written submission, para. 2.

⁴² India's second written submission, para. 2.

⁴³ India's second written submission, paras. 5-6.

⁴⁴ India's second written submission, para. 3. See also closing statement at the second meeting of the Panel, paras. 1-2; and response to Panel question No. 71.

⁴⁵ Japan's response to Panel question No. 13, para. 15; opening statement at the second meeting of the Panel, para. 10.

⁴⁶ Japan's response to Panel question No. 13, para. 8 (referring to Appellate Body Reports, *EC – Bananas III*, para. 135; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74). See also opening statement at the second meeting of the Panel, paras. 8-9.

in good faith.⁴⁷ It has noted that the measure at issue was in force at the time of the establishment of the Panel⁴⁸ and that Japan, as the complaining party, has continued to request that the Panel make findings.⁴⁹ Japan has further submitted that the dispute between the parties has not been resolved, given that India continues to argue that the measure at issue is fully consistent with the relevant provisions under the GATT 1994 and the Agreement on Safeguards.⁵⁰ Japan has also highlighted the difference between the expiration of a measure (when the measure has lapsed) and the revocation of a measure (recall or annulment of the measure). In Japan's view, only the revocation of the measure at issue, in which not only the measure itself but also any resulting effects are removed from the legal system, would solve this dispute.⁵¹ Regarding India's argument on Article 7.5 of the Agreement on Safeguards, Japan has noted that Article 7.5 does not prevent India from imposing the measure after the time limit provided therein expires.⁵² Finally, Japan has emphasized the temporary nature of safeguard measures and argued that if panels refrained from issuing findings and recommendations with respect to expired measures, it would mean that Members may adopt WTO-inconsistent safeguard measures without a possibility for other Members to effectively challenge those measures.⁵³

7.3.2 Evaluation by the Panel

7.16. The terms of reference of this Panel are based on the description of the matter that was referred to the DSB by Japan in its panel request of 9 March 2017. That panel request included the specific measure at issue identified by Japan and the legal basis of Japan's complaint (the claims). When the DSB established this Panel on 3 April 2017, it outlined the Panel's jurisdiction to adjudicate the matter that has been brought before us.⁵⁴

7.17. Once a panel's jurisdiction is established, the panel is required to address the "matter" before it in accordance with Article 11 of the DSU, which sets out the function of panels. We have already noted the text of Article 11 of the DSU, which describes the function of panels as assisting the DSB in discharging its responsibilities under the DSU and the covered agreements. To this end, "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." In addition, a panel should "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Accordingly, panels carry out their adjudicative mandate, as set out in Article 11 of the DSU, so as to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

7.18. WTO panels have certain powers that are inherent in their adjudicative function under Article 11 of the DSU. For instance, panels have the authority to determine whether they have jurisdiction in a given case and to determine the scope and limits of that jurisdiction, as defined by their terms of reference.⁵⁵ Panels also have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly

⁴⁷ Japan's response to Panel question No. 13, para. 9.

⁴⁸ Japan's response to Panel question No. 13, para. 14; opening statement at the second meeting of the Panel, paras. 11-12.

⁴⁹ Japan's opening statement at the second meeting of the Panel, para. 12.

⁵⁰ Japan notes that previous panels considered relevant the fact that the defending party argued its measures to be consistent with its WTO obligations, when deciding whether they should make findings with regard to expired measures. (Japan's opening statement at the second meeting of the Panel, para. 13 (referring to Panel Reports, *EC – IT Products*, para. 7.166; *India – Additional Import Duties*, paras. 7.69-7.70; *China – Publications and Audiovisual Products*, para. 7.453; and *US – Poultry (China)*, para. 7.55)).

⁵¹ Japan's response to Panel question No. 74, paras. 6-9.

⁵² Japan's opening statement at the second meeting of the Panel, para. 16. Japan added that India failed to indicate the provision of the domestic legislation that prevents it from re-imposing safeguard measures.

⁵³ Japan's opening statement at the second meeting of the Panel, para. 16.

⁵⁴ Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.13; *US – Countervailing Measures (China)*, para. 4.6; *US – Carbon Steel*, para. 125; and *Guatemala – Cement I*, paras. 69-76.

⁵⁵ Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.16; *Mexico – Taxes on Soft Drinks*, para. 45 and fn 90 (referring to Appellate Body Reports, *US – 1916 Act*, fn 30; and *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53).

regulated".⁵⁶ However, as noted by the Appellate Body in *Mexico – Taxes on Soft Drinks*, once jurisdiction has been validly established, a WTO panel may not entirely decline to exercise that jurisdiction in a case that is properly before it.⁵⁷

7.19. In the present case, neither of the parties has questioned that the Panel has jurisdiction to rule on the matter before it. We note in this respect that the measure at issue was in force at the time of the establishment of the Panel⁵⁸ and expired only during the Panel proceedings. As noted by the panel on *EU – PET (Pakistan)*, while some past panels have declined to make findings with respect to a measure that had expired *before* panel establishment, no panel has declined to hear the entirety of a dispute due to the expiry of the challenged measure after panel establishment.⁵⁹ Moreover, no issue has arisen that would indicate a legal impediment precluding the Panel from ruling on the merits of the matter before us.⁶⁰

7.20. Article 3.7 of the DSU, the provision cited by India, contemplates a "largely self-regulating" mechanism by which each Member is to exercise its own judgement as to whether action under the WTO dispute settlement procedures would be fruitful before bringing a matter through this system.⁶¹ In relevant part, Article 3.7 provides:

Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

7.21. We must accordingly presume that when Japan submitted its panel request, it did so in good faith, having duly exercised its judgement as to whether recourse to this panel process would be "fruitful". As noted by the Appellate Body, "Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement".⁶² The fact that a Member may initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member, pursuant to Article 3.3 of the DSU, "implies that that Member is entitled to a ruling by a WTO panel".⁶³

7.22. The Appellate Body has noted that the mere fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.⁶⁴ Although

⁵⁶ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.16; *Mexico – Taxes on Soft Drinks*, para. 45 and fn 91 (quoting Appellate Body Report, *EC – Hormones*, fn 138, referring in turn to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248).

⁵⁷ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 46 and 52-53.

⁵⁸ The Appellate Body in *EC – Chicken Cuts* stated:

The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.

(Appellate Body Report, *EC – Chicken Cuts*, para. 156).

⁵⁹ Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35 (referring to Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, paras. 7.1307 and 7.1308; *US – Gasoline*, para. 6.19; and *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13).

⁶⁰ In *Mexico – Taxes on Soft Drinks*, the Appellate Body noted that a decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of the complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU. The Appellate Body, however, cautioned that it was "[m]indful of the precise scope of Mexico's appeal", and that it expressed "no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it." (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 53-54).

⁶¹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *EC – Bananas III*, para. 135).

⁶² Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.

⁶³ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis omitted)

⁶⁴ Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.25; *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

Article 12.7 of the DSU provides that when the parties to a dispute arrive at a mutually satisfactory solution a panel should refrain from ruling on the merits of the claims before it, the repeal or expiry of a measure does not necessarily constitute, without more, a "satisfactory settlement of the matter" within the meaning of Article 3.4, or a "positive solution to the dispute" within the meaning of Article 3.7.⁶⁵

7.23. We note India's argument that, due to its expiration, it would not be possible to "withdraw" the challenged measure within the meaning of Article 3.7 of the DSU, if it is found to be inconsistent with provisions of the covered agreements. We also note that even after the measure at issue expired on 13 March 2018, there are potential lingering effects of the measure with respect to imports that occurred before that date. Indeed, as noted above, if a duty resulting from the safeguard measure was not levied or was not paid for any reason, such duty may still be claimed within a period of two years (or even for a period of five years if the duty was not levied or was not paid by reason of collusion, wilful misstatement, or suppression of facts).⁶⁶

7.24. We have already noted that the measure at issue was in force at the time when this Panel was established and expired only during the Panel proceedings. Moreover, as noted above, Japan has continued to request the Panel to make findings with respect to the measure at issue despite its expiry. The Appellate Body has noted that, pursuant to Articles 3.3 and 3.7 of the DSU, a complaining Member's continued request for findings following the expiry of a measure at issue is a relevant consideration for a panel in deciding whether to proceed to make findings in a dispute.⁶⁷ Despite the expiry of the measure, there continues to exist a dispute between the parties on the "applicability of and conformity with the relevant covered agreements"⁶⁸ as regards the Indian competent authority's findings underpinning the measure at issue. Therefore, the "matter" within the jurisdiction of the Panel has not been fully resolved by the expiry of the measure. Finally, as indicated, despite the termination of the measure at issue there are potential lingering effects of the measure with respect to imports that occurred before that date.

7.25. For the reasons indicated, in the circumstances of the present case, the expiry of the measure at issue after the Panel was established⁶⁹ does not excuse us from exercising our function under Article 11 of the DSU to make findings with respect to the matter raised by Japan.

7.26. Finally, we note that Japan has also asked the Panel to make recommendations with respect to the measure at issue, even if the measure has expired.

7.27. Article 19 of the DSU is entitled "Panel and Appellate Body Recommendations". In relevant part it provides in paragraph 1 that "[w]here a panel ... concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement".⁷⁰ Despite what Article 19.1 provides, panels generally refrain from making recommendations on measures found to be inconsistent with provisions of the covered agreements when these measure are no longer in existence.⁷¹ Having said that, to the extent that an expired measure may continue to have an effect on the operation of a covered agreement, it would be appropriate for a panel to provide recommendations with regard to the measures at issue.⁷²

7.28. We have already noted that, despite the expiry of the measure at issue, there are potential lingering effects of the measure with respect to imports that occurred before that date. Accordingly,

⁶⁵ Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.27; *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *US – Upland Cotton*, para. 270).

⁶⁶ Excerpt from the Customs Act, 1962, Section 28, (Exhibit JPN-26). Japan has noted that a resolution of the current dispute would require, not just the termination of the measure at issue itself, but also of any legal effects that may survive after the measure has expired. (Japan's response to Panel question No. 74, paras. 6-9).

⁶⁷ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.42.

⁶⁸ Article 11 of the DSU.

⁶⁹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179.

⁷⁰ Fn omitted.

⁷¹ See, for example, Appellate Body Reports, *US – Certain EC Products*, paras. 81-82; and *China – Raw Materials*, para. 264. See also Panel Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 8.6-8.7; and *EC – Approval and Marketing of Biotech Products*, para. 7.1316.

⁷² See, for example, Appellate Body Report, *US – Upland Cotton*, paras. 271-273; and Panel Reports, *Thailand – Cigarettes (Philippines)*, paras. 6.25 and 8.8; and *India – Autos*, paras. 8.47, 8.51, 8.60, and 8.65.

in the circumstances of the present case, it is appropriate for the Panel to provide recommendations with regard to the measure at issue to the extent that there may continue to be effects with respect to imports occurred when the measure was in force.

7.4 Whether Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute

7.4.1 Introduction

7.29. We recall that Article 11 of the DSU sets out panels' standard of review, and provides that "a panel should make an objective assessment of the matter before it", which includes, among others, an assessment of the "applicability" of the relevant covered agreements.⁷³

7.30. In this dispute, most of the claims have been raised by Japan under Article XIX of the GATT 1994 and under different provisions of the Agreement on Safeguards. The parties have not questioned the applicability of Article XIX of the GATT 1994 or the Agreement on Safeguards to the dispute. Indeed, both parties agree that the challenged measure is a safeguard within the meaning of Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards.⁷⁴ However, given the facts before us and the arguments made by the parties and third parties in this proceeding⁷⁵, we consider it appropriate to examine whether the measure at issue falls within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994, before addressing the merits of Japan's claims. Indeed, as noted by the Appellate Body:

[A] panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute.⁷⁶

7.31. According to Article 1 of the Agreement on Safeguards, this agreement contains rules "for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994".

7.32. Article XIX of GATT 1994 is entitled "Emergency Action on Imports of Particular Products" and provides in paragraph 1(a) as follows:

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 [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*.⁷⁷

7.33. In other words, Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards refer to emergency measures adopted by a Member, which suspend obligations under the GATT 1994 (including tariff concessions), when unforeseen developments and the effect of such

⁷³ In this respect the Appellate Body has noted that: "the 'fundamental structure and logic' of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement". (Appellate Body Reports, *China – Auto Parts*, para. 139 (emphasis original)).

⁷⁴ Japan's second written submission, paras. 278-279; response to Panel question No. 11; India's response to Panel question No. 11; and opening statement at the second meeting of the Panel, paras. 5-6. See also paras. 7.44, 7.54, and 7.64 below.

⁷⁵ Australia's third-party submission, paras. 5-15; third-party response to Panel question No. 3, paras. 3.1-3.4; European Union's third-party submission, paras. 7-26; third-party statement, paras. 3-19; and third-party response to Panel question No. 5, paras. 19-20. See also Chinese Taipei's third-party statement, paras. 5-13; and third-party response to Panel question No. 5, para. 11.

⁷⁶ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.33.

⁷⁷ Emphasis added.

GATT obligations have resulted in an increase in imports that causes or threatens to cause serious injury to the relevant domestic producers. Article XIX: 1(a) and the Agreement on Safeguards allow WTO Members to impose a measure that would otherwise be inconsistent with its GATT obligations, provided that the conditions for the application of such a measure are met.⁷⁸ Such measures are to be applied temporarily, and subject to a schedule of progressive liberalization, so as to prevent or remedy serious injury caused by increased imports to the domestic producers of like or directly competitive products. Article 11 of the Agreement on Safeguards refers to the measures applied under Article XIX of the GATT 1994 as "emergency actions on imports of particular products", the same expression contained in the title of Article XIX. In this regard, the Appellate Body has stated that "safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'".⁷⁹

7.34. The Appellate Body has further clarified that:

[I]n order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole.⁸⁰

7.4.2 Whether the measure at issue constitutes an ordinary customs duty

7.35. As part of our assessment of the design, structure, and operation of the measure at issue, we start by considering the argument raised by some third parties that the measure adopted by India constitutes an ordinary customs duty. Indeed, in response to a question posed by the Panel, the European Union has argued that "the safeguard duties imposed in this case are 'ordinary customs duties' within the meaning of Article II:1 of the GATT 1994".⁸¹ The European Union concludes that the measure at issue "did not suspend, withdraw, or modify India's obligations under Article II of the GATT 1994".⁸² Similarly, Australia has argued that the measure at issue did not withdraw or modify India's tariff concession of 40% recorded in its Schedule of Concessions.⁸³

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

The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], 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.

7.37. India has bound in its Schedule of Concessions its ordinary customs duties (tariffs) for the products at issue in this dispute, i.e. hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more (product concerned), classified under tariff heading 7208 and tariff item 7225.30.90, at a level of 40% *ad valorem*.⁸⁴ During the period of application of the

⁷⁸ Panel Reports, *US – Steel Safeguards*, para. 10.9.

⁷⁹ Appellate Body Report, *Korea – Dairy*, para. 86.

⁸⁰ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

⁸¹ European Union's third-party response to Panel question No. 2, para. 11.

⁸² European Union's third-party submission, para. 22.

⁸³ Australia's response to Panel question No. 3.

⁸⁴ Schedule of Concessions XII – India, annexed to the Marrakesh Protocol, available at: https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (accessed 15 July 2018); Excerpt from India's Schedule of Concessions with respect to customs heading 7208, (Exhibit IND-21); and Excerpt from Schedule of Concessions XII – India (15 March 2000), (Exhibit JPN-28).

measure at issue, the applied tariffs for the products concerned were 10 or 12.5% *ad valorem*.^{85, 86} In turn, the maximum amount of the duty imposed, pursuant to the safeguard at issue in the present dispute, was 20% *ad valorem*.⁸⁷ As a result, during the time when the measure at issue was in force, the duties imposed on the importation of the products concerned, including the duties resulting from the measure and the regular tariff, did not exceed 32.5% *ad valorem*. In other words, even considering both the measure at issue and the applicable tariff, the total import duties on the product concerned did not exceed India's 40% bound rate of ordinary customs duties.

7.38. The fact that the measure at issue did not result in total duties on the importation of the product concerned that exceeded the rate bound by India in its Schedule of Concessions, however, does not necessarily imply that the duties resulting from the measure had the nature of an ordinary customs duty.

7.39. As the panel in *Dominican Republic – Safeguard Measures* noted, while a Member may impose various duties at the border, ordinary customs duties are those that possess the essential attributes or qualities of customs duties.⁸⁸ The panel indicated that "the expression 'ordinary customs duties' in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute 'customs duties' in the strict sense of the term (*stricto sensu*) and ... does not cover possible extraordinary or exceptional duties collected in customs".⁸⁹ The panel in that case considered the design and structure of the measures concerned.

7.40. We are aware that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law.⁹⁰ At the same time, the operation of measures under domestic law may be a useful starting point when ascertaining a measure's design, structure, and operation. As explained by India, customs duties on the importation of products are approved through legislation.⁹¹ India has indicated that:

The relevant domestic legislation governing "ordinary customs duties" is the Customs Act, 1962.

The procedure for amending the relevant domestic legislation governing "ordinary customs duties" i.e. the Customs Act, 1962 is through an Act of Parliament. While the power to levy of "ordinary customs duties" flows from section 12 of the Customs Act, 1962, the "rate of duty" is set out under the Customs Tariff Act, 1975.⁹²

7.41. In contrast, India's domestic legislation on safeguards is contained in Section 8B of the Customs Tariff Act, 1975, and in the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997.⁹³ The measure at issue was imposed by India's Ministry of Finance pursuant to this legislation that authorizes the Central Government "after conducting such enquiry as it deems

⁸⁵ India's response to Panel question No. 79; first written submission, para. 49; and Japan's first written submission, para. 48 (referring to Notification No. 10/2015-Customs (1 March 2015), (Exhibit JPN-19); Notification No. 39/2015-Customs (16 June 2015), (Exhibit JPN-20); and Notification No. 45/2015-Customs (12 August 2015), (Exhibit JPN-21)).

⁸⁶ During the POI, the applied tariff for the product concerned was primarily 7.5%. (Final Findings, (Exhibits JPN-11/IND-11), para. 81, p. 205). See also India's first written submission, para. 49; and Japan's first written submission, para. 48 (referring to Notification No. 12/2012-Customs (17 March 2012), (Exhibit JPN-17); and Notification No. 12/2014-Customs (11 July 2014), (Exhibit JPN-18)).

⁸⁷ The safeguard duty at issue was imposed on imports of the product concerned at the following rate: (i) 20% from 14 September 2015 to 13 September 2016, (ii) 18% from 14 September 2016 to 13 March 2017, (iii) 15% from 14 March 2017 to 13 September 2017, and (iv) 10% from 14 September 2017 to 13 March 2018. (Final Findings, (Exhibits JPN-11/IND-11), p. 209).

⁸⁸ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.82.

⁸⁹ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85.

⁹⁰ Appellate Body Reports, *China – Auto Parts*, para. 178. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60 (referring to Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 586 and 593; *US – Offset Act (Byrd Amendment)*, para. 259; *US – Softwood Lumber IV*, para. 56; *US – Corrosion-Resistant Steel Sunset Review*, fn 87; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127).

⁹¹ India's response to Panel question No. 12. See Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 2, p. 2. See also *ibid.* Sections 6-7, pp. 8-9.

⁹² India's response to Panel question No. 81.

⁹³ Customs Tariff Act, (Exhibits JPN-1/IND-1); Safeguard Rules, (Exhibits JPN-2/IND-2).

fit, [when it] is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry ... by notification in the Official Gazette [to] impose a safeguard duty on that article".⁹⁴

7.42. The measure at issue resulted in duties levied in customs on the importation of the products concerned into the territory of India. These duties operated similarly to an ordinary customs duty. However, by its design and structure, the measure at issue and the duties that resulted from its application were different from an ordinary customs duty. As noted above, the legal basis in Indian domestic legislation under which the measure at issue was applied is different from that which regulates the imposition of tariffs on imports. Moreover, as described in the decision adopted on 29 March 2016 by the Ministry of Finance, the definitive safeguard measure was imposed for a period of thirty months (two and a half years, from 14 September 2015 to 13 March 2018). During this period, the duties resulting from the measure were subject to progressive reductions, according to a schedule contained in the same Ministry of Finance decision. As noted in the same decision by the Ministry of Finance, the measure was imposed on the basis of a conclusion from the national competent authority that "[t]he increased imports of [the product under consideration] into India, [had] caused serious injury and [were] threatening to cause serious injuries to the domestic producers of [the product under consideration] and [that] it [would] be in the public interest to impose safeguard duty on imports of [the product under consideration] into India ... in terms of Rule 12 of the Customs Tariff (Identification And Assessment of Safeguard Duty) Rules'97, for a period of two Years and Six months".⁹⁵ In other words, the measure at issue was an "extraordinary" or "exceptional" instrument and not an "ordinary" one.

7.43. The duties resulting from the measure at issue did not replace the normal tariffs applied to imports. Indeed, the applicable legislation in India provides that "[t]he duty chargeable under this section [i.e. Section 8B on safeguard measures] shall be in addition to any other duty imposed under this Act or under any other law for the time being in force".⁹⁶ In other words, the measure at issue did not constitute the ordinary tariff that is normally applicable to the importation of the product concerned into the territory of India under the Customs Act, 1962. Instead, the measure at issue constituted an emergency action under specific legislation, that resulted in temporary duties ("other duties or charges") applied on the importation of goods originating from certain countries, and that was adopted by the Indian competent authority to protect domestic production from the alleged injury caused by increased imports of the subject product. In conclusion, the measure at issue does not possess the essential attributes or qualities of ordinary customs duties. By their design, structure, and operation, the duties resulting from this measure do not constitute "ordinary customs duties" for the purposes of Article II: 1(b) of the GATT 1994.

7.4.3 Whether the measure at issue resulted in the suspension of a GATT obligation

7.44. We now turn to the argument raised by some third parties that the measure at issue did not suspend India's obligations under the GATT 1994.⁹⁷ In contrast, the complainant and the respondent are of the view that the duties resulting from the measure at issue resulted in a suspension of some obligations under the GATT 1994. Indeed, both parties assert that the measure at issue suspended India's obligation under Article II: 1(b), second sentence, of the GATT 1994 with regard to "all other duties or charges of any kind".⁹⁸ Both parties also argue that the measure suspended India's most-favoured nation (MFN) obligation under Article I: 1 of the GATT 1994.⁹⁹ India

⁹⁴ Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B, pp. 10-11. See also Safeguard Rules, (Exhibits JPN-2/IND-2), p. 9.

⁹⁵ Final Findings, (Exhibits JPN-11/IND-11), section R, p. 208. See also Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 5.

⁹⁶ Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(3), pp. 10-11.

⁹⁷ Australia's third-party submission, para. 15; third-party response to Panel question No. 3, paras. 3.1-3.4; European Union's third-party submission, paras. 22-23 and 25; and third-party statement, paras. 8-17.

⁹⁸ Japan's response to Panel question No. 11, para. 4; second written submission, paras. 279-283; India's first written submission, para. 344; opening statement at the first meeting of the Panel, para. 44; responses to Panel question No. 11(a) and No. 91; and opening statement at the second meeting of the Panel, paras. 5-6.

⁹⁹ Japan's responses to Panel question No. 11, para. 5, and No. 80, paras. 19-23; second written submission, paras. 279 and 284-285; India's responses to Panel question Nos. 11(a), 80, 83, and 91; and opening statement at the second meeting of the Panel, paras. 5-6.

additionally asserts that the measure also suspended India's obligations under paragraphs 4, 8, and 12 of Article XXIV of the GATT 1994.¹⁰⁰ Japan disagrees that the measure resulted in a suspension of obligations under Article XXIV of the GATT 1994.¹⁰¹

7.45. We recall in this regard the Appellate Body's indication that one of the constituent features of a safeguard is that the measure suspends, in whole or in part, a GATT obligation (or withdraws or modifies a GATT concession).¹⁰² Moreover, for a measure to be a safeguard, the suspension of the relevant GATT obligation or the withdrawal or modification of a tariff concession must be done to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry.¹⁰³ We will accordingly consider the specific GATT obligations that India allegedly suspended by applying the measure at issue.

7.4.3.1 Article II:1(b) of the GATT 1994

7.46. We have noted above the text of Article II:1(b) of the GATT 1994. The first sentence of this provision prohibits levying of ordinary customs duties in excess of the bindings set forth in the schedule of concessions of the importing Member. The second sentence of Article II:1(b) prohibits the levying of "other duties or charges of any kind" imposed on or in connection with importation in excess of those imposed on the date of entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date. The Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 provides that the importing Member had to record in its schedule of concessions any other duties or charges applied on the date of entry into force of the GATT 1994 or which had to be applied directly and mandatorily under legislation in force on that date.

7.47. Article II:2 contains a list of measures which are carved out from the obligation in Article II:1(b) and may be imposed on the importation of any product, which includes (i) charges equivalent to internal taxes levied on like domestic products or in respect of articles from which the imported product has been manufactured; (ii) anti-dumping or countervailing duties; and (iii) fees or other charges commensurate with the cost of services rendered. Safeguard measures or the duties resulting from such safeguard measures are not carved out by Article II:2 from the obligations in Article II:1(b).

7.48. As stated by the panel on *Dominican Republic – Safeguard Measures*:

The use of the expression "*all other* duties or charges of any kind imposed on or in connection with the importation" in Article II:1(b), second sentence, suggests that the prohibition covers any duty or charge of any kind on or in connection with the importation that is not an ordinary customs duty.^[146] In other words, the category of *other duties or charges* under Article II:1(b), second sentence, is a residual one covering all duties or charges on or in connection with the importation that are not ordinary customs duties and which are not expressly provided for in Article II:2 of the GATT 1994.¹⁰⁴

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

7.49. We have already concluded that the duties resulting from the measure at issue do not constitute "ordinary customs duties" in the sense of Article II:1(b) of the GATT 1994. We also note that those duties do not correspond to any of the measures listed in Article II:2 of the GATT 1994. To the extent that those duties were imposed on imports of the product concerned into the territory

¹⁰⁰ India's first written submission; para. 117; responses to Panel question Nos. 11(a), 20, 86, and 91; and opening statement at the second meeting of the Panel, paras. 5-6 and 8.

¹⁰¹ Japan's second written submission, para. 286; comments on India's responses to Panel question No. 86, para. 22, and No. 125, paras. 77-78.

¹⁰² Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

¹⁰³ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

¹⁰⁴ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79. (emphasis original; some fns omitted)

of India, they constituted "other duties or charges ... imposed on or in connection with ... importation". We also note that the measures at issue are not recorded in India's Schedule of Concessions as other duties or charges that were applied on the date of entry into force of the GATT 1994 or which had to be applied directly and mandatorily under legislation in force on that date.¹⁰⁵ Consequently, the imposition of the duties resulting from the measure at issue to imports of the product concerned into the territory of India constituted a suspension of India's obligations under Article II:1(b), second sentence, of the GATT 1994.

7.50. The remaining question is whether the duties imposed by India, which resulted in a suspension of Article II:1(b) of the GATT 1994, were adopted to prevent or remedy serious injury to India's domestic production. Again, the starting point is the manner in which India itself has characterized the measure at issue.

7.51. As noted above, the measure at issue was imposed by India's Ministry of Finance pursuant to legislation that authorizes the Central Government to impose safeguard duties when it is satisfied that products are imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to domestic industry.¹⁰⁶ Moreover, as described in the Ministry of Finance's decision of 29 March 2016 adopting the definitive safeguard measure, this measure was imposed on the basis of a conclusion from the national competent authority that the increased imports of the product concerned into India had caused serious injury and were threatening to cause serious injury to the domestic producers of the product concerned.¹⁰⁷

7.52. The design, structure, and operation of the measure at issue confirm this aspect. The measure resulted in the imposition by the Indian Government of temporary duties on the importation of the subject products of up to 20% *ad valorem*, additional to the applicable tariffs.¹⁰⁸ The level and form of the duties corresponded to the recommendation made by the Indian competent authority, which was based in turn on its estimation of "the minimum required to protect the interests of the domestic industry", by considering the average cost of sales by the domestic producer of the product concerned, after allowing a reasonable return.¹⁰⁹ The Indian competent authority also noted that the domestic industry had submitted "detailed adjustment plans... which [focused] on cost reduction, optimum utilization and expansion of production capacities which will enable them to adjust to the international competition".¹¹⁰ The design, structure, and operation of the measure at issue suggest to us that the central aspect of that measure is the imposition of specific duties through which India sought to remedy an alleged serious injury to its domestic industry and to prevent a threat of further serious injury.

7.53. Accordingly, we find that the suspension of Article II:1(b) of the GATT 1994 by India was designed to prevent or remedy serious injury to India's domestic production.

7.4.3.2 Article I:1 of the GATT 1994

7.54. Japan and India consider that the challenged measure also suspended India's MFN obligation under Article I:1 of the GATT 1994, because India excluded certain developing countries from the application of the duties resulting from the measure at issue, and thus granted an advantage that was not accorded immediately and unconditionally to the like products originating in other WTO Members.¹¹¹

7.55. Article I of the GATT 1994 is entitled General Most-Favoured-Nation Treatment. In its paragraph 1 it provides as follows:

¹⁰⁵ Excerpt from India's schedule of concessions with respect to customs heading 7208, (Exhibit IND-21); India's opening statement at the first meeting of the Panel, para. 44. See also Japan's first written submission, para. 520; second written submission, para. 270; opening statement at the first meeting of the Panel, para. 113; and response to Panel question No. 11, para. 4.

¹⁰⁶ See para. 7.41 above.

¹⁰⁷ See para. 7.42 above.

¹⁰⁸ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 5.

¹⁰⁹ Final Findings, (Exhibits JPN-11/IND-11), section R, p. 209.

¹¹⁰ Final Findings, (Exhibits JPN-11/IND-11), section J, pp. 203-204.

¹¹¹ Japan's responses to Panel question No. 11, para. 5, and No. 80, paras. 19-23; second written submission, paras. 279 and 284-285; India's responses to question Nos. 11(a), 80, 83 and 91; and opening statement at the second meeting of the Panel, paras. 5-6.

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.56. Section 8B of the Customs Tariff Act, 1975, provides that:

[No safeguard] duty shall be imposed on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing **countries ... so long as the** aggregate of the imports from all such countries taken together does not exceed nine per cent of the total imports of that article into India.¹¹²

7.57. The same provision notes that, for the purpose of that section, "'developing country' means a country notified by the Central Government in the Official Gazette".¹¹³ The list of developing countries for the purposes of safeguard investigations (which includes 132 countries) was provided in Notification No. 19/2016 published by the Ministry of Finance on 5 February 2016.¹¹⁴

7.58. In the Final Findings, the Indian competent authority noted that it had examined the share of imports from developing countries during the period of investigation (POI). It stated that developing countries had less than 3% individually and 9% collectively of total imports into India, apart from China and Ukraine whose shares were 24% and 4% of total imports respectively. The Indian competent authority concluded that all developing countries listed in Notification No. 19/2016, except for China and Ukraine, should be excluded from the application of the measure at issue.¹¹⁵ The Ministry of Finance notification of 29 March 2016, imposing the definitive safeguard measure, provided that:

Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries under clause (a) of sub-section (6) of section 8B of the Customs Tariff Act, other than [the] People's Republic of China and Ukraine.¹¹⁶

7.59. India has argued that its exclusion of developing countries from the application of the measure at issue was done pursuant to Article 9.1 of the Agreement on Safeguards.¹¹⁷ The provision cited by India, entitled Developing Country Members, provides as follows:

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

7.60. Japan argues that the fact that imports from Ukraine and China are subject to the measure at issue due to their significant market shares indicates that India selected the sources of imports to be subject to the measure with a view to preventing or remedying serious injury.¹¹⁸

7.61. It is an undisputed fact that the measure at issue excluded imports originating in certain developing countries from the application of the resulting duties. This exclusion resulted in favourable treatment for imports from those countries that was not accorded immediately and unconditionally to the like products originating in the territories of all other Members. This aspect as

¹¹² Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(1), p. 10.

¹¹³ Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(6)(a), p. 11.

¹¹⁴ Notification No. 19/2016-Customs (5 February 2016), (Exhibits JPN-3/IND-3).

¹¹⁵ Final Findings, (Exhibits JPN-11/IND-11), section M, p. 206. See also *ibid.* section R(b), p. 209.

¹¹⁶ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 7.

¹¹⁷ India's first written submission, paras. 342-343.

¹¹⁸ Japan's second written submission, para. 285; response to Panel question No. 11, para. 5.

a matter of fact resulted in a suspension by India of the general MFN treatment provided for in Article I:1 of the GATT 1994.

7.62. We have noted, however, that the mere suspension of a GATT obligation is not sufficient to characterize a measure as a safeguard. To constitute a safeguard, the suspension of the GATT obligation must be done with the objective of preventing or remedying serious injury to the domestic production. In this respect, neither the Ministry of Finance's notification of 29 March 2016, imposing the definitive safeguard measure, nor the findings by the Indian competent authority, indicate that the exemption of imports from certain developing countries from the application of the duties was designed to prevent or remedy serious injury. Before the Panel, India has argued instead that this exclusion was done to comply with Article 9.1 of the Agreement on Safeguards.¹¹⁹ Indeed, the language of the legislation on which India based the exemption of imports from certain developing countries (namely, Section 8B of the Customs Tariff Act, 1975) closely reflects the language in Article 9.1 of the Agreement on Safeguards. The exemption of certain countries from the application of the duties resulting from the measure at issue has the result of allowing *more* imports of the subject products into India's territory for the purpose of complying with India's obligation under Article 9.1 of the Agreement on Safeguards.

7.63. Accordingly, the suspension of Article I:1 of the GATT 1994 entailed by the exemption of certain countries from the application of the duties resulting from the measure at issue was not designed to prevent or remedy serious injury to India's domestic industry.

7.4.3.3 Article XXIV of the GATT 1994

7.64. India also asserts that the measure at issue suspended its obligations under Article XXIV of the GATT 1994, specifically Articles XXIV:4, XXIV:8, and XXIV:12, with respect to the free trade agreements (FTAs) subscribed with the Republic of Korea and Japan.¹²⁰ "In India's view, compliance with FTAs entered by India with Korea and Japan under the aegis of Article XXIV of the GATT, 1994 is an 'obligation' under the GATT, 1994."¹²¹ India refers to the statement in the Final Findings that the bilateral safeguard action under the respective FTAs limits the safeguard duties only to a level not exceeding MFN rates, which would not be sufficient to mitigate the serious injury suffered by the domestic industry.¹²² Japan replies that Article XXIV does not impose an obligation on Members to either establish a customs union or free-trade area or to apply a particular rate of duty on imports of the product concerned from certain FTA partners.¹²³

7.65. We note that in 2009 India and Japan entered into to a Comprehensive Economic Partnership Agreement, which came into effect on 1 August 2011 (India-Japan CEPA). India is also a party to a Comprehensive Economic Partnership Agreement with Korea, which entered into force on 1 January 2010 (India-Korea CEPA).¹²⁴ Both agreements provide that the duties for the products concerned shall be reduced or eliminated. In the Final Findings, the Indian competent authority explained in this way its recommendation that imports of the products concerned from Korea and Japan be included in the safeguard measure:

[I]t is immaterial that imports from Korea RP and Japan increased due to low customs duty under the respective FTAs. Imports from these two countries have occurred in huge quantities in the most recent period and these imports are at very low prices causing serious injury to the domestic industry. Further, it is the discretion of the Government of India to explore bilateral mechanisms under the respective FTAs or adopt a general safeguard measure in this case. Both the FTAs nowhere mention that India is obligated to explore bilateral mechanisms first and only after failure of such

¹¹⁹ India's first written submission, paras. 342-343; opening statement at the first meeting of the Panel, para. 42.

¹²⁰ India's first written submission, para. 117; responses to Panel question Nos. 11(a), 20, 86, and 91; and opening statement at the second meeting of the Panel, paras. 5-6 and 8.

¹²¹ India's response to Panel question No. 20.

¹²² India's first written submission, para. 117 (referring to Final Findings, (Exhibit IND-11), para. 55, pp. 200-201).

¹²³ Japan's second written submission, para. 286. See also comments on India's responses to Panel question No. 86, para. 22, and No. 125, para. 78.

¹²⁴ Japan's first written submission, paras. 50-53. See also WTO regional trade agreements information system, available at <http://rtais.wto.org/UI/PublicAIIRTAList.aspx> (accessed 15 July 2018).

mechanisms can adopt a general safeguard measure. The imports from non-FTA countries had also significantly increased, therefore, safeguard action under the FTA would have left the door open for non-FTA countries to further increase their exports. Secondly, the safeguard action on the FTA limits the safeguards duties only to the level not exceeding the MFN rates, which is not by itself sufficient to mitigate the present situation. It may be noted that these FTAs have specific provisions that allow India to impose general safeguard duty. The only exception under [the Agreement on Safeguards] and Safeguard Duty Rules is exclusion of developing countries whose individual share in imports is below 3% and whose aggregate share in imports is below 9%. Korea RP and Japan do not fall under this exception, as both of them are developed countries.¹²⁵

7.66. Article XXIV of the GATT 1994 contains rules applicable to customs unions and free-trade areas of which WTO Members are part. In its relevant sections, this provision states:

4. The [Members] recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other [Members] with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of [Members], the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

...

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of [Members] not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

8. For the purposes of this Agreement:

...

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

¹²⁵ Final Findings, (Exhibits JPN-11/IND-11), para. 55, p. 201.

12. Each [Member] shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.¹²⁶

7.67. As indicated by the Appellate Body in *Turkey – Textiles* "Article XXIV [of the GATT 1994] may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency".¹²⁷ The *chapeau* of Article XXIV: 5 provides that the obligations contained in the GATT 1994 shall not prevent the formation of such customs unions or free-trade areas. According to this provision, however:

Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.¹²⁸

7.68. A Member party to a free-trade area may invoke Article XXIV to defend a measure incompatible with an obligation under the GATT 1994 if it can demonstrate that two conditions are met (i) the free-trade area must comply with the requirements in paragraphs 8(b) and 5(b) of Article XXIV; and (ii) the measure at issue must be necessary for the formation or functioning of the free-trade area, in the sense that the formation or proper functioning of the free-trade area would be prevented if the measure at issue was not allowed.¹²⁹

7.69. In other words, any obligation that India may have, under the FTAs entered with Korea and Japan, to apply a particular rate of duties or to refrain from imposing specific measures to imports of those countries does not arise from the GATT 1994 but from the FTAs in question. As noted by the panel in *Indonesia – Iron or Steel Products*:

Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its [regional trade agreements] partners. Article XXIV of the GATT 1994 is a *permissive* provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures. Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its [Association of Southeast Asian Nations] trading partners is established in the [Association of Southeast Asian Nations] Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the [Association of Southeast Asian Nations]-Korea Free Trade Agreement, not in Article XXIV. In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX: 1(a).¹³⁰

7.70. More specifically, Article XXIV:4, which is one of the provisions cited by India, reflects only the recognition by WTO Members that (i) freedom of trade can be increased through preferential trade agreements between Members; and (ii) the purpose of preferential trade agreements (customs union and free-trade areas) should be to facilitate trade between the parties and not to raise barriers to the trade of other Members. This language may provide context when interpreting other provisions, but does not contain any positive obligation for WTO Members.

7.71. Similarly, Article XXIV:8, another provision cited by India, defines what shall be understood by a free-trade area for the purpose of the agreement. Again this language provides important context when interpreting other provisions. The Member who attempts to justify a GATT-inconsistent

¹²⁶ Emphasis original.

¹²⁷ Appellate Body Report, *Turkey – Textiles*, para. 45.

¹²⁸ Appellate Body Report, *Turkey – Textiles*, para. 46.

¹²⁹ Appellate Body Report, *Turkey – Textiles*, paras. 58-59.

¹³⁰ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.20. (emphasis original; fns omitted)

measure by invoking Article XXIV has the burden of demonstrating that the free-trade area at issue complies with the requirements in Article XXIV:8(b). Article XXIV:8, however, does not contain any positive obligation for WTO Members.

7.72. In contrast with other sections in Article XXIV, paragraph 12 contains a positive obligation. It provides that Members shall take all reasonable measures available to ensure that regional and local authorities comply with obligations under the GATT 1994. The measure at issue, however, was adopted by India's Central Government. There is no indication that the measure resulted in regional or local authorities engaging in any conduct that was inconsistent with India's obligations under the GATT 1994. Accordingly, the issue of whether India failed to take all reasonable measures available to it to ensure that regional and local authorities complied with obligations under the GATT 1994 has not arisen in this case.

7.73. Accordingly, India has not demonstrated that the measure at issue resulted in a suspension of its obligations under Article XXIV of the GATT 1994, specifically under Articles XXIV:4, XXIV:8, and XXIV:12.

7.4.4 Conclusion

7.74. For the reasons explained above, the Panel concludes that the measure at issue resulted in a suspension of obligations incurred by India under the GATT 1994, namely Article II:1(b), second sentence. The measure that resulted in this suspension of GATT obligations was adopted by India as a temporary emergency action, designed to remedy an alleged situation of serious injury to the domestic industry brought about by an increase in imports of the subject products. In light of those aspects, we find that the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Accordingly, the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination that the Panel has to make of the claims raised in the present dispute.

7.75. We have already noted that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law. Likewise, the manner in which a Member conducts an investigation or notifies measures to the WTO is not dispositive of the legal characterization of the measure. However, all these factors may be relevant elements when considering a measure's design and structure. In this regard, we find that the following elements confirm our conclusion. First, the fact that the Indian competent authority imposed the measure at issue and conducted the respective investigation under domestic legislation that authorizes the Government to impose duties on imports after determining that relevant products are being imported into India in increased quantities and under conditions so as to cause or threaten to cause serious injury to the domestic industry. Second, the fact that the measure at issue had the typical characteristics of a safeguard measure, including (i) that it resulted in duties imposed on imports of the like or directly competitive product to that produced by the affected domestic industry; (ii) that the duties were only temporary; (iii) that the measure was subject to a progressive liberalization at periodic intervals; and (iv) that imports from certain developing countries that did not exceed a threshold were exempted from the duties. Third, the fact that India notified this investigation and measures to the WTO Committee on Safeguards pursuant to the provisions in Article XIX of the GATT 1994 and in the Agreement on Safeguards.

7.5 Whether India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to the existence of "unforeseen developments" and the effect of GATT obligations

7.5.1 Introduction

7.76. Japan claims that India acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate:

- a. the existence of "unforeseen developments" and a logical connection between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry; and

- b. a logical connection between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry.

7.77. Before addressing Japan's claims, we recall the relevant facts regarding the Indian competent authority's determination on the unforeseen developments and the effect of the obligations incurred under the GATT 1994 and set out our understanding of Article XIX: 1(a) of the GATT 1994.

7.5.2 The Indian competent authority's determination

7.78. Both the Preliminary and Final Findings of the Indian competent authority address the issue of "unforeseen developments" and "the effect of the obligations incurred" under the GATT 1994.

7.79. With respect to "unforeseen developments", the Indian competent authority observed that the world production capacity of crude steel was 2,351 million tonnes as of 31 December 2014, which exceeded global demand by almost 30%.¹³¹ It further noted that the production capacity in early 2015 was 1,055 million tonnes for the non-Chinese industry and 991 million tonnes for China, for a total of 2.05 billion tonnes. When compared to steel production of 1.66 billion tonnes in 2014, there were 382 million tonnes of excess global steel production capacity.¹³²

7.80. The Indian competent authority stated that, specifically, China, Russia, Ukraine, Japan, and Korea developed "huge capacities" to meet the demand for steel in developed countries. At the same time, the traditional importers of steel such as the United States and the European Union reduced their dependence on imported steel. This fact induced exporters to look for other export markets with increasing demand and high domestic prices.¹³³ The latter included India, where demand for steel had increased by 3.1%. The Indian competent authority considered that India became "the natural choice" for steel surplus manufacturers due to its increasing demand and high domestic prices.¹³⁴

7.81. The Indian competent authority also noted that the Russian currency had depreciated due to a drop in oil prices and Russian steel exporters experienced "high realization for their exports". At the same time, Russian exporters faced restricted access to their traditional export markets, such as the European Union and Ukraine.¹³⁵ The Indian competent authority further noted that, after a sustained growth rate for many decades, the demand for steel in China had decreased due to a slowdown in its infrastructure sector, which was the biggest consumer of steel in China. It considered that this situation was unlikely to change in the near future.¹³⁶ The Indian competent authority further observed that, due to its political crisis, Ukraine's currency had depreciated by 60% in 2014. The depreciation of the Ukrainian currency and the resulting low export prices for Ukrainian steel, together with the Russian and Chinese sales, put further pressure on the global steel market.¹³⁷ The Indian competent authority concluded that the above events were unforeseen developments that had resulted in increased imports of the product concerned into India.¹³⁸

7.82. With respect to the "the effect of the obligations incurred" under the GATT 1994, the Indian competent authority examined whether the increase in imports had occurred as a result of the effect of the obligations incurred by India under the GATT 1994.¹³⁹ The Indian competent authority stated that, according to India's Schedule of Concessions, the bound rate on the product concerned was

¹³¹ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 19, p. 14.

¹³² Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15 (referring to *World Steel Dynamics*).

¹³³ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 18, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.

¹³⁴ Preliminary Findings, (Exhibits JPN-7/IND-7), paras. 18 and 20, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.

¹³⁵ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 21, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 76, p. 204.

¹³⁶ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 23, pp. 14-15; Final Findings, (Exhibits JPN-11/IND-11), para. 78, p. 204.

¹³⁷ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 22, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 77, p. 204.

¹³⁸ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15; Final Findings, (Exhibits JPN-11/IND-11), para. 79, pp. 204-205.

¹³⁹ Final Findings, (Exhibits JPN-11/IND-11), paras. 80-81, p. 205.

40% *ad valorem*. It noted that India reduced its applied rates on products in many sectors, including the steel sector and that the applied rate on the product concerned was 7.5% in 2013-2015. The Indian competent authority concluded that "due to the effect of such low applied tariffs" and given the circumstances and market conditions present in that time the imports of the product concerned had increased in "sudden, sharp, significant manner into India".¹⁴⁰

7.83. Considering the above, the Indian competent authority concluded that "as a result of unforeseen developments and as an effect of obligations under GATT including tariff concessions", imports of the product concerned had increased in a sudden, sharp, significant and recent manner into India.¹⁴¹

7.5.3 Article XIX:1(a) of the GATT 1994

7.84. Article XIX:1(a) reads as follows:

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 [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.

7.85. Article XIX:1(a) provides WTO Members with a right to apply a safeguard measure when, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products.¹⁴² As noted by the panel in *US – Steel Safeguards*, pursuant to Article XIX of GATT 1994, when unforeseen developments have resulted in increased imports that are causing or threatening to cause serious injury to the relevant domestic industry, WTO Members may limit market access by taking an otherwise WTO-inconsistent measure and obtain temporary relief.¹⁴³

7.86. The unforeseen developments and the effect of GATT obligations are not "independent conditions" for the application of safeguard measures, additional to the conditions set forth in the second clause of Article XIX:1(a) and reiterated in Article 2.1 of the Agreement on Safeguards. Rather, these two elements constitute "circumstances" that must be demonstrated, as a matter of fact, to apply safeguard measures consistently with Article XIX:1(a). In this sense, the Appellate Body stated 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" – and the conditions for the application of safeguard measures set forth in the second clause of Article XIX:1(a), such as a demonstration of an import surge, serious injury, and a causal link.¹⁴⁴

7.87. A WTO Member imposing a safeguard measure must demonstrate the existence of unforeseen developments and the effect of GATT 1994 obligations through reasoned and adequate explanations contained in its published report.¹⁴⁵ These explanations must show that the identified unforeseen developments have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic industry, and that one or more obligations under the GATT 1994 limit the importing Member's ability to prevent or offset the effect resulting from such increased imports.

¹⁴⁰ Final Findings, (Exhibits JPN-11/IND-11), para. 81, p. 205.

¹⁴¹ Final Findings, (Exhibits JPN-11/IND-11), para. 82, p. 205.

¹⁴² Appellate Body Report, *US – Steel Safeguards*, para. 264; Panel Reports, *US – Steel Safeguards*, para. 10.9.

¹⁴³ Panel Reports, *US – Steel Safeguards*, para. 10.9; See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.

¹⁴⁴ Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92.

¹⁴⁵ Appellate Body Report, *US – Lamb*, paras. 72 and 76.

7.88. The phrase "unforeseen developments" means developments that were "unexpected" at the time the importing Member incurred the relevant GATT obligation.¹⁴⁶ In *US – Fur Felt Hats*, the GATT panel stated that "unforeseen developments" should be interpreted to mean "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".¹⁴⁷ In *US – Steel Safeguards*, the panel stated that the legal standard used to determine what constitutes unforeseen developments has subjective and objective elements. The subjective element relates to what constitutes unforeseen developments for a particular importing Member and it will vary depending on the context and circumstances. The objective element focuses on what negotiators could reasonably have had in mind when they incurred a GATT obligation (not what the specific negotiators had in mind).¹⁴⁸ The competent authority's published report must discuss how the developments were unforeseen at the appropriate time, and why the increase in imports causing or threatening to cause serious injury to the domestic industry occurred as a result of those unforeseen developments.¹⁴⁹

7.89. With respect to the effect of a GATT 1994 obligation, the competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry.

7.5.4 The existence of unforeseen developments

7.90. Japan submits that India acted inconsistently with Article XIX:1(a) by failing to demonstrate the existence of unforeseen developments. Japan argues that, although the Preliminary and Final Findings include a section on unforeseen developments, the Indian competent authority failed to demonstrate why the developments identified in that section were unforeseen.¹⁵⁰ Japan also argues that the Indian competent authority did not explain whether all or some of the events mentioned in its determination were considered as unforeseen developments.¹⁵¹ Japan adds that the Final Findings note that the identified developments were unforeseen by the domestic industry, which does not prove that they were necessarily unforeseen by India. Japan submits that under Article XIX:1(a) the developments have to be unforeseen or unexpected for the importing country, rather than for its domestic industry.¹⁵²

7.91. India responds that the Preliminary and Final Findings clearly indicate that the Indian competent authority considered a confluence of events or circumstances to constitute the "unforeseen developments".¹⁵³ India points out that its competent authority referred to the panel report in *US – Steel Safeguards*, which clarified that a confluence of events can form a basis for the unforeseen developments. India notes that Article XIX:1(a) does not specify how a competent authority should demonstrate the existence of unforeseen developments. India refers to the Appellate Body's statements in *US – Lamb* to argue that a competent authority should demonstrate the existence of unforeseen developments as a "matter of fact" and to provide a "discussion", and not necessarily an "explanation", as to why the identified developments were "unforeseen" at the appropriate time.¹⁵⁴ Finally, India submits that, although the Final Findings note that the domestic industry demonstrated the existence of unforeseen developments that had resulted in an import surge, the conclusion regarding unforeseen developments is that of the competent authority.¹⁵⁵

¹⁴⁶ Appellate Body Reports, *Korea – Dairy*, para. 86; *Argentina – Footwear (EC)*, para. 93.

¹⁴⁷ Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT ("Hatters' Fur"), GATT/CP/106 (adopted 22 October 1951), para. 9.

¹⁴⁸ Panel Reports, *US – Steel Safeguards*, paras. 10.41-10.43.

¹⁴⁹ Panel Reports, *US – Steel Safeguards*, para. 10.67.

¹⁵⁰ Japan's first written submission, paras. 104-106, 108-112, and 116 (referring to Panel Report, *Argentina – Preserved Peaches*, paras. 7.23 and 7.33); second written submission, paras. 13-23.

¹⁵¹ Japan's first written submission, para. 107; second written submission, paras. 9-12.

¹⁵² Japan's first written submission, para. 113; second written submission, paras. 24-25.

¹⁵³ India's first written submission, paras. 70-72, 76, and 81(a) (referring to Panel Reports, *US – Steel Safeguards*, para. 10.99).

¹⁵⁴ India's first written submission, paras. 79 and 81(b).

¹⁵⁵ India's first written submission, para. 81(g).

7.92. We first note that both parties agree that the text of Article XIX:1(a) allows a competent authority to consider either a confluence of events or individual events as the unforeseen developments provided for in Article XIX:1(a).¹⁵⁶ This understanding is supported by the panel report in *US – Steel Safeguards*, referred to by both parties, that a "confluence of developments can form the basis of 'unforeseen developments' for the purposes of Article XIX of GATT 1994".¹⁵⁷ Japan argues, however, that the Indian competent authority's determination lacks an explanation on whether the identified events separately or together constitute unforeseen developments.

7.93. Both the Preliminary and Final Findings show that the Indian competent authority considered the simultaneous occurrence of developments or confluence of events as the "unforeseen developments" provided for in Article XIX:1(a). In particular, the Indian competent authority, before analysing each of the events, referred to the panel's statement in *US – Steel Safeguards* that "the confluence of several events can unite to form the basis of an unforeseen development".¹⁵⁸

7.94. The Indian competent authority considered that major steel exporting countries (including China, Russia, Ukraine, Japan, and Korea) had significantly increased their production capacity to meet the demand in developed countries. According to the Preliminary Findings, as of 31 December 2014 the world crude steel capacity was in excess of global demand by almost 30%. The developed countries that traditionally were big importers of steel, including the United States and the European Union, had reduced their dependence on imported steel. After a "sustained growth rate" for many decades, China had experienced a drop in its domestic demand for steel. The findings also note that, at the same time, the demand in India was growing and domestic prices were high, which made India a natural destination for steel exports from countries with high supply of steel products. In addition, the depreciation of the Russian and the Ukrainian currencies relative to the US dollar led to the lowering of export prices for steel from these countries, which put further pressure on the global steel market. These findings show that the Indian competent authority considered that the excess production capacity of steel, combined with the increased demand in India, declined demand in other major markets, and currency depreciation in Ukraine and Russia, were unexpected developments that allegedly led to the increase in imports into India.

7.95. Japan next argues that India did not explain why the identified developments were unforeseen. Japan submits that a mere statement that a given event constitutes an unforeseen development, without any explanation as to why such event is to be regarded as an unforeseen development, is insufficient. According to Japan, while the Final Findings use several times the words "unforeseen" or "unforeseen developments", they fail to provide any explanation as to why the reported events were indeed "unforeseen" at that time.¹⁵⁹ As discussed above, the term "unforeseen developments" means changes that the importing Member could not have reasonably foreseen at the time when the relevant GATT obligation was negotiated (in this case, at the end of the Uruguay Round, as of 1 January 1995). A competent authority must demonstrate in its published report, through reasoned and adequate explanation, how these developments were unexpected or unforeseen.¹⁶⁰ We note that Japan does not advance any arguments that any of the identified developments or confluence of these developments could have been foreseen by India. Japan's argument focuses instead on the alleged lack of explanation by the Indian competent authority as to why the developments were unforeseen. Therefore, we will consider whether the Indian competent authority sufficiently explained its conclusion that the identified developments were unforeseen.

¹⁵⁶ Japan's second written submission, para. 10; India's first written submission, para. 72.

¹⁵⁷ The panel in *US – Steel Safeguards* stated that:

Article XIX does not preclude consideration of the confluence of a number of developments as "unforeseen developments". Accordingly, the Panel believes that confluence of developments can form the basis of "unforeseen developments" for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

(Panel Reports, *US – Steel Safeguards*, para. 10.99).

¹⁵⁸ Preliminary Findings, (Exhibits JPN-7/IND-7), paras. 14-17; Final Findings, (Exhibits JPN-11/IND-11), paras. 71-74.

¹⁵⁹ Japan's first written submission, para. 112; second written submission, paras. 16-18.

¹⁶⁰ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.51.

7.96. In its discussion of unforeseen developments, the Indian competent authority referred to the increase of production capacity in major exporting countries, the increase in demand in India, and the decrease in demand in the European Union, the United States, and China. Even though the changes in production capacity or demand are not necessarily extraordinary circumstances, and can occur as part of normal business cycles, the extent and timing of such changes as well as the degree of their impact on the competitive situation in the market can be unforeseen.¹⁶¹ The Indian competent authority observed that in 2014 the world production capacity of crude steel was 2,351 million tonnes, which exceeded the global demand by almost 30%.¹⁶² The production capacity further increased significantly in 2015: "effective capacity figure for early 2015 is 1055 million tonnes [sic] for the non-Chinese industry and 991 million tonnes [sic] for China, a total of 2.05 billion tonnes [sic]. When compared to steel production in 2014 of 1.66 billion tonnes [sic], there is 382 million tonnes [sic] of excess global steel making capacity".¹⁶³ These data indicate the significant extent and speed of changes in world production capacity of steel. Furthermore, the Indian competent authority found that the increase in production capacity occurred at the same time as other developments in the market. In particular, the European Union and the United States, which were "traditionally the biggest importers of steel", decreased their demand for imported steel. The Indian competent authority also referred to the decrease in the domestic demand in China and noted that China used to have a "sustained growth rate" for many decades, which indicates that the drop in growth rate was unexpected. Finally, India could not reasonably have expected the currency depreciations in Russia and Ukraine, which happened due to political and economic crises in these countries that were unrelated to the ordinary course of commerce.

7.97. In our view, it was reasonable for the Indian competent authority to find that an increase to such extent in production capacity, combined with higher domestic demand in India, decreased demand in several major markets, and that currency depreciation in Russia and Ukraine were unforeseen developments. We consider that negotiators could not reasonably have expected this confluence of events when India negotiated its tariff concessions. In light of the above reasons, we conclude that the Indian competent authority provided reasoned and adequate explanation as to why the identified developments were unforeseen.

7.98. Japan also argues that the Indian competent authority concluded that the domestic industry, and not India, did not foresee the developments. Japan refers to the Indian competent authority's statement that "[t]he domestic industry has been able to demonstrate that the developments in the market for surge in imports of the [product under consideration] were unforeseen".¹⁶⁴ We reject this argument, because, even if the Indian competent authority was supporting arguments made by the domestic industry during the investigation, the Final Findings contain a statement by the authority and not by the domestic industry.

7.99. In light of the above, we find that Japan has failed to demonstrate that India did not identify events that represent a plausible set of unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994.

7.5.5 Logical connection between unforeseen developments and the increased imports

7.100. We turn to considering Japan's arguments that the Preliminary and Final Findings do not demonstrate that the identified unforeseen developments resulted in increased imports into India allegedly causing injury to the domestic industry.

¹⁶¹ In *US – Fur Felt Hats*, a GATT panel considered that the fact that hat styles had changed did not constitute an "unforeseen development" within the meaning of Article XIX:1(a). However, "the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947". (Report of the Intersessional Working Party on the complaint of Czechoslovakia concerning the withdrawal by the United States of a tariff concession under Article XIX of the GATT, GATT/CP/106 (adopted 22 October 1951), paras. 11-12).

¹⁶² Preliminary Findings, (Exhibits JPN-7/IND-7), para. 19, p. 14.

¹⁶³ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15.

¹⁶⁴ Japan's first written submission, para. 113 (referring to Final Findings, (Exhibit JPN-11), para. 102(iii), p. 208).

7.101. Japan contends that India failed to demonstrate a "logical connection" between the unforeseen developments and the increase in imports of the product concerned into India.¹⁶⁵ First, Japan argues that the Indian competent authority failed to explain how imports of the product concerned increased "as a result" of the unforeseen developments.¹⁶⁶ In this respect, Japan submits that the Indian competent authority should have examined how the unforeseen developments modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing serious injury to the domestic industry.¹⁶⁷ Furthermore, Japan argues that the Indian competent authority should have conducted a country-specific analysis of imports, given that certain unforeseen developments in this case relate to specific countries.¹⁶⁸ Japan emphasizes that the Indian competent authority also failed to address any developments in Japan and Korea, which are the two largest exporting countries of the product concerned into India.¹⁶⁹ Japan also argues that the Indian competent authority failed to demonstrate when the events identified as unforeseen developments occurred. According to Japan, the increased imports can be "a result of" unforeseen developments only if the latter have occurred before the imports started to surge. Japan argues that the Indian competent authority failed to indicate whether the unforeseen developments preceded the import surge, and thus failed to establish the link between the alleged unforeseen developments and the import surge.¹⁷⁰

7.102. Second, Japan asserts that India examined the unforeseen developments with regard to steel in general and failed to consider the effect of unforeseen developments with regard to the specific product concerned.¹⁷¹ Third, Japan submits that the Indian competent authority failed to provide any supporting data regarding the alleged unforeseen developments, including specific data regarding production capacities of the product concerned in the exporting countries and supporting evidence regarding depreciation of Russian and Ukrainian currencies.¹⁷²

7.103. India argues that Article XIX:1(a) does not require a competent authority to examine whether the unforeseen developments have modified the conditions of competition between the imported and the domestic products. India considers that Japan reads into Article XIX:1(a) an obligation that does not exist.¹⁷³ India asserts that Article XIX:1(a) only requires a competent authority to demonstrate a logical connection between "unforeseen developments" and "increased imports", which was shown in the Indian competent authority's determination.¹⁷⁴ India submits that, in the circumstances, a logical connection should be examined between the increased imports and the confluence of developments, and not with individual events which form the basis for the unforeseen developments.¹⁷⁵ India disagrees with Japan that the complexity of the matter in the underlying investigation required more sufficient explanation. India considers that Japan failed to exercise its burden of proof to demonstrate that a more detailed analysis was necessary.¹⁷⁶

7.104. India further submits that considering the global nature of safeguard measures, there is no requirement to examine the developments individually on a country-specific basis.¹⁷⁷ India also argues that, in accordance with Article XIX:1(a), a competent authority has to demonstrate a logical connection between (i) the unforeseen developments, and (ii) the increased imports of specified products. India disagrees that the unforeseen developments themselves should be connected to a

¹⁶⁵ Japan's first written submission, paras. 114-116 and 118 (referring to Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; and *US – Steel Safeguards*, para. 315; and Panel Reports, *Argentina – Preserved Peaches*, para. 7.23; and *US – Steel Safeguards*, para. 10.122).

¹⁶⁶ Japan's first written submission, paras. 114-116 and 118 (referring to Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; and *US – Steel Safeguards*, para. 315; and Panel Reports, *Argentina – Preserved Peaches*, para. 7.23; and *US – Steel Safeguards*, para. 10.122).

¹⁶⁷ Japan's first written submission, paras. 85-86 and 117-119 (referring to Panel Reports, *US – Lamb*, paras. 7.23-7.24; and *US – Steel Safeguards*, para. 10.115); second written submission, paras. 42-43.

¹⁶⁸ Japan's first written submission, paras. 133 and 136; second written submission, paras. 44-48.

¹⁶⁹ Japan's first written submission, paras. 134-135; second written submission, para. 47.

¹⁷⁰ Japan's first written submission, paras. 137-141; second written submission, paras. 49-52.

¹⁷¹ Japan's first written submission, paras. 142-146; second written submission, paras. 53-62.

¹⁷² Japan's first written submission, paras. 147-151; second written submission, paras. 63-67.

¹⁷³ India's first written submission, para. 85; second written submission, paras. 9-10.

¹⁷⁴ India's first written submission, paras. 84-87 and 91.

¹⁷⁵ India's first written submission, para. 70.

¹⁷⁶ India's first written submission, paras. 88 and 93-95.

¹⁷⁷ India's first written submission, paras. 86 and 90 (referring to Final Findings, (Exhibit IND-11), paras. 34-42, 102(i), and 102(iii); and Preliminary Findings, (Exhibit IND-7), paras. 14-24 and 71-82); response to Panel question No. 88.

specific product, since the increase in imports may result from such events as, for example, currency devaluations, closure of downstream industries, or acts of war, which do not relate to a specific product.¹⁷⁸ India also rejects Japan's allegation that the unforeseen developments should necessarily coincide with the increased imports. India notes that Japan does not dispute the facts of the currency devaluation and the increase in imports in the recent past.¹⁷⁹

7.105. We begin by noting Japan's argument that, since in this case there is no clear link between the unforeseen developments and the increase in imports, the Indian competent authority should have examined how the alleged unforeseen developments modified the conditions of competition between the domestic and imported products. We recall that Article XIX:1(a) does not provide any guidance on how the relationship between unforeseen developments and the increase in imports shall be examined. The competent authorities enjoy certain discretion in choosing the appropriate method for examining the relationship between unforeseen developments and the increase in imports, taking into account the facts and circumstances of the particular case. At the same time, a competent authority must provide in its published report a reasoned and adequate explanation supporting its conclusions on unforeseen developments. Therefore, the question before us is whether the Indian competent authority demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments resulted in increased imports causing (or threatening to cause) serious injury to the domestic industry of the products concerned.

7.106. We agree with the panel's statement in *US – Steel Safeguards* that the enquiry as to whether an explanation regarding the relationship between unforeseen developments and the increased imports is reasoned and adequate depends on the factual circumstances of the particular case. In particular, the panel stated that:

In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a[n] explanation is reasoned and adequate.¹⁸⁰

7.107. We will first consider Japan's argument that the Indian competent authority should have conducted a country-specific analysis of imports, considering that some of the alleged unforeseen developments relate to events in specific exporting countries. The Indian competent authority's examination of unforeseen developments focused on changes in the global steel market (the difference between global production capacity and global demand) as well as on developments in certain exporting countries (such as China, Russia, and Ukraine). The developments in specific countries include the weakening of the Russian currency due to a drop in oil prices and the consequent increase of steel exports from Russia; the restricted access for Russian steel to its traditional export markets; the depreciation of the Ukrainian currency and consequent low priced imports from Ukraine; and a decrease in domestic demand for steel in China.¹⁸¹

7.108. The Indian competent authority hardly mentioned any developments relating to Korea and Japan, even though these two countries were the two largest exporters of the product concerned. The share of imports from Japan was 37% in 2013-2014, 31% in 2014-2015, and 34% in the first quarter of 2015-2016. The share of imports from Korea was 13% in 2013-2014, 26% in 2014-2015, and 40% in 2015-2016.¹⁸² Although the Indian competent authority mentioned Korea and Japan among countries that significantly increased their production capacity, no supporting data

¹⁷⁸ India's first written submission, para. 103.

¹⁷⁹ India's first written submission, para. 102.

¹⁸⁰ Panel Reports, *US – Steel Safeguards*, para. 10.115.

¹⁸¹ The share of imports from Russia was 4% in 2013-2014, 6% in 2014-2015, and 5% in the first quarter of 2015-2016. The share of imports from Ukraine was 6% in 2013-2014, 3% in 2014-2015, and 4% in the first quarter of 2015-2016. (Japan's first written submission, para. 134 (referring to Revised Application, (Exhibit JPN-6); and Application, (Exhibit JPN-5)). See also Final Findings, (Exhibits JPN-11/IND-11), section XIII, para. k, p. 186.

¹⁸² Japan's first written submission, para. 134 (referring to Revised Application, (Exhibit JPN-6), and Application, (Exhibit JPN-5)). See also Final Findings, (Exhibits JPN-11/IND-11), section XIII, para. k, p. 186.

regarding the increase in production capacity in Japan and Korea were provided in the Preliminary or Final Findings. The section on unforeseen developments does not discuss further any development in Japan and Korea that may have led to the import surge from these countries into India. At the same time, the section on serious injury refers to the FTAs that India concluded with Japan and Korea. In particular, the India-Korea CEPA came into effect on 1 January 2010 and India-Japan CEPA came into effect on 1 August 2011.¹⁸³ These FTAs provided for a gradual reduction of applied duties for the product concerned originating from Korea and Japan. The reduced tariffs under the respective FTAs ranged from 0% to 3.75% during the POI, while the MFN duty rate was 10%.¹⁸⁴ The Indian competent authority concluded that:

[I]t is immaterial that imports from Korea RP and Japan increased due to low customs duty under the respective FTAs. *Imports from these two countries have occurred in huge quantities in the most recent period* and these imports are at very low prices causing serious injury to the domestic industry.¹⁸⁵

7.109. In response to a question from the Panel, India stated that the lowering of duties under the respective FTAs was not considered part of the confluence of unforeseen developments, and that it instead referred to the effect of the obligations incurred by India under the GATT 1994, namely Article XXIV.¹⁸⁶ As noted above, the lowering of tariffs for the product concerned originating from Korea and Japan is an obligation for India under the respective FTAs. Article XXIV of the GATT 1994 does not impose an obligation on India to either enter into specific FTAs or to provide a certain level of customs duties to its FTA partners. India's acknowledgement that the significant volume of imports originating from Korea and Japan as a result of the FTAs was not part of the confluence of unforeseen developments undermines the logical connection between the increased imports and the unforeseen developments. In any case, the reference to India's obligations under Article XXIV of the GATT 1994 is an *ex post* explanation, since the Indian competent authority did not refer to these obligations in the Final Findings.

7.110. As indicated above, Article XIX:1(a) does not provide any methodology for examining the relationship between the unforeseen developments and the increase in imports. Even though a competent authority enjoys a certain latitude in choosing the appropriate method, it must provide a reasoned and adequate explanation of its findings. In the underlying investigation, the Indian competent authority relied in its analysis of unforeseen developments on events occurring in specific countries, in particular China, Russia, and Ukraine, while a significant portion of imports during the POI originated from its FTA partners, Korea and Japan. Although we acknowledge that the origin of the unforeseen developments may differ from the origin of the increased imports¹⁸⁷, the facts before the Indian competent authority warranted an explanation as to why the alleged increase in imports, with a predominant share from Japan and Korea, occurred due to the unforeseen developments of different origins.

7.111. Moreover, the unforeseen developments identified in the Indian competent authority's findings relate to changes in the steel market in general. The steel industry worldwide produces numerous varieties of steel products. The underlying investigation was conducted with regard to a particular product – "hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more". In response to a question from the Panel, India noted that:

Steel production worldwide is measured in terms of the crude capacity. The proportion of the [product under consideration] remains the same *qua* the crude production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable.¹⁸⁸

7.112. Neither the Preliminary nor the Final Findings, however, contain this explanation, nor do they provide any supporting data regarding the proportion of the product concerned in the crude

¹⁸³ India's response to Panel question No. 85. See also WTO regional trade agreements information system, available at <http://rtais.wto.org/UI/PublicAllIRTAList.aspx> (accessed 15 July 2018).

¹⁸⁴ Japan's comments on India's response to Panel question No. 85, para. 19 and table 1.

¹⁸⁵ Final Findings, (Exhibits JPN-11/IND-11), para. 55, p. 201. (emphasis added)

¹⁸⁶ India's responses to Panel question Nos. 20 and 86.

¹⁸⁷ Panel Reports, *US – Steel Safeguards*, para. 10.146.

¹⁸⁸ India's response to Panel question No. 16. See also response to Panel question No. 90.

steel production. In our view, the Indian competent authority failed to explain how the unforeseen developments related to steel in general resulted in an increase in imports of the specific product concerned into India or, alternatively, why such analysis was unnecessary.

7.113. The Indian competent authority also found that many developed countries that were "traditionally the biggest importers of steel", including the United States and the European Union, had decreased their demand for imported steel. The exporting countries searched for other markets and India was a natural choice for these manufactures to divest their excess capacity.¹⁸⁹ The Indian competent authority failed to support this statement with any data and to link the excess supply with the alleged increase of imports into India. Similarly, the Indian competent authority stated that Russian exporters had "a restricted access to traditional markets like the European Union and Ukraine resulting in [an] export push to India"¹⁹⁰, without providing any supporting data. The findings also mention that China experienced a decrease in domestic demand for steel, which led to a sudden surge of imports from China to India.¹⁹¹ Apart from noting that a negative growth rate of -0.5% in steel use in China would continue in 2015 and 2016, no other supporting data were provided. Therefore, we consider that the Indian competent authority failed to support its conclusions regarding the change in demand in several markets with data and to link these steel market displacements to the specific increase of imports into India.

7.114. Finally, we agree with Japan that the timing of the unforeseen developments is a relevant consideration for showing that the unforeseen developments resulted in an increase in imports. In our view, the Indian competent authority's examination of unforeseen developments lacks an explanation on the timing of events, which form the basis for the unforeseen developments. In particular, the Indian competent authority referred to the increase in production capacity in certain exporting countries¹⁹², the decrease in demand in the European Union and the United States, as well as the increase in demand in India, but failed to indicate the timing of these developments as well as to link them to the subsequent increase in imports into India. The Indian competent authority further noted that domestic demand in China was likely to remain unchanged in the short term and that steel use in China would continue to experience a "negative growth of -0.5% in 2015 and 2016". However, this consideration refers to an estimation of future developments. The Indian competent authority's determination does not provide data regarding the timing of the decrease in demand in China. Similarly, the Indian competent authority refers to the currency depreciation in Russia and the subsequent decrease in export prices, as a reason for increased imports from Russia¹⁹³, but failed to indicate the timing of these developments. We recall that the Indian competent authority identified the confluence of events as "unforeseen developments". Although we do not believe that all events that form a confluence of developments must necessarily take place simultaneously, there must be a clear temporal connection between the events that constitute a confluence of developments that is in turn connected to the increase in imports.

7.115. For the foregoing reasons, we find that India failed to provide a reasoned explanation that the increase in imports of the product concerned into India occurred as a result of unforeseen developments.

7.5.6 Effect of the obligations incurred under the GATT 1994

7.116. We now address Japan's arguments that India failed to demonstrate a "logical connection" between the effect of the obligations incurred by India under the GATT 1994 and the increase in imports causing (or threatening to cause) serious injury to the domestic industry.

7.117. Japan argues that a Member imposing a safeguard measure must demonstrate, not only the existence of the obligation under the GATT 1994 *per se*, but also *the effects* that such obligation has

¹⁸⁹ Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.

¹⁹⁰ Final Findings, (Exhibits JPN-11/IND-11), para. 76, p. 204.

¹⁹¹ Final Findings, (Exhibits JPN-11/IND-11), para. 78, p. 204.

¹⁹² In particular, the Indian competent authority observed that "a number of countries including China PR, Russia, Ukraine, Japan and Korea have developed huge capacities". It indicated the timing of the changes in production capacity only with regard to China. See paras. 7.79-7.80 above.

¹⁹³ We note that the Indian competent authority indicated the timing of currency depreciation in Ukraine. It observed that the Ukrainian currency depreciated by 60% in 2014 and considered that this trend would continue in 2015. (Preliminary Findings, (Exhibits JPN-7/IND-7), para. 22, p. 15).

produced.¹⁹⁴ Japan contends that a competent authority has to explain how the effects of the obligation under the GATT 1994 have resulted in the increase in imports causing or threatening to cause serious injury to the domestic industry, i.e. that there must be a "logical connection" between the effects of the GATT obligation and the increased imports.¹⁹⁵ Japan argues that this "logical connection" means that a relevant GATT obligation constrains a Member's freedom of action and prevents it from taking a WTO-consistent measure to address the increase in imports causing injury to the domestic industry.¹⁹⁶ Japan notes that India's bound rate on the product concerned was 40% *ad valorem*, while the applied rate was 7.5% in 2013-2015. Japan therefore submits that India could have increased its applied rate up to the level of the bound rate and was not prevented from doing so by Article II:1(b) of the GATT 1994.¹⁹⁷

7.118. India refers to the Appellate Body's statement that the phrase "the effect of the obligations incurred" under the GATT 1994 means that an importing Member must demonstrate "as a matter of fact" that it has incurred obligations under the GATT 1994, including tariff concessions.¹⁹⁸ India submits that Japan's argument that, in order to apply a safeguard measure, it must be demonstrated that the effects of the obligations under the GATT 1994 have resulted in the increase in imports, is contrary to the panel's statement in *US – Steel Safeguards* that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product".¹⁹⁹ India submits that the Indian competent authority's Final Findings note that India has tariff concessions on the product concerned.

7.119. India has stated that the safeguard measure at issue is a result of the obligations incurred by India under Article II and Article XXIV of the GATT 1994 collectively. India argues that it considers its FTAs to constitute obligations under Article XXIV of the GATT 1994 and refers to the Indian competent authority's discussion of the FTAs with Korea and Japan.²⁰⁰ India has also argued that the challenged measure suspended, in addition to Article XXIV of the GATT 1994, India's obligations under the second sentence of Article II:1(b) of the GATT 1994, which prohibits Members from imposing "all other duties or charges of any kind imposed on or in connection with ... importation".²⁰¹

7.120. As we have noted above, Article XXIV of the GATT 1994 does not impose an obligation on Members to enter into FTAs or to provide a certain level of customs duties to its FTA partners. In any event, India's argument on Article XXIV is an *ex post* explanation, because the Indian competent authority's consideration of the effect of the GATT obligations does not include any reference to the obligations with respect to customs unions and free-trade areas contained in Article XXIV.

7.121. With respect to Article II:1(b), we recall that, in its Final Findings, the Indian competent authority referred to India's tariff concession on the product concerned – a bound rate of 40% *ad valorem*. The Indian competent authority cited, not the tariff concession, but the "low applied tariffs" as a reason for the increase in imports into India. The findings contain no discussion on the alleged effect of India's obligations under either the first sentence of Article II:1(b), with respect to tariff bindings, or the second sentence, with respect to other duties or charges. Therefore, we consider that the Indian competent authority failed to provide a reasoned and adequate explanation with regard to the effect of the relevant obligations of the GATT 1994.

7.5.7 Conclusion

7.122. In light of the foregoing, we conclude that India acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate that the unforeseen developments and the effect of

¹⁹⁴ Japan's first written submission, para. 155; second written submission, para. 80 (referring to Panel Report, *Ukraine – Passenger Cars*, para. 7.96).

¹⁹⁵ Japan's first written submission, para. 156.

¹⁹⁶ Japan's first written submission, paras. 157 and 161.

¹⁹⁷ Japan's first written submission, paras. 162-163; second written submission, paras. 81-82.

¹⁹⁸ India's first written submission, para. 114 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 91).

¹⁹⁹ India's first written submission, paras. 115-116 (quoting Panel Reports, *US – Steel Safeguards*, paras. 10.139-10.140).

²⁰⁰ India's first written submission, para. 117 (referring to Final Findings, (Exhibit IND-11), para. 55).

²⁰¹ India's responses to Panel question Nos. 11 and 91.

GATT obligations have resulted in an increase in imports of the product concerned causing or threatening to cause serious injury to the relevant domestic industry in India.

7.6 Whether India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the increase in imports

7.6.1 Introduction

7.123. Japan claims that India's examination of the increase in imports is inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.²⁰² Specifically, Japan submits that the Indian competent authority failed to (i) make a qualitative analysis of the increase in imports; (ii) demonstrate that its determination of an increase in imports is based on "objective data"; (iii) demonstrate that the increase in imports was "recent enough, sudden enough, sharp enough, and significant enough"; and (iv) ensure that the examined increase in imports is "a result of" unforeseen developments and the effect of GATT obligations.²⁰³

7.124. Before addressing Japan's arguments, we will recall the Indian competent authority's findings with regard to increased imports and set out our understanding of the relevant provisions of the Agreement on Safeguards.

7.6.2 The Indian competent authority's determination on increased imports

7.125. In its Final Findings, the Indian competent authority found that there had been an increase in imports of the product concerned during the POI in absolute terms and relative to production.

7.126. The Indian competent authority evaluated the volume of imports during the POI, which included the following three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).²⁰⁴ The first two years covered the volume of imports during full financial years from 1 April 2013 until 31 March 2015. The volume of imports for the last year (2015-2016) was "annualized" on the basis of the data for the first quarter of 2015-2016 (from 1 April to 30 June 2015) by multiplying by four the volume of imports for the first quarter.²⁰⁵

Table 1: Increase in imports

Financial Year	Total Imports (MT)	Trend	Production in India (MT)	% of imports with respect to production
2013-2014	1,252,441	100	25,510,777	5
2014-2015	2,644,911	211	26,395,795	10
2015-2016(Q1)	881,233		6,646,258	
2015-2016(A)	3,524,932	281	26,585,032	13

Source: Final Findings, (Exhibits JPN-11/IND-11), paras. 41 and 43, p. 197.

7.127. The Indian competent authority noted that:

It is apparent from the data in the table above that there is a surge in import in absolute terms i.e. Import increased from [1,252,441] MT during the period 2013-14 to [3,524,932] MT during 2015-16 (Annualised).

The imports of product under consideration in India during the period of investigation have increased in relation to all Indian production. The import with respect to total production increased from 5% in 2013-14 to 13% in 2015-16(A).²⁰⁶

²⁰² Japan also claims that India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards by failing to provide a reasoned and adequate explanation of its determination regarding the increase in imports. This claim is addressed in section 7.11 below.

²⁰³ Japan's first written submission, para. 179; second written submission, para. 91.

²⁰⁴ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), para. 31, p. 196.

²⁰⁵ India's first written submission, para. 139; responses to Panel question Nos. 31 and 32.

²⁰⁶ Final Findings, (Exhibits JPN-11/IND-11), paras. 42-43, p. 197.

7.128. Based on these data, the Indian competent authority concluded that there was "a sudden, sharp and significant surge in imports" during the POI both in absolute terms and relative to total domestic production.²⁰⁷

7.6.3 Articles 2.1 and 4.2(a) of the Agreement on Safeguards

7.129. Article 2.1 reads 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.²⁰⁸

7.130. Article 4.2(a) provides in relevant part that:

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[.]

7.131. Article 2.1 of the Agreement on Safeguards sets out conditions for the application of safeguard measures. In particular, a Member applying a safeguard measure has to determine that the 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. Article 4.2(a) of the Agreement on Safeguards further provides that a competent authority shall evaluate "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" as one of the relevant factors "of an objective and quantifiable nature" having a bearing on the situation of the domestic industry. In *Argentina – Footwear (EC)*, the panel noted that Articles 2.1 and 4.2(a) are both relevant provisions for examining an increase in imports as a basic prerequisite for the application of safeguard measures.²⁰⁹ Article 2.1 "sets forth the conditions for the application of a safeguard measure", while Article 4.2(a) provides "the operational requirements for determining whether the conditions identified in Article 2.1 exist".²¹⁰

7.132. Article 2.1 requires a competent authority to examine the increase in imports in both absolute terms and relative to domestic production. Previous panels and the Appellate Body have stated that Article 2.1 does not refer to just any increase in imports, but to an increase in "such ... quantities" as to cause or threaten to cause serious injury to the domestic industry.²¹¹ The Appellate Body clarified that the expression "in such increased quantities" in 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'".²¹²

7.133. In turn, Article 4.2(a) requires that the increase in imports must also be evaluated "in its full context, in particular with regard to its 'rate and amount'".²¹³ The obligation under Article 4.2(a) to evaluate the rate and amount of the increased imports requires a competent authority to analyse the intervening *trends* of imports over the POI (rather than just comparing the end points).²¹⁴ The

²⁰⁷ Final Findings, (Exhibits JPN-11/IND-11), paras. 40-44, p. 197.

²⁰⁸ Fn omitted.

²⁰⁹ Panel Report, *Argentina – Footwear (EC)*, para. 8.138.

²¹⁰ Panel Report, *Argentina – Footwear (EC)*, paras. 8.139-8.140.

²¹¹ Panel Report, *Argentina – Footwear (EC)*, para. 8.161; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

²¹² Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

²¹³ Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

²¹⁴ Panel Report, *Argentina – Footwear (EC)*, para. 8.159 and fn 526; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

use of the present tense in the phrase "is being imported" suggests that a competent authority must examine the recent imports.²¹⁵ The Appellate Body noted that "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".²¹⁶ At the same time, the data from the most recent past should be assessed in the light of the longer-term trends in the data for the entire POI.²¹⁷

7.6.4 Evaluation by the Panel

7.134. Japan's claim regarding the Indian competent authority's determination on the increase in imports raises two main questions before us. First, whether by using annualized import data for 2015-2016 the Indian competent authority was basing its determination regarding an increase in imports on objective data. Second, whether the Indian competent authority examined the increase in imports both quantitatively and qualitatively and sufficiently explained its conclusions in the Final Findings that the increase in imports was "recent enough, sudden enough, sharp enough, and significant enough".

7.135. We begin by considering Japan's allegation that by using annualized data for 2015-2016, the Indian competent authority failed to base its determination regarding an increase in imports on "objective data" and thus acted inconsistently with Article 4.2(a).

7.136. Japan argues that the Indian competent authority failed to explain why it was reasonable to use annualized data for 2015-2016, extrapolating data from the first quarter to the rest of the year.²¹⁸ India submits that the Agreement on Safeguards does not provide any guidance regarding the analysis of the data, therefore the method applied by the Indian competent authority cannot be questioned unless it is shown that such method is unreasonable and biased.²¹⁹ India argues that the annualization of data is a logical method, when the only data available pertains to a short period of the year.²²⁰ India submits that the data for one quarter was annualized to make it comparable to the full year data of the preceding periods.²²¹

7.137. Pursuant to Article 4.2(a), "the rate and amount of the increase in imports" is one of the factors of "an objective and quantifiable nature" that must be evaluated by a competent authority. In *US – Lamb*, the Appellate Body stated that the requirement of "objectivity and quantifiability" applies, not only to factors, but also to data:

We recognize that the clause "of an objective and quantifiable nature" refers expressly to "factors", but not expressly to data. We are, however, convinced that factors can only be "of an objective and quantifiable nature" if they allow a determination to be made, as required by Article 4.2(b) of the *Agreement on Safeguards*, on the basis of "objective evidence". Such evidence is, in principle, objective data. The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors.²²²

We agree with this statement and consider that a competent authority must base its evaluation of factors under Article 4.2(a), including the rate and amount of the increase in imports, on objective data and evidence. Although Article 4.2(a) does not provide any guidance regarding the methodology for evaluating the increase in imports, the evaluation made by the competent authorities must be objective and unbiased.²²³

²¹⁵ Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

²¹⁶ Appellate Body Report, *US – Lamb*, para. 137.

²¹⁷ Appellate Body Report, *US – Lamb*, para. 138.

²¹⁸ Japan's first written submission, paras. 206-210; second written submission, paras. 111-117.

²¹⁹ India's first written submission, para. 139 (referring to Panel Report, *US – Line Pipe*, para. 7.203).

²²⁰ India's first written submission, para. 139.

²²¹ India's responses to Panel question Nos. 31, 33, and 95.

²²² Appellate Body Report, *US – Lamb*, para. 130. (emphasis original)

²²³ In *US – Line Pipe*, in determining whether the US methodology for the analysis of increased imports complied with the Agreement on Safeguards and the GATT 1994, the panel considered "whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports". (Panel Report, *US – Line Pipe*, para. 7.194).

7.138. As noted above, in the underlying investigation, the Indian competent authority selected the POI from 2013-2014 to 2015-2016 (annualized on the basis of the first quarter), i.e. the POI covers the following three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).²²⁴ The first two years covered the period from 1 April until 31 March. The volume of imports for the last year (2015-2016) was annualized on the basis of the data for the first quarter of 2015-2016 (from 1 April to 30 June 2015).²²⁵ In response to a question from the Panel, India clarified that the POI was, in fact, from 1 April 2013 to 30 June 2015.²²⁶ This period covers two financial years (from 1 April 2013 to 31 March 2015) and three months (1 April to 30 June 2015). India explained that the first quarter of 2015-2016 was only annualized to make the data of this period comparable to the full year data of the preceding periods.²²⁷

7.139. The methodology used by the Indian competent authority, where data were annualized in order to make them comparable with those of previous years, warrants a compelling explanation as to why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. The Preliminary and Final Findings do not contain any explanation in this respect.

7.140. The section of the Final Findings titled "Examination of Post POI data" provides data on the volume of imports for the second quarter of 2015-2016. The Indian competent authority observed that the volume of imports for 2015-2016, annualized on the basis of the first and second quarters, was 4,587,168 tonnes, which is 1,062,236 tonnes more than the volume of imports for 2015-2016, annualized on the basis of the first quarter only (3,524,932 tonnes).²²⁸ Although these data show that the volume of imports had increased by about 30% in the second quarter as compared to the first quarter of 2015-2016, they cast doubts as to what extent the volume of imports in 2015-2016, annualized on the basis of the first quarter, could provide a reasonable basis for comparison with the preceding periods.

7.141. In addition, the import data provided in the domestic industry's application show that the volume of imports fluctuates during a year. The domestic industry provided the data on the volume of imports in 2014-2015 with quarterly breakdown: first quarter – 421,109 tonnes; second quarter – 499,941 tonnes; third quarter – 718,494 tonnes; fourth quarter – 900,570 tonnes.²²⁹ The Indian competent authority examined the change in imports during the first two years of the POI (2013-2014 and 2014-2015) based on annual data only and did not provide any quarterly breakdown, which could provide a basis for comparison of import trends with quarterly data of 2015-2016.

7.142. The analysis of the increase in imports must be based on evidence of the actual volume of imports. As noted before, it should be also based on evidence from the most recent *past*.²³⁰ We recall that the Indian competent authority initiated the safeguard investigation on 7 September 2015. Before the Panel, India asserts that the POI was from 1 April 2013 to 30 June 2015, and that the annualized data for the rest of the financial year 2015-2016 were used only to make the information comparable to the full year data of the preceding periods. Although India denies that the data for the first quarter were used to draw conclusions with regard to the whole year²³¹, the Final Findings, cited in paragraphs 7.126-7.127 above, show that the Indian competent authority relied on the full year of 2015-2016 (annualized) to examine the trends in imports and draw conclusions regarding the existence of the import surge.²³² Absent any explanation on methodology, the reliance on annualized data calls into question whether the evaluation of import trends was based on actual imports, especially pertaining to the third and fourth quarters of 2015-2016.

²²⁴ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), para. 31, p. 196.

²²⁵ India's first written submission, para. 139.

²²⁶ India's response to Panel question No. 29.

²²⁷ India's first written submission, para. 230; responses to Panel question Nos. 29 and 31.

²²⁸ Final Findings, (Exhibits JPN-11/IND-11), para. 100, p. 208.

²²⁹ Revised Application, (Exhibits JPN-6/IND-20), p. 7.

²³⁰ See para. 7.133 above.

²³¹ India's response to Panel question No. 31.

²³² Final Findings, (Exhibits JPN-11/IND-11), paras. 40-44, p. 197. See also Preliminary Findings, (Exhibits JPN-7/IND-7), para. 13, p. 13.

7.143. Moreover, the record of the investigation contains import data for the three most recent years preceding the initiation of the investigation, which could have been used by the Indian competent authority. Indeed, the domestic industry's application specifically provides information on the volume of imports from 2011-2012 to June 2015²³³:

Table 2: Increase in Imports

2011-2012	2012-2013	2013-2014	2014-2015	2015-2016 (Quarter 1)
2,219,711	2,120,996	1,292,099	2,540,114	844,840

Source: Revised Application, (Exhibits JPN-6/IND-20), p. 7.

7.144. The Final Findings do not explain why the Indian competent authority did not use this information and decided instead to annualize the data for 2015-2016. In response to a question from the Panel, India noted that since the Agreement on Safeguards does not indicate how long the POI should be, a competent authority enjoys certain discretion to select the POI.²³⁴ Although the competent authorities can determine in each case the relevant POI to evaluate the increase in imports, the Final Findings do not indicate why the Indian competent authority did not use a period for which information was available and decided instead to annualize the data for 2015-2016.

7.145. For the above reasons, we consider that the Indian competent authority failed to evaluate the rate and amount of the increase in imports on the basis of objective data, when it analysed the increase in imports at least partly on annualized data.

7.146. Next, we turn to Japan's allegation that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, by failing to conduct a qualitative analysis of the increase in imports, since its analysis did not ensure that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.²³⁵

7.147. In particular, Japan submits that the Indian competent authority failed to properly examine the recent trends in imports in the context of longer-term trends. Japan points out to import trends before the POI, in 2011-2012 and 2012-2013, and argues that the short-term increase between 2013-2014 and the first quarter of 2015-2016 was only a recovery of imports to their previous levels.²³⁶ Japan submits that the domestic industry referred to import trends in 2011-2013 in their application and the interested parties raised the same issue during the investigation, but the Indian competent authority failed to provide reasons for disregarding this data.²³⁷ According to Japan, in order to make a qualitative analysis, the Indian competent authority should have evaluated the real significance of this short-term trend during the POI in light of longer-term trends or any other methods so as to ensure that this short-term upward trend was recent enough, sudden enough, sharp enough and significant enough.²³⁸ Although Japan does not challenge the selection of the POI as such, it considers that a competent authority's discretion to select the POI is not unlimited and must be exercised with due regard to the obligations provided in the Agreement on Safeguards that relate to the investigation process.²³⁹ Japan also argues that the Indian competent authority failed to provide an adequate explanation as to why it considered that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, as to cause and threaten to cause serious injury.²⁴⁰

²³³ Revised Application, (Exhibits JPN-6/IND-20), p. 7.

²³⁴ India's response to Panel question No. 36.

²³⁵ Japan's second written submission, para. 103; response to Panel question No. 94, para. 38.

²³⁶ Japan's first written submission, paras. 185, 187-188, and 190 (referring to Panel Report, *Argentina – Preserved Peaches*, para. 7.64); second written submission, para. 105.

²³⁷ Japan's first written submission, para. 192 (referring to Final Findings, (Exhibit JPN-11), para. 30, p. 195).

²³⁸ Japan's second written submission, para. 103.

²³⁹ Japan's first written submission, paras. 194-195.

²⁴⁰ Japan's first written submission, paras. 211-215; second written submission, para. 18.

7.148. India submits that the selected POI was long enough to enable the Indian competent authority to examine the recentness of the increase in imports in the context of the longer-term trends.²⁴¹ India asserts that the Agreement on Safeguards does not provide any guidance regarding the selection of the POI and that a competent authority enjoys certain discretion for determining the POI.²⁴² India denies Japan's allegation that the selected POI distorted the picture regarding the trends in imports. India submits that a mixed trend or even a downturn in imports does not mean that the serious injury to the domestic industry ceases to exist. According to India, the data show that although the imports declined before the POI, they have increased in recent terms and exceeded the quantities of the period preceding the POI.²⁴³ India adds that, even assuming that the period of 2011-2012 had been included into the POI, it would have still shown that the imports had increased both in absolute terms and relative to the domestic production.²⁴⁴

7.149. As we have discussed above, Article 2.1 of the Agreement on Safeguards and Article XIX: 1 of the GATT 1994 require a competent authority to determine not just any increase in imports, but an increase in "such ... quantities" as to cause or threaten to cause serious injury to the domestic industry.²⁴⁵ This implies both a quantitative and a qualitative consideration of the increase in imports. The increase in imports must be considered "in its full context", including in particular its "rate and amount" as required by Article 4.2(a).²⁴⁶ It follows that the enquiry with regard to the increase in imports requires the evaluation of the trends in imports or changes in import levels over the entire POI. While the Agreement on Safeguards does not provide any guidance with regard to the selection of the POI and a competent authority has certain discretion in this regard²⁴⁷, the POI should be long enough to provide an adequate basis for comparison of import trends. In *US – Line Pipe*, the panel noted that the POI should allow a competent authority to focus on recent imports, while being sufficiently long so that the authority can draw conclusions regarding the existence of increased imports.²⁴⁸

7.150. In our view, the POI of two years and three months did not allow the Indian competent authority to make a quantitative and qualitative objective analysis. India based its evaluation of the increase in imports on the import data pertaining to two years and three months, which in effect provides two points of comparison of the volume of imports in 2013-2014 and in 2014-2015. With regard to the third point of comparison, 2015-2016, as we have found above, the Indian competent authority did not have objective data for the full financial year. The import data for 2015-2016 was based on imports for the first quarter of this year, which undermines the trend analysis of changes in imports in 2015-2016 compared to the previous two years. Furthermore, the data for the last year of POI is of particular importance, since it reflects the most recent trends in imports. Considering the above, we conclude that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX: 1 of the GATT 1994, by failing to objectively examine trends in imports and to provide a reasoned explanation with regard to the conclusion in the Final Findings that there was "a sudden, sharp and significant surge in imports" during the POI.²⁴⁹

7.151. Finally, Japan argues that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX of the GATT 1994 by failing to ensure that the examined increase in imports is a result of unforeseen developments and of the effect of GATT obligations. Japan submits that the Indian competent authority considered all imports and failed to ensure that these imports resulted from unforeseen developments and the effect of the obligations incurred under the GATT 1994.²⁵⁰ Since we have found above that India acted inconsistently with Article XIX: 1 of the GATT 1994 with regard to its consideration of the unforeseen developments, the effect of GATT obligation and the increase in imports, we do not need to address this argument of Japan.

²⁴¹ India's first written submission, paras. 125-127 (referring to Appellate Body Report, *US – Lamb*, para. 138 and fn 88).

²⁴² India's first written submission, para. 124 (referring to Appellate Body Report, *US – Line Pipe*, paras. 7.196-7.197 and 7.201).

²⁴³ India's first written submission, para. 133.

²⁴⁴ India's first written submission, paras. 128-130.

²⁴⁵ Panel Report, *Argentina – Footwear (EC)*, para. 8.161; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

²⁴⁶ Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

²⁴⁷ Panel Report, *US – Line Pipe*, para. 7.196.

²⁴⁸ Panel Report, *US – Line Pipe*, para. 7.201.

²⁴⁹ Final Findings, (Exhibits JPN-11/IND-11), para. 44, p. 197.

²⁵⁰ Japan's first written submission, paras. 180-183; second written submission, paras. 97-100.

7.6.5 Conclusion

7.152. In light of the foregoing, we find that India's determination on the increase in imports is inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994.

7.7 Whether India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry

7.7.1 Introduction

7.153. Japan submits that India failed to determine the domestic industry as required by Article 4.1(c) of the Agreement on Safeguards.²⁵¹ Japan asserts that the concept of "domestic industry" is critical to the injury and causal link analysis and alleges that the Indian competent authority's injury and causation determinations are consequently inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards as well as with Article XIX:1(a) of the GATT 1994.²⁵²

7.7.2 Article 4.1(c) of the Agreement on Safeguards

7.154. Article 4.1(c) of the Agreement on Safeguards reads as follows:

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

7.155. Article 4.1(c) of the Agreement on Safeguards provides two options for the definition of the "domestic industry" (i) "the producers *as a whole* of the like or directly competitive products"; or (ii) the producers whose output constitutes "*a major proportion*" of the total domestic production of the like or directly competitive products.²⁵³

7.156. The Agreement on Safeguards does not provide any specific percentage or share of the domestic production, which would meet the requirement of "a major proportion".²⁵⁴ Neither does it establish any methodology or procedure that competent authorities must follow for determining a major proportion of the total domestic production. The consideration as to what constitutes "a major proportion" depends on the specific circumstances of each case.

7.157. The Appellate Body has clarified, in the context of a similar provision in the Anti-Dumping Agreement, that the term "major proportion" means "a relatively high proportion of the total domestic production".²⁵⁵ The term "major proportion" has both "quantitative and qualitative connotations".²⁵⁶ The qualitative element aims to ensure that "the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production".²⁵⁷ The Appellate Body has stated that there is "an inverse relationship" between the proportion of total production included in the domestic industry and the existence of a material risk of distortion in the definition of domestic industry and in the assessment of injury.²⁵⁸

²⁵¹ Japan's first written submission, paras. 216-217 and 243; second written submission, para. 120.

²⁵² Japan's first written submission, paras. 244-246.

²⁵³ Emphasis added.

²⁵⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 411.

²⁵⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 412. In addition, in *Argentina – Poultry Anti-Dumping Duties*, the panel stated that "it is permissible to define the 'domestic industry' in terms of domestic producers of an important, serious or significant proportion of total domestic production". (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341-7.342).

²⁵⁶ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303.

²⁵⁷ Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.13.

²⁵⁸ Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303; *Russia – Commercial Vehicles*, para. 5.13.

Specifically, "the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole".²⁵⁹ At the same time, "the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted".²⁶⁰

7.7.3 Evaluation by the Panel

7.158. In the investigation at hand, the Indian competent authority defined the domestic industry on the basis of the second option, i.e. "a major proportion" of the total domestic production of the like or directly competitive products. The "domestic industry", as defined by the Indian competent authority, comprised producers representing 70% of the total domestic production in 2013-2014, 68% in 2014-2015, and 67% in the first quarter of 2015-2016.²⁶¹ The domestic industry comprised three out of six producers of the product concerned in India, namely: Steel Authority of India Limited, Essar Steel India Limited, and JSW Steel Limited, who filed the application for the initiation of the safeguard investigation (the applicants).²⁶² Questionnaires were sent to all six known domestic producers, but replies were received only from the applicants.²⁶³

7.159. Japan submits that if a competent authority defines the domestic industry based on the second option provided in Article 4.1(c) (i.e. those producers whose collective output constitutes "a major proportion" of the total domestic production), it must ensure that the process of defining the domestic industry does not give rise to a material risk of distortion in the injury and causation determination.²⁶⁴ Japan argues that the Indian competent authority's approach to define the domestic industry introduced a material risk of distortion, because the record of the investigation shows that the producers outside the domestic industry as defined performed substantially differently, in particular in terms of sales, market share, and production. Japan refers to this fact to argue that the producers comprising the domestic industry did not "substantially reflect" the total domestic production.²⁶⁵ For Japan, the Indian competent authority relied on a "purely quantitative test", when it concluded that the applicants necessarily constituted "a major proportion" under Article 4.1(c) if they represented at least 50% of the total production.²⁶⁶ In addition, Japan takes issue with the fact that the domestic industry comprised only the applicants. Japan argues that the domestic industry was defined based on "a self-selection process" by the domestic producers themselves, which does not exclude that the domestic producers "purposely" included low performing producers into the "domestic industry" while ignoring high performing producers.²⁶⁷

7.160. India responds that since the share of domestic production of producers comprising the domestic industry is more than 50%, the competent authority does not need to examine the rest of the producers. India asserts that examining the rest of producers would result in merging the two options provided in Article 4.1(c).²⁶⁸ India further submits that since the Indian competent authority examined data with respect to 67% of the total domestic production, there is no basis to suggest that the injury or causation analysis is distorted.²⁶⁹ India notes that even though there is no requirement to examine all producers, the Indian competent authority nevertheless sent questionnaires to all known producers, but the rest of the producers did not cooperate.²⁷⁰ Regarding Japan's reference to sales and market share, India argues that the data on sales and market share have no bearing on the definition of the domestic industry. Furthermore, India submits that once

²⁵⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 412.

²⁶⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 414.

²⁶¹ Final Findings, (Exhibits JPN-11/IND-11), para. I(f), p. 167. As explained by India, the domestic industry as defined by the Indian competent authority covered both captive and non-captive segments of production. (India's response to Panel question No. 42).

²⁶² Preliminary Findings, (Exhibits JPN-7/IND-7), para. 1, p. 12; Final Findings, (Exhibits JPN-11/IND-11), para. 26, p. 194.

²⁶³ Final Findings, (Exhibits JPN-11/IND-11), para. 4, pp. 119-120; India's first written submission, paras. 159-160.

²⁶⁴ Japan's first written submission, para. 235.

²⁶⁵ Japan's first written submission, paras. 237-241; second written submission, para. 127.

²⁶⁶ Japan's first written submission, para. 236; second written submission, paras. 122-125.

²⁶⁷ Japan's second written submission, para. 126.

²⁶⁸ India's first written submission, paras. 157-158.

²⁶⁹ India's first written submission, para. 162; second written submission, para. 13.

²⁷⁰ India's first written submission, paras. 159-160; second written submission, para. 14.

the domestic industry has been defined, the data with regard to producers outside the domestic industry do not have any bearing on the determination of either injury or causation.²⁷¹

7.161. We begin by addressing Japan's argument that the Indian competent authority defined the domestic industry on the basis of a quantitative approach only, and failed to conduct any qualitative analysis. To support this argument, Japan refers to the Appellate Body's statement that the term "major proportion" has both quantitative and qualitative connotations. We note that the Appellate Body linked the qualitative analysis to the proportion of the domestic producers represented in the domestic industry. If the proportion of the domestic producers is sufficiently high, it is likely to meet both the quantitative and the qualitative aspects of the analysis, because the domestic industry so defined sufficiently reflects the totality of the domestic producers. The Appellate Body explained:

[T]here is an inverse relationship between, on the one hand, the proportion of producers represented in the domestic industry and, on the other hand, the absence of a risk of material distortion in the definition of the domestic industry and in the assessment of injury. We thus read the requirement in Article 4.1 that domestic producers' output constitute a "major proportion" as having both quantitative and qualitative connotations.

When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1. However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1.²⁷²

7.162. From a quantitative point of view, the domestic industry, as defined by the Indian competent authority, represented a high proportion of the domestic production in relation to the total. Specifically, the domestic industry comprised between 67% and 70% of the total domestic production and can in principle be considered as a substantial reflection of the domestic producers as a whole.

7.163. Japan supports its claim that the Indian competent authority failed to conduct a qualitative analysis by the fact that the producers outside the domestic industry performed better. Japan contends that the Indian competent authority defined the domestic industry in a manner that introduced "a material risk of distortion" of the injury analysis, because the situation of producers outside of the domestic industry improved and they had different trends in sales, market share, and production than the producers included into the domestic industry. Japan considers that factors such as sales, market share, and production of the domestic producers outside the domestic industry may be relevant in confirming whether the domestic industry "substantially reflects" the total domestic production.²⁷³ Specifically, Japan asserts that (i) the sales of the domestic industry slightly increased over the POI, while the sales of the other domestic producers increased substantially over the same period²⁷⁴; (ii) the market share of the domestic industry decreased over the POI, while the market share of the other domestic producers increased²⁷⁵; and (iii) the production of the domestic industry

²⁷¹ India's first written submission, paras. 164 and 167.

²⁷² Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), paras. 5.302-5.303 (fn omitted). In that case, the domestic industry had been defined "at the lower end of the spectrum", representing 27% of the total domestic production.

²⁷³ Japan's response to Panel question No. 45(a), para. 67.

²⁷⁴ The sales of the domestic industry (captive and non-captive) were 14,616,565 tonnes in 2013-2014; 14,968,955 tonnes in 2014-2015; and 15,645,704 tonnes in 2015-2016 (annualized). The sales of other Indian producers were 6,995,047 tonnes in 2013-2014; 7,914,137 tonnes in 2014-2015; and 8,986,612 tonnes in 2015-2016 (annualized). (Japan's first written submission, para. 238).

²⁷⁵ The domestic industry's market share (covering captive and non-captive segments of the market) was 64% in 2013-2014; 59% in 2014-2015; and 56% in 2015-2016 (annualized). The market share of other Indian producers was 31% in 2013-2014; 31% in 2014-2015; and 32% in 2015-2016 (annualized). (Japan's first written submission, para. 239).

remained stable, while the production of the other Indian producers substantially increased.²⁷⁶ For Japan, these trends suggest that the alleged increase in imports affected the domestic industry and the other producers differently.

7.164. During the investigation, the Indian competent authority rejected a similar argument of interested parties that the applicants did not meet the requirement of "a major proportion", given that their market share was 45% in 2013-2014, while the market share of other domestic producers was 51%. The Indian competent authority explained the market share is not a "measure of standing" for defining the domestic industry.²⁷⁷ India repeats this argument before the Panel and argues that under Article 4.1(c) the domestic industry is defined on the basis of a proportion in domestic production. We agree with India. Article 4.1(c) specifically provides that "a major proportion" is defined on the basis of the "collective output" of the like or directly competitive products in "the total domestic production" of those products. When the competent authority defines the "domestic industry" as the producers "whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products" pursuant to Article 4.1(c), the focus is on "the question of *how much* production must be represented by those producers making up the domestic industry".²⁷⁸ Article 4.1(c) does not require a competent authority to examine the domestic producers' market share and sales in order to define the domestic industry. Therefore, we reject Japan's argument that the Indian competent authority needed to consider the market share and sales of the other domestic producers, when it defined the domestic industry.²⁷⁹

7.165. At the same time, once the domestic industry is defined, in accordance with Article 4.2(a) the competent authority must examine the trends in its production, sales, and market share as part of the mandatory relevant factors in the evaluation of the domestic industry's situation. The performance of producers outside the domestic industry (including their production, sales, and market share) may be considered as a non-attribution factor under Article 4.2(b) and taken into account in the final determination of whether the domestic industry suffers serious injury caused by the increased imports.

7.166. Furthermore, Japan argues that the Indian competent authority's definition of the domestic industry involved "a self-selection process" by the domestic producers themselves, because only applicants were included into the definition of the domestic industry. According to Japan, this approach might suggest that better performing producers were intentionally excluded from the domestic industry. In this respect, we note that it is not unusual that the weaker-performing producers take an initiative to start and participate in a trade remedy investigation, while better performing producers may choose a passive approach. This understanding is consistent with the panel's statement in *China – Autos (US)* in the context of an anti-dumping dispute:

In our view, the possibility that weaker-performing producers in a given industry will more strongly support an AD or CVD investigation or be more likely to participate actively is simply a reflection of the realities of trade remedy actions. The possibility of imposition of definitive AD and/or CVD measures will afford all producers relief from lower-priced imports, but producers performing less well will tend to have a greater incentive to seek initiation of and participate in an investigation.²⁸⁰

²⁷⁶ The domestic industry's production was 17,881,187 tonnes in 2013-2014; 17,836,937 tonnes in 2014-2015; and 17,827,180 tonnes in 2015-2016 (annualized). The production of other Indian producers was 7,629,590 tonnes in 2013-2014; 8,558,858 tonnes in 2014-2015; and 8,757,852 tonnes in 2015-2016 (annualized). (Japan's first written submission, para. 241).

²⁷⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 25, p. 194.

²⁷⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 411. (emphasis original)

²⁷⁹ We also note Japan's argument that in *Russia – Commercial Vehicles* the Appellate Body upheld the panel's findings, in the context of a similar provision in the Anti-Dumping Agreement, that the investigating authority had not complied with the "major proportion" requirement by failing to include one producer in the domestic industry although the other producer included in the domestic industry represented 87.9% share of total domestic production of the like product. The facts in *Russia – Commercial Vehicles* are different from those in this case. In *Russia – Commercial Vehicles*, the panel's finding was based on the fact that the investigating authority defined the domestic industry as one producer, representing 87.9% of total production, after it had received the questionnaire responses from two domestic producers producing like products. (Panel Report, *Russia – Commercial Vehicles*, para. 7.16).

²⁸⁰ Panel Report, *China – Autos (US)*, paras. 7.224-7.225.

7.167. We note the cautionary words of the Appellate Body that, when the domestic industry is defined as the domestic producers whose output constitutes a major proportion of total domestic production, if the proportion is not sufficiently high, then a qualitative element becomes crucial in establishing whether the domestic industry has been appropriately defined.²⁸¹ This situation may arise, for example, in the case of a fragmented industry with numerous producers, when there are practical constraints on an authority's ability to obtain information and therefore a "major proportion" may be lower than what would be ordinarily permissible in a less fragmented industry.²⁸² This is not the situation in the present case. As noted above, the Indian competent authority included in the definition of the domestic industry a proportion of the domestic producers' output that was high enough that it can constitute a substantial reflection of the total domestic production. Accordingly, the definition of the domestic industry would very likely satisfy both the quantitative and the qualitative elements of the definition in Article 4.1(c) of the Agreement on Safeguards. Japan has failed to demonstrate that, despite such high proportion, the domestic production as defined by the Indian competent authority was not representative of the total domestic production in India.

7.168. Considering the above, we find that Japan has not demonstrated that India failed to meet the requirement of "a major proportion" under Article 4.1(c) of the Agreement on Safeguards. Accordingly, we also reject Japan's consequential claims in this regard under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.8 Whether India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat of serious injury

7.8.1 Introduction

7.169. With respect to India's determination of serious injury and threat of serious injury, Japan has brought the following claims:

- a. that India acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards, by failing to properly evaluate certain injury factors (such as the share of the domestic market taken by increased imports, prices, profits and losses) and by failing to provide reasoned and adequate explanation regarding other factors showing positive trends;
- b. that India acted inconsistently with Article 4.2(a), by failing to base its analysis of the existence of serious injury on objective data;
- c. that India's alleged determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a); and
- d. as a consequence of the above alleged violations, that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.170. We will first summarize the relevant facts regarding the Indian competent authority's determination on serious injury and threat of serious injury. We will then turn to considering Japan's claim regarding the Indian competent authority's evaluation of the share of the domestic market taken by increased imports, the prices, profits and losses, as well as the examination of other factors showing positive trends. After that, we will address Japan's claim that India failed to base its analysis of serious injury on objective data. Finally, we will consider Japan's claims regarding an alleged finding of threat of serious injury in addition to the finding of serious injury.

7.8.2 The Indian competent authority's determination regarding serious injury and threat thereof

7.171. In its serious injury analysis, the Indian competent authority evaluated the following factors having a bearing on the situation of the domestic industry (i) production, (ii) changes in the level of

²⁸¹ Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.303.

²⁸² Appellate Body Report, *EC – Fasteners (China)*, para. 419.

sales, (iii) market shares of imports and the domestic industry, (iv) capacity utilization, (v) employment, (vi) productivity, (vii) profits and losses, (viii) inventories, and (ix) price effects. Following the evaluation of these factors, the Indian competent authority observed that some of the factors such as production, sales, capacity utilization, employment, productivity, and inventories remained stable over the POI. The domestic industry's profitability declined sharply leading to losses, its prices went down, and its market share declined due to the increase in imports, all of which led to a serious injury to the domestic industry by way of financial losses.²⁸³

7.172. The Indian competent authority evaluated most of the injury factors during the POI, which includes three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).²⁸⁴ The trends in prices, profitability, and inventories were evaluated during the two financial years of 2013-2014 and 2014-2015, and the first quarter of 2015-2016.²⁸⁵

7.173. The Indian competent authority observed that the demand for the product concerned in India increased during the POI. However, despite the increase in demand, the production, employment, and sales of the domestic industry "remained stagnant", while inventories slightly increased. While the domestic industry increased its production capacity to meet the increased demand in India, it was unable to increase its capacity utilization, production, and sales. Most of the share of increased demand was taken by imports. The profitability of the domestic industry decreased significantly and turned into losses. An evaluation of all relevant factors having a bearing on the situation of the domestic industry showed a "significant overall impairment" of the situation of the domestic industry. The Indian competent authority concluded that the domestic industry suffered serious injury as a result of the increased imports of the product concerned.²⁸⁶

7.174. The Indian competent authority further indicated that, given "the surplus production capacities available" to foreign producers, the imports would continue to increase. Considering the likelihood of further increase in imports, it concluded that "there is a threat of further serious injury to the domestic market." The Indian competent authority found that the domestic industry "faces serious injury and a further threat of greater serious injury".²⁸⁷

7.175. In the final section of the Final Findings titled "Recommendations", the Indian competent authority concluded that the increased imports of the product concerned "have caused serious injury and are threatening to cause serious injuries to the domestic producers".²⁸⁸

7.8.3 Serious Injury

7.8.3.1 Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards

7.176. Article 4.1(a) of the Agreement on Safeguards defines "serious injury" for the purposes of this agreement as "a significant overall impairment in the position of a domestic industry". Article 4.2(a) reads 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.

7.177. The standard of serious injury under Article 4.1(a) of the Agreement on Safeguards has been described as a "very high standard of injury". The word "serious" implies a "much higher" standard

²⁸³ Final Findings, (Exhibits JPN-11/IND-11), paras. 49-50, pp. 198-200.

²⁸⁴ Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), paras. 31 and 49, pp. 196 and 198-199.

²⁸⁵ Final Findings, (Exhibits JPN-11/IND-11), para. 49 (g), pp. 198-199.

²⁸⁶ Final Findings, (Exhibits JPN-11/IND-11), paras. 56-58, p. 201.

²⁸⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 59.

²⁸⁸ Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 208.

of injury than the word "material" used by the Anti-Dumping and the SCM Agreements.²⁸⁹ In order to make a determination of serious injury, Article 4.2(a) requires a competent authority to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". Article 4.2(a) does not provide any specific methodology as to how the relevant factors shall be examined. The Appellate Body has clarified that an objective assessment of a claim under Article 4.2(a) has two elements. A panel must consider, first, whether the competent authority has evaluated all relevant factors and, second, whether the competent authority has provided a reasoned and adequate explanation of how the facts support its determination.²⁹⁰

7.178. The determination of serious injury must be made on the basis of the "overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry".²⁹¹ In other words, a competent authority is required to make its determination based on an evaluation of all injury factors "as a whole".²⁹² In order to demonstrate a "significant overall impairment", a competent authority does not need to show a negative trend in each factor listed in Article 4.2(a), rather "it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination".²⁹³ At the same time, positive trends in some factors would require a compelling explanation by the competent authority of why and how the domestic industry is still injured despite such positive trends.²⁹⁴

7.8.3.2 Whether the Indian competent authority evaluated relevant injury factors consistently with Articles 4.1(a) and 4.2(a)

7.8.3.2.1 The share of the domestic market taken by increased imports

7.179. Article 4.2(a) of the Agreement on Safeguards lists the share of the domestic market taken by increased imports among the mandatory factors that a competent authority must evaluate in determining whether increased imports have caused or are threatening to cause serious injury to the domestic industry. In the Final Findings, the Indian competent authority concluded that over the POI the market share of imports increased from 5% to 13%, while the market share of the domestic industry decreased from 45% to 37%.²⁹⁵ Japan contends that the Indian competent authority failed to properly evaluate and provide a reasoned and adequate explanation regarding the effect of the decline in the domestic industry's market share on the situation of the domestic industry.

7.180. Japan argues that the Indian competent authority failed to explain why a decrease in the domestic industry's market share is indicative of serious injury, given that the domestic demand was expanding and the domestic industry's sales increased. Japan submits that the Indian competent authority failed to consider other reasons why the domestic industry maintained its volume of non-captive sales, but did not meet the increasing demand. Japan suggests, for instance, that the market share of the domestic industry might have decreased due to either a limited domestic production capacity to meet increasing demand, the domestic industry's decision to shift its sales to its captive market, or the increased demand for products that the domestic industry did not produce.²⁹⁶ Japan also submits that the Indian competent authority focused its analysis on the non-captive segment of the domestic industry, without evaluating the captive segment, and therefore failed to examine the market share with regard to the entire domestic industry.²⁹⁷

7.181. India responds that Article 4.2(a) of the Agreement on Safeguards requires a competent authority to evaluate "the share of the domestic market taken by increased imports", which is distinct

²⁸⁹ Appellate Body Report, *US – Lamb*, paras. 124 and 126.

²⁹⁰ Appellate Body Report, *US – Lamb*, para. 103. See also Panel Reports, *Ukraine – Passenger Cars*, para. 7.248; and *Dominican Republic – Safeguard Measures*, para. 7.260.

²⁹¹ Panel Report, *US – Wheat Gluten*, para. 8.80 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 138-139).

²⁹² Panel Report, *US – Lamb*, para. 7.188.

²⁹³ Panel Report, *US – Wheat Gluten*, para. 8.85 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 139).

²⁹⁴ Panel Reports, *Thailand – H-Beams*, para. 7.249; *China – Cellulose Pulp*, para. 7.129 (in the context of a similar provision in the Anti-Dumping Agreement).

²⁹⁵ Final Findings, (Exhibits JPN-11/IND-11), para. 49(c), p. 198.

²⁹⁶ Japan's first written submission, paras. 279-280; second written submission, paras. 147-149.

²⁹⁷ Japan's first written submission, paras. 281-290 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204 and 207); second written submission, paras. 150-155.

from the language in the Anti-Dumping Agreement that refers to a "decline" in the domestic industry's market share. India argues that, under Article 4.2(a), a competent authority has to establish whether the domestic industry lost market share to imports.²⁹⁸ India asserts that its competent authority found that the market share of imports had increased, while the domestic industry's market share had decreased during the same period.²⁹⁹ India rejects Japan's claim that the market share was evaluated only with respect to the non-captive segment.³⁰⁰ India submits that the Indian competent authority, when considering market share, examined the entire domestic market, including captive and non-captive sales of the domestic industry, sales of other domestic producers, and imports.³⁰¹

7.182. As we indicated above, when addressing a claim under Article 4.2(a), a panel must consider whether a competent authority has evaluated all relevant factors and has provided a reasoned and adequate explanation of how the facts support its injury determination. There is no disagreement between the parties that the Indian competent authority evaluated the market share of increased imports in its Final Findings. Therefore, the question before us is whether, in its evaluation of the share of the domestic market taken by increased imports, the Indian competent authority provided a reasoned and adequate explanation in the context of the overall examination of the situation of the domestic industry.

7.183. In the Final Findings, the Indian competent authority considered the following data regarding the market shares of imports and the domestic industry:

Table 3: Changes in the level of sales and market shares

Financial Year	Total Import (MT)	Sales of DI (MT)	Sales of other Indian Producers (MT)	Captive Sale of DI (MT)	Captive Sale of Others (MT)	Total Demand (MT)	Market Share (%)	
							DI	Imports
2013-14	1,252,441	10,342,565	2,994,323	4,274,000	4,000,724	22,864,053	45	5
2014-15	2,644,911	9,949,214	3,298,273	5,019,741	4,615,864	25,528,003	39	10
2015-16(Q1)	881,233	2,589,929	1,065,972	1,321,497	1,180,681	7,039,312		
2015-16(A)	3,524,932	10,359,716	4,263,888	5,285,988	4,722,724	28,157,248	37	13

Source: Final Findings, (Exhibits JPN-11/IND-11), para. 49(b), p. 198.

7.184. Based on these data, the Indian competent authority concluded that:

Imports had a market share of 5% in 2013-14 which increased to 13% during 2015-16(A) whereas the market share of Domestic industry decreased from 45% to 37% during the same period.³⁰²

7.185. When addressing the interested parties' arguments, the Indian competent authority also noted that the market share of domestic producers outside the domestic industry increased by two percentage points in 2015-2016 compared to 2014-2015.³⁰³

7.186. Further, in its examination of the situation of the domestic industry, the Indian competent authority stated that:

Imports have taken away most of share of the increase in demand of the subject goods. In 2014-15, while demand excluding captive increased by [1,303,069] MT and imports increased much more by [1,392,470] MT. This shows the aggressive manner in which imports of the [product under consideration] are entering the Indian market. The domestic industry had raised its capacities foreseeing the increasing demand in India.

²⁹⁸ India's first written submission, para. 199.

²⁹⁹ India's first written submission, paras. 199 and 202 (referring to Final Findings, (Exhibit IND-11), para. 49(c), p. 198).

³⁰⁰ India's first written submission, para. 215.

³⁰¹ India's first written submission, paras. 206 and 213.

³⁰² Final Findings, (Exhibits JPN-11/IND-11), para. 49(c), p. 198. See also *ibid.* para. 97, p. 207.

³⁰³ Final Findings, (Exhibits JPN-11/IND-11), para. 97, p. 207.

However, the domestic industry is unable to increase its capacity utilization, production and sales.³⁰⁴

7.187. We begin by noting that the product concerned (hot-rolled coils) is an intermediate good used in the production of various downstream steel products (e.g. cold rolled sheets, electrical sheets, coating, and plating sheets). The product concerned can be sold externally (open or non-captive market) as well as used internally to manufacture downstream steel products (captive market).³⁰⁵ In the latter situation, the product concerned is not sold into an open or non-captive market, where it competes with imports, but is transferred internally to an integrated producer. The Indian competent authority's findings above show that, when it assessed the share of the domestic market taken by imports, it considered both the captive and the non-captive segments of the market.

7.188. The market shares of both imports and domestic industry were assessed based on the total demand (captive and non-captive). The domestic industry lost sales and market share in the non-captive segment, while it was able to maintain its market share represented by the captive market (19%).³⁰⁶ Over the POI, the market share of imports increased by 8 percentage points, while the domestic industry's market share decreased by a similar 8 percentage points. Other domestic producers not part of the domestic industry maintained the same market share during the first two years of POI (13%) and gained 2 percentage points of the market share (15%) towards the end of the POI.³⁰⁷ The data in table 3 also shows that the total demand in the Indian market for the product concerned grew by 23% from 22,864,053 tonnes to 28,157,248 tonnes over the POI. The domestic industry increased its sales by 1,029,139 tonnes, which allowed it to keep its market share in the captive market. The sales of the domestic industry in the non-captive segment, where it competes with imports, remained nearly the same over the POI. This suggests that the share of the increased demand in the non-captive segment was taken by imports and by domestic producers not part of the domestic industry. Given that the market share of imports increased by 8 percentage points and domestic producers outside the domestic industry gained 2 percentage points, we consider that the Indian competent authority reasonably concluded that "imports have taken away *most* of share of the increase in demand of the subject goods".³⁰⁸

7.189. Next, the Indian competent authority considered that, notwithstanding the expanded production capacity³⁰⁹, the domestic industry could not increase its sales and capacity utilization commensurate with the surge in demand due to the competition with the increased imports.³¹⁰ The Final Findings note that the level of capacity utilization of the domestic industry over the POI remained the same, around 76%.³¹¹ In our view, it is not unreasonable for a competent authority to consider that the fact that the domestic industry could not keep its market share in front of increasing demand indicates a negative trend in the situation of the domestic industry, considering that the domestic industry had available production capacity to meet the growing demand.³¹²

7.190. Finally, we consider Japan's argument that the Indian competent authority focused its analysis on the non-captive segment of the domestic industry, without evaluating the captive segment. In *US – Hot-Rolled Steel*, the Appellate Body addressed the question of examining captive and non-captive markets in an injury analysis in the context of the Anti-Dumping Agreement. The Appellate Body observed that in an industry "where a significant part of domestic production – captive production – is shielded by the structure of the domestic market from direct competition with imports", a comparison between the captive and the merchant markets is important, because

³⁰⁴ Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

³⁰⁵ Japan's first written submission, para. 45.

³⁰⁶ See table 4 below.

³⁰⁷ Final Findings, (Exhibits JPN-11/IND-11), paras. 49(b) and 97, pp. 198 and 207.

³⁰⁸ Emphasis added.

³⁰⁹ According to the domestic industry's application, in 2011-2013, the domestic industry increased its production capacity from 18,768,996 to 23,568,996 tonnes. (Revised Application, (Exhibits JPN-6/IND-20), p. 15).

³¹⁰ Final Findings, (Exhibits JPN-11/IND-11), paras. (i)(cc) and 56, pp. 174 and 201.

³¹¹ Final Findings, (Exhibits JPN-11/IND-11), paras. 49(d) and 50, pp. 199-200.

³¹² Japan also argues that the decrease in the market share of the domestic industry might have been due to the fact that the increase in demand was for products that were not produced by the domestic industry. (Japan's first written submission, para. 280). We do not view such an enquiry to be necessary in the context of Article 4.2(a). We consider that the increase in demand for certain products or change in consumer preferences may be regarded as a non-attribution factor under the second sentence of Article 4.2(b).

it "enhances" the ability of the investigating authorities to make an appropriate determination about the state of the domestic industry as a whole.³¹³ The examination of only one part of the domestic industry may lead "[to] highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry".³¹⁴ The Appellate Body stated that "the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".³¹⁵ We find that these considerations are equally applicable to the similarly worded provisions concerning injury analysis in the Agreement on Safeguards.

7.191. As we indicated above, the Indian competent authority considered both captive and non-captive segments in its evaluation of market shares. The facts of the present case do not suggest that the deterioration of the situation of the domestic industry in the non-captive market happened due to shift of sales from non-captive to captive markets, as Japan alleged.³¹⁶

Table 4: Domestic industry's market share

Year	Domestic Industry			Total Demand
	Non-Captive	Captive	Total	
2013-2014	10,342,565 (45%)	4,274,000 (19%)	14,616,565 (64%)	22,864,053
2014-2015	9,949,214 (39%)	5,019,741 (20%)	14,968,955 (59%)	25,528,003
2015-2016 (A)	10,359,716 (37%)	5,285,988 (19%)	15,645,704 (56%)	28,157,248

Source: Japan's first written submission, p. 82.

7.192. As indicated in the Final Findings, the domestic industry's market share in the non-captive market decreased by eight percentage points during the POI, from 45% to 37%. The data on the domestic industry's captive sales show that the market share of the domestic industry represented by the captive segment remained stable over the POI (19%). Notably, the market share of the domestic industry covering both the captive and the non-captive segments also decreased by eight percentage points from 64% to 56%. Even though the share of captive sales increased by one percentage point in 2014-2015 in comparison to 2013-2014, this change does not fully explain the decrease of the domestic industry's market share by eight percentage points over the POI and thus does not distort the findings of the Indian competent authority.

7.193. In light of the foregoing, we conclude that Japan has not demonstrated that the Indian competent authority failed to properly evaluate and provide reasoned and adequate explanations regarding the effect of the decline in the domestic industry's market share on the situation of the domestic industry.

7.8.3.2.2 Profits and losses

7.194. Article 4.2(a) of the Agreement on Safeguards specifies "profits and losses" among the relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry that a competent authority must evaluate in its serious injury analysis. In the Final Findings, the Indian competent authority found that the profitability of the domestic industry declined sharply in the first quarter of 2015-2016 and the domestic industry recorded losses.³¹⁷ The Indian competent authority considered that "[t]he major reason for decline in profitability of domestic industry is the increased imports at reduced prices".³¹⁸ Article 4.2(a) of the Agreement on Safeguards does not list prices among the mandatory factors that a competent authority must evaluate in its injury analysis. The list of relevant factors provided in Article 4.2(a), however, is not exhaustive and a competent authority can and should evaluate any other relevant factors that have a bearing on the situation of the domestic industry. Japan challenges the Indian competent

³¹³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 207.

³¹⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

³¹⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

³¹⁶ Japan's first written submission, para. 280; second written submission, para. 155.

³¹⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 49(f), p. 199.

³¹⁸ Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

authority's evaluation of domestic industry "profits and losses" as well as the effect the import prices had on the domestic industry's prices.

7.195. First, Japan submits that the Indian competent authority failed to provide an adequate explanation regarding the effect of the decrease in the domestic industry's prices (from 100 to 83) on its financial condition, considering that the costs of sales also decreased (from 100 to 94) (all indexed). For Japan, the indication that the domestic prices declined "much more sharply" is not a sufficient explanation of the effect of this factor on the domestic industry, especially given that it is based exclusively on indexed data.³¹⁹ Second, Japan submits that the Indian competent authority failed to consider the data on profitability pertaining to the entire POI, because it focused only on the recent data. In particular, the Indian competent authority referred to the decrease in profitability in the first quarter of 2015-2016 and failed to take into account the increase in profitability in 2013-2014 and 2014-2015.³²⁰ Third, Japan argues that the Indian competent authority failed to evaluate these two factors with regard to the entire domestic industry, when it excluded information regarding price trends and profitability in the captive segment of the market.³²¹

7.196. India refers to the Final Findings that the import prices declined sharply from 100 to 78 and the domestic industry's prices declined from 100 to 83, while the domestic industry's cost of sales decreased only from 100 to 94 (all indexed), which led to a decline in profitability for the domestic industry. India notes that the domestic industry's prices declined more sharply than the cost of sales.³²² India further submits that profitability declined substantially in the first quarter of 2015-2016, leading to losses.³²³ India argues that the domestic industry's profitability was analysed over the entire POI, and the fact that the domestic industry was profitable in the preceding two years of the POI and had losses at the end of the POI indicates that there was a serious injury to the domestic industry. India adds that the data from the most recent past have special importance.³²⁴ With regard to Japan's argument on the captive market, India replies that the captive production was considered when evaluating production, demand, inventory, and capacity utilization. India argues that captive production cannot be considered for sales data and profitability, because the captive segment does not involve sales transactions.³²⁵

7.197. In the Final Findings, the Indian competent authority stated that:

[T]he domestic Industry was always under consistent pressure to either reduce their prices to match the import prices or to hold on to their prices. The penetration of increased imports at an unprecedented high level was such that even after reducing the prices, the domestic industry was not able to keep on to its market share. This has resulted into losses during 2015-16(Q1) for the domestic industry.³²⁶

7.198. The Indian competent authority considered the changes in import prices, and in the domestic industry's prices, costs, and profitability as follows:

³¹⁹ Japan's first written submission, paras. 292-296; second written submission, para. 158.

³²⁰ Japan's first written submission, para. 302; second written submission, paras. 162-163.

³²¹ Japan's first written submission, paras. 297 and 303; second written submission, paras. 159-160 and 164.

³²² India's first written submission, paras. 217-218 and 222 (referring to Final Findings, (Exhibit IND-11), paras. 49(f) and 49(g), pp. 199-200).

³²³ India's first written submission, paras. 218 and 222.

³²⁴ India's first written submission, para. 223 (referring to the Appellate Body Report, *US – Lamb*, para. 138).

³²⁵ India's response to Panel question No. 49.

³²⁶ Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(a), pp. 199-200.

Table 5: Changes in prices and profitability

Components (Indexed)	Unit	2013-14	2014-15	2015-16 (Q1)
Cost of Sales	INR/MT	100	97	94
Weighted average sales realization ³²⁷	INR/MT	100	99	83
Landed price of imports	INR/MT	100	95	78
Profit/ (Loss)	INR/MT	100	136	(114)

Source: Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(a), p. 200.

7.199. Based on the above data, the Indian competent authority noted that:

It is seen from above that while the Index of cost of sales come down from 100 to 94, the landed price of imports declined sharply from 100 to 78 leading to reduction in sales realization which declined from 100 to 83. While comparing the sales realization vis-à-vis cost of sales, it is observed that the sales realization declined much more sharply than the cost of sales. There was as substantial decline in profitability index from 136 in 2014-15 to (114) in 2015-16 (Q1).³²⁸

7.200. In its examination of the situation of the domestic industry, the Indian competent authority concluded that "[t]he major reason for decline in profitability of domestic industry is the increased imports at reduced prices".³²⁹

7.201. Similarly to its arguments regarding the market share analysis, Japan submits that the Indian competent authority failed to consider the captive segment of the domestic industry in its evaluation of the domestic industry's prices and profitability.

7.202. As India noted, since the captive market does not involve commercial transactions, there are no price data available for the captive market. Furthermore, as discussed above, the Indian competent authority considered the domestic industry's sales in both the captive and the non-captive segments of the market, and found that the domestic industry lost sales to imports in the non-captive market. Given that the domestic industry competes with imports in the non-captive market, we consider that it was reasonable to compare import prices with the domestic industry's prices, and associated profitability, in the non-captive market. Therefore, we do not think that an additional explanation with regard to prices and profitability in the captive market was necessary in light of the facts of this case.

7.203. We also disagree with Japan's argument that the use of indexed data distorted the evaluation of prices, given that the Indian competent authority's conclusion is based on the analysis of trends in costs and prices of the domestic industry as well as trends in import prices. India explained that its competent authority conducted the price analysis on the basis of actual data from the domestic industry and indexed figures were used in published reports in order to comply with the confidentiality requirement under Article 3.2 of the Agreement on Safeguards.³³⁰

7.204. Nonetheless, a sharp decline in prices occurred only in the first quarter of 2015-2016, as compared to the preceding full financial years, where the domestic industry's prices were stable and declined marginally from 100 to 99 (indexed). These trends warrant a reasoned and adequate explanation from the Indian competent authority as to why valid conclusions may be drawn by comparing the average prices of full financial years to the average prices of a quarter. In particular, the Indian competent authority should have provided a sufficient explanation of why it could exclude

³²⁷ In response to Panel question No. 114, India clarified that "[w]eighted average sales realization" refers to "the weighted average of the average sales realization of all the applicant companies. The average sales realization and the quantity of all the applicant companies were multiplied respectively and the combined total then divided by the total sales quantity to arrive at the weighted average sales realization. The cost of sale is also weighted similarly".

³²⁸ Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(b), p. 200.

³²⁹ Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

³³⁰ India's first written submission, para. 265.

the fact that the higher rate of price decrease in the first quarter of 2015-2016 might reflect a seasonal or temporal downturn in prices in a given quarter of the year.³³¹

7.205. Furthermore, the data on profitability show that the domestic industry remained profitable during most of the POI and experienced losses only during the last three months, i.e. the first quarter of 2015-2016. The Indian competent authority relied on the losses suffered by the domestic industry in the first quarter of 2015-2016 as one of the main indicators of serious injury to the domestic industry. It considered that the decline in market share of the domestic industry and the decline in import prices led to the financial losses recorded by the domestic industry. In our view, even though the losses in the first quarter of 2015-2016 refer to the most recent data available over the POI, the competent authority should have evaluated this information in the context of the entire POI.³³² As seen from the above table, the domestic industry's profits increased considerably from 100 to 136 (indexed) in 2014-2015 compared to base year of 2013-2014. The losses in the first quarter 2015-2016 refer to three months only, April-June 2015, and were compared with the profitability rate of full financial years of 2013-2014 and 2015-2016. In our view, this analysis warrants an explanation by the Indian competent authority of why a comparison of three-months data of the first quarter of 2015-2016 to the full financial years is valid, especially considering the sharp change between gaining considerable profits during the most of the POI and suffering losses during the last three months of the POI. In particular, the Indian competent authority should have provided a reasoned and adequate explanation of why it could exclude the fact that the losses in the first quarter of 2015-2016 might reflect a seasonal or temporal circumstance.

7.206. We conclude that the Indian competent authority failed to properly evaluate and sufficiently explain the changes in import prices and their effect on the domestic industry's prices and therefore on profitability.

7.8.3.2.3 Evaluation of injury factors showing stable or positive trends

7.207. Japan argues that the Indian competent authority failed to explain its finding of serious injury suffered by the domestic industry, given the positive trends in certain injury factors.³³³ Japan submits that most of the injury factors, such as production, sales, capacity utilization, employment, productivity, and inventories, showed stable or positive trends. Japan contends that the Indian competent authority should have explained why it determined the existence of serious injury for the domestic industry, despite the evidence that these factors showed stable or positive trends.³³⁴

7.208. India responds that a competent authority is not required to explain in detail how each factor individually supports the finding of serious injury for the domestic industry or to show a negative trend in each factor to justify its finding of serious injury.³³⁵ India disagrees with Japan that its competent authority failed to provide an adequate explanation regarding changes in the level of sales, capacity utilization, employment, productivity, and inventories. According to India, its competent authority considered that, regardless of the increase in demand, the production, employment, and sales of the domestic industry "have remained stagnant", which indicates the existence of serious injury to the domestic industry.³³⁶

³³¹ In the context of our examination of Japan's claims under Article 4.2(b), we also conclude that the Indian competent authority failed to properly examine the price competition between imported and domestic products, when it based its price comparison on the average unit price of imported products and the average unit price of the like or directly competitive domestic products (see para. 7.256 below).

³³² The Appellate Body in *US – Lamb* stated that:

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.

(Appellate Body Report, *US – Lamb*, para. 138).

³³³ Japan's first written submission, para. 275.

³³⁴ Japan's first written submission, paras. 306-309 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.313); second written submission, paras. 165-167.

³³⁵ India's first written submission, paras. 194-195 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 139; and Panel Report, *US – Lamb*, para. 7.203).

³³⁶ India's first written submission, para. 197 (referring to Final Findings, (Exhibit IND-11), para. 56, p. 201).

7.209. We recall that pursuant to Article 4.2(a) of the Agreement on Safeguards a competent authority must determine serious injury on the basis of the overall position of the domestic industry, considering all the relevant factors having a bearing on the situation of that industry.³³⁷ A competent authority should take into account the totality of the trends in injury factors and their interaction.³³⁸ If a number of injury trends show a positive trend or an improvement in the situation of the domestic industry, the competent authority would need to provide a compelling explanation of why and how the domestic industry is injured despite such positive trends.³³⁹ Therefore, we will examine whether, in its evaluation of positive trends of the domestic industry and their interaction with other trends, the Indian competent authority provided a reasoned and sufficient explanation in its Final Findings.

7.210. The Indian competent authority evaluated the following factors having a bearing on the situation of the domestic industry: production, changes in the level of sales, market share, capacity utilization, employment, productivity, profits and losses, inventories, and price effects. It found that several factors remained "stagnant" over the POI:

Table 6: Factors analysed by India

Injury Factor	2013-2014	2014-2015	2015-2016(Q1)	2015-2016 (Annualized)
Production (MT)	17,881,187	17,836,937	4,456,795	17,827,180
Production (trend)	100	100		100
Capacity utilization	75.9	75.7	-	75.7
Number of Employees (Indexed)	100	100	100	100
Productivity (Indexed) Per employee (MT)	100	100	-	100
Inventories (MT)	636,879	648,290	657,099	-
Inventories (MT) (Indexed)	100	102	103	-

Source: Final Findings, (Exhibits JPN-11/IND-11), pp. 198-199.

7.211. In addition, as noted above, the Indian competent authority observed that the total sales of the domestic industry increased over the POI from 14,616,565 tonnes to 15,645,704 tonnes, mainly due to the increase in captive sales by 1,011,988 tonnes. However, relative to growing consumption, captive sales remained the same (19% of the market share), and non-captive sales went down (market share decreased from 45% to 37%). The domestic industry's prices declined and the domestic industry suffered financial losses.

7.212. The Indian competent authority provided an overall assessment of the situation of the domestic industry, stating:

From the above analysis it is seen that the demand for the [product under consideration] in India has increased in the injury analysis period. Despite increase in demand, the production, employment and sales of domestic industry have remained stagnant, while inventories have somewhat increased. Imports have taken away most of share of the increase in demand of the subject goods. In 2014-15, while demand excluding captive increased by [1,303,069] MT and imports increased much more by [1,392,470] MT. This shows the aggressive manner in which imports of the [product under consideration] are entering the Indian market. The domestic industry had raised its capacities foreseeing the increasing demand in India. However, the domestic industry is unable to increase its capacity utilization, production and sales. The profitability has gone down drastically and even turned to losses during 2015-16(Q1). The major reason for decline in profitability of domestic industry is the increased imports at reduced prices. If the same trend continues, the domestic industry fears that they would be forced to shut down their operations.³⁴⁰

³³⁷ Panel Reports, *US – Wheat Gluten*, para. 8.80; *US – Lamb*, para. 7.188.

³³⁸ Panel Report, *US – Wheat Gluten*, para. 8.85.

³³⁹ Panel Reports, *Thailand – H-Beams*, para. 7.249; *China – Cellulose Pulp*, para. 7.129 (in the context of a similar provision in the Anti-Dumping Agreement).

³⁴⁰ Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

7.213. We disagree with Japan that India failed to provide any explanation regarding the positive trends in certain injury factors. The fact that several factors showed some amelioration or did not show a deteriorating trend at all does not necessarily imply an improvement in the performance of the domestic industry. The Indian competent authority explained that, despite the increase in demand, many factors remained "stagnant" during the POI. The Indian competent authority found that the demand for the product concerned had increased from 22,864,053 tonnes to 28,157,248 tonnes (a 23% increase) over the POI. The domestic industry increased its production capacity anticipating the market expansion³⁴¹, but was not able to increase its production, non-captive sales, and capacity utilization. In our view, it is not unreasonable for a competent authority to consider that "stagnant" trends in several injury factors in light of a considerable increase in demand, may constitute negative trends in the overall situation of the domestic industry. In the present case, the Indian competent authority noted that the domestic industry increased its production capacity and had available capacity to meet the growing demand, but its performance did not improve in step with the increasing demand.

7.214. We conclude that Japan has not demonstrated that India failed to explain its finding of serious injury suffered by the domestic industry, given the positive trends in certain injury factors.

7.8.3.2.4 Conclusion

7.215. We note that the Indian competent authority based its conclusion on the situation of the domestic industry largely on the fact that the domestic industry's market share and prices decreased leading to financial losses. We have found above that the Indian competent authority failed to properly evaluate the domestic industry's prices and profitability and to provide a reasoned and adequate explanation of these factors in light of its overall conclusion on the situation of the domestic industry. For these reasons, we find that Japan has demonstrated that India acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards in its assessment of the situation of the domestic industry.

7.8.3.3 Whether the Indian competent authority failed to base its serious injury determination on objective data

7.216. Japan contends that India acted inconsistently with Article 4.2(a) of the Agreement on Safeguards by failing to base its determination of serious injury on objective data. Japan submits that the Indian competent authority based its analysis of the injury factors in 2015-2016 on the data pertaining to the first quarter of 2015-2016. Japan argues that the Indian competent authority failed to explain its assumption that the data for the first quarter of 2015-2016 are representative of the entire year and thus could be annualized.³⁴² India denies Japan's claim that the serious injury analysis was not based on objective data. India submits that the data for the first quarter of 2015-2016 have been annualized to make a proper comparison with the data for previous years.³⁴³

7.217. We recall that the POI in the underlying investigation covered three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized). Before the Panel, India asserts that the POI was, in fact, from 1 April 2013 to 30 June 2015, covering two financial years and three months.³⁴⁴ India asserts that the first quarter of 2015-2016 was only annualized to make the data of this period comparable to the full year data of the preceding periods.³⁴⁵ The Indian competent authority used annualized data for the last financial year of POI, when it evaluated most of the injury factors, namely production, changes in the level of sales, market share, capacity utilization, employment, and productivity.³⁴⁶ These factors are listed in Article 4.2(a) of the Agreement on Safeguards among the relevant factors "of objective and quantifiable nature" having a bearing on

³⁴¹ According to the domestic industry's application, in 2011-2013, the domestic industry increased its production capacity from 18,768,996 to 23,568,996 tonnes. (Revised Application, (Exhibits JPN-6/IND-20), p. 15).

³⁴² Japan's first written submission, paras. 310-315; second written submission, paras. 171-173.

³⁴³ India's first written submission, paras. 228-230.

³⁴⁴ India's response to Panel question No. 29.

³⁴⁵ India's first written submission, para. 230; responses to Panel question Nos. 29 and 31.

³⁴⁶ Final Findings, (Exhibits JPN-11/IND-11), para. 49, pp. 199-200.

the situation of the domestic industry that a competent authority must evaluate in its serious injury analysis.

7.218. We recall that the phrase "factors of objective and quantifiable nature" in Article 4.2(a) implies that the injury factors must be evaluated based on objective data and evidence.³⁴⁷ We have found above that the Indian competent authority failed to evaluate the rate and amount of increase in imports on the basis of objective data, when it based its analysis of the increase in imports at least partly on annualized data.³⁴⁸ We reach the same conclusion with regard to use of the annualized data in the Indian competent authority's serious injury analysis. Since data were annualized in order to make them comparable with those of previous years, this required a compelling explanation from the Indian competent authority as to why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. The Preliminary and Final Findings do not contain any explanation in this respect.

7.219. Therefore, we find that India acted inconsistently with Article 4.2(a) of the Agreement on Safeguards, when it based its analysis of injury factors at least partly on annualized data.³⁴⁹

7.8.4 Threat of serious injury

7.220. Article 2.1 of the Agreement on Safeguards provides that a Member can apply safeguard measures when the product concerned "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".³⁵⁰ Article 4.1(a) defines the term "serious injury" as "a significant overall impairment in the position of a domestic industry". Article 4.1(b) defines the term "threat of serious injury" as follows:

"[T]hreat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 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[.]

7.221. Japan argues that the Indian competent authority does not appear to have made findings on a threat of serious injury, however to the extent it did, Japan submits that such determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards.³⁵¹ Japan submits that the alleged determination of "further threat of greater serious injury" lacks any legal basis under the Agreement on Safeguards and is, in any case, irrelevant.³⁵² India asserts that its competent authority made a finding of both serious injury and threat of serious injury.³⁵³

7.222. The question of simultaneous determinations of serious injury and threat of serious injury was discussed by the Appellate Body in *US – Line Pipe*. The Appellate Body stated that the phrase "cause or threaten to cause serious injury" in Article 2.1 covers a finding of serious injury, threat of

³⁴⁷ See para. 7.137 above. In *US – Lamb*, the Appellate Body noted that: We recognize that the clause "of an objective and quantifiable nature" refers expressly to "factors", but not expressly to data. We are, however, convinced that factors can only be "of an objective and quantifiable nature" if they allow a determination to be made, as required by Article 4.2(b) of the *Agreement on Safeguards*, on the basis of "objective evidence". Such evidence is, in principle, objective data. The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors. (Appellate Body Report, *US – Lamb*, para. 130. (emphasis original)).

³⁴⁸ See para. 7.145 above.

³⁴⁹ We also note Japan's argument that the Indian competent authority failed to base its decision on objective data, because the figures for inventories, production, and sales for any given year of the POI do not match. India responds that these figures were duly verified from the records of the domestic industry and are correct. Since we have already found that India acted inconsistently with Article 4.2(a), by failing to base its injury analysis on objective data, we do not need to address this argument.

³⁵⁰ Emphasis added.

³⁵¹ Japan's first written submission, paras. 325-331; second written submission, paras. 181-183.

³⁵² Japan's first written submission, para. 324; second written submission, paras. 177-180.

³⁵³ India's response to Panel question No. 47.

serious injury, or both in combination.³⁵⁴ The Appellate Body clarified that "serious injury" is often "the realization of a threat of serious injury" and it may be difficult to discern the precise point where a "threat of serious injury" becomes "serious injury":

[T]here 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".³⁵⁵

7.223. In other words, a threat of serious injury means a significant overall impairment in the position of a domestic industry, which has not yet materialized, but it is "clearly imminent".³⁵⁶ The threat of serious injury emerges before and precedes a serious injury. The use of the word "imminent" means that "the anticipated 'serious injury' must be on the very verge of occurring".³⁵⁷ Article 4.1(b) specifies that a threat of serious injury must be based on "facts and not merely on allegation, conjecture or remote possibility". Accordingly, a finding of threat of serious injury "whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation" and "supported by specific evidence and adequate analysis".³⁵⁸

7.224. Turning to the facts of this dispute, in the last section of its Final Findings titled "Recommendations", the Indian competent authority concluded that the increased imports of the product concerned into India "have caused serious injury or are threatening to cause serious injuries" to the domestic industry and that it would be in the public interest to impose safeguard duties on imports of the product concerned into India for a period of two years and six months.³⁵⁹

7.225. Earlier, in the section titled "Determination of Serious Injury and Threat of Serious Injury", the Indian competent authority noted that the determination of "serious injury or threat of serious injury" must include evaluation of all relevant factors having a bearing on the situation of the domestic industry.³⁶⁰ After considering all relevant factors, the Indian competent authority found that there was a "significant overall impairment" in the situation of the domestic industry, and that the domestic industry "suffered serious injury as a result of the increased imports of the [product concerned]". The Indian competent authority further considered that, due to the surplus production capacities available to foreign producers, the imports would continue to increase. Considering the likelihood of a further increase in imports, it concluded that there was "a threat of further serious injury to the domestic market".³⁶¹ The Final Findings provide as follows:

[A]n evaluation of the overall position of the DI, in light of all the relevant factors having a bearing on the situation of the DI, shows a 'significant overall impairment'. It is thus concluded that *Domestic Industry has suffered serious injury as a result of increased imports of the* [product under consideration].

There is a serious injury to the domestic industry due to the surge of imports and the most recent trend of import volumes entering India. The volume of imports continues to increase, despite already being at high levels. The market share of imports has also substantially increased over the period. Considering the surplus production capacities available with the foreign producers, the imports will continue to increase, as is evident from the post POI analysis at Para-100 resulting in further injury to the domestic

³⁵⁴ Appellate Body Report, *US – Line Pipe*, para. 171.

³⁵⁵ Appellate Body Report, *US – Line Pipe*, para. 168. (emphasis original; fn omitted)

³⁵⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.224.

³⁵⁷ Appellate Body Report, *US – Lamb*, para. 125.

³⁵⁸ Panel Report, *Argentina – Footwear (EC)*, paras. 8.283-8.285.

³⁵⁹ Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 208.

³⁶⁰ Final Findings, (Exhibits JPN-11/IND-11), paras. 48-49, p. 198.

³⁶¹ Final Findings, (Exhibits JPN-11/IND-11), para. 59, p. 201.

industry. The likelihood of further increased import leads to a conclusion that there is *a threat of further serious injury to the domestic market*. In view of the fact, that the domestic industry is unable to make profitable sales in the Indian market, I am of the view that in absence of levy of safeguard duty, the Domestic Industry faces serious injury and *a further threat of greater serious injury*.³⁶²

7.226. Therefore, the Indian competent authority concluded that the domestic industry suffered "serious injury" and there was "a further threat of greater serious injury". In other words, it found the existence of serious injury to the domestic industry and that there was a risk of a further deterioration of the situation of this industry. The Indian competent authority did not make any finding that the serious injury had not yet materialized. On the contrary, the Final Findings clearly state that there was a "significant overall impairment" in the situation of the domestic industry and that the latter suffered serious injury.

7.227. In response to a question from the Panel on where a finding of threat of serious injury could be found in the Final Findings, India referred to its analysis of the relevant injury factors provided for in Article 4.2(a).³⁶³ It is true that when making a determination of serious injury or threat of serious injury, a competent authority must evaluate all relevant factors identified in Article 4.2(a). However, when making a determination of threat of serious injury, such evaluation must involve "a fact-based assessment of likely developments in the very near future with respect to all the relevant factors".³⁶⁴ The Indian competent authority's evaluation of the relevant injury factors does not include any evidence or assessment of their likely developments in the near future. As discussed above, following the evaluation of all relevant injury factors, the Indian competent authority explicitly concluded that the domestic industry suffered serious injury.

7.228. India also submits that the finding of threat of serious injury is reflected in the evaluation of post POI data.³⁶⁵ The Indian competent authority evaluated changes in some injury factors in the period between the first and the second quarters of 2015-2016 in order to "draw a clear inference about the possibility of accentuation of the injury to the domestic industry".³⁶⁶ This analysis showed that in the second quarter of 2015-2016 the volume of imports increased by 30% and the market share of imports grew by 2 percentage points. In the same period, the domestic industry increased its sales by only 1%, while its market share and production declined by 2 percentage points and 6% respectively. The domestic industry increased its inventories and suffered financial losses.³⁶⁷ The Indian competent authority reiterated that "the domestic industry has suffered serious injury" and that the analysis of post POI data showed that "the position of domestic industry further deteriorated".³⁶⁸

7.229. In our view, the examination of post POI data has been provided by the Indian competent authority in support of its conclusion of the current serious injury and further deterioration of the situation of the domestic industry, and does not constitute a stand-alone analysis of threat of serious injury within the meaning of Article 4.1(b).

7.230. In light of the foregoing, we consider that the Indian competent authority's findings refer to the existence of serious injury. On their face, the Final Findings do not show that the Indian competent authority conducted an analysis of the "threat of serious injury" within the meaning of Article 4.1(b), i.e. a "serious injury that is clearly imminent". Rather, the Indian competent authority found that the domestic industry suffered serious injury and that there was a threat that the serious injury would continue to exist in the future and that the situation of the domestic industry might deteriorate to a greater extent due to the surplus production capacities available to foreign producers and the likelihood of a further increase in imports. The Indian competent authority's reference to a "threat of serious injury" in its conclusions and recommendations is not supported by any analysis or evidence in the Final Findings. Therefore, we find that the Indian competent authority's conclusion that the increased imports of the product concerned are threatening to cause serious injury to the

³⁶² Final Findings, (Exhibits JPN-11/IND-11), paras. 58-59, p. 201. (emphasis added)

³⁶³ India's response to Panel question No. 47.

³⁶⁴ Panel Report, *Ukraine – Passenger Cars*, para. 7.234.

³⁶⁵ India's response to Panel question No. 47.

³⁶⁶ Final Findings, (Exhibits JPN-11/IND-11), para. 100, p. 207.

³⁶⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 101, p. 208. We also note that the analysis of the post POI data does not include evaluation of all relevant factors listed in Article 4.2(a).

³⁶⁸ Final Findings, (Exhibits JPN-11/IND-11), paras. 102(ii) and (vi), p. 208.

domestic industry is inconsistent with Articles 4.1(b) and 4.2(a), because the existence of a threat of serious injury was not adequately addressed or analysed in the Final Findings.

7.8.5 Consequential claim under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

7.231. We have found above that India acted inconsistently with Articles 4.1(a) and (b), and 4.2(a) of the Agreement on Safeguards. In the preceding sections of this Report, we have also found that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In light of this, we see no need to address Japan's consequential claims that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to its assessment of the situation of the domestic industry. We therefore exercise judicial economy and decline to make findings on these claims.

7.9 Whether India acted inconsistently with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and serious injury

7.9.1 Introduction

7.232. Japan claims that India acted inconsistently with Article 4.2(b) of the Agreement on Safeguards by failing to determine the existence of a causal link between the increased imports and the serious injury and to ensure that the injury caused by other factors was not attributed to the injury caused by the increased imports. As a consequence, Japan also claims that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.³⁶⁹ Having concluded that the Indian competent authority's findings on the increased imports and the existence of serious injury are inconsistent with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards, it would normally not be necessary to address Japan's claims whether the Indian competent authority demonstrated the existence of the causal link between the increased imports and serious injury.³⁷⁰ Nevertheless, in light of the circumstances of the present case and with a view to assisting the parties to arrive at a positive solution to the dispute, we will consider Japan's claims on the causal link and non-attribution analyses.

7.9.2 Article 4.2(b) of the Agreement on Safeguards

7.233. Article 4.2(b) of the Agreement on Safeguards reads as follows:

The determination referred to in subparagraph (a) [that increased imports have caused or are threatening to cause serious injury to a domestic industry] 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.

7.234. Article 4.2(b) of the Agreement on Safeguards provides two distinct legal requirements. First, a competent authority should demonstrate that there is a causal link between the increased imports and the serious injury to the domestic industry (causation requirement). Second, the serious injury caused by factors other than the increased imports must not be attributed to the increased imports (non-attribution requirement).³⁷¹

7.235. The Agreement on Safeguards does not provide any specific methodology as to how the existence of a causal link has to be determined. The Panel will have to consider whether the Indian competent authority provided a reasoned and adequate explanation of its finding that there is a causal link between the increased imports and the serious injury suffered by the domestic industry. Previous panels in assessing whether a Member has fulfilled the causation requirement considered,

³⁶⁹ Japan's first written submission, paras. 334-335; second written submission, para. 187.

³⁷⁰ Appellate Body Report, *Argentina – Footwear (EC)*, para. 145; Panel Reports, *Argentina – Preserved Peaches*, para. 7.135; *Dominican Republic – Safeguard Measures*, paras. 7.327-7.329.

³⁷¹ Appellate Body Report, *US – Line Pipe*, para. 208.

among other factors (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned, and reasonable explanation was provided as to why nevertheless the data show causation; and (ii) whether the conditions of competition between the imported and domestic products as analysed demonstrate the existence of a causal link between the imports and any serious injury.³⁷²

7.236. Upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist.³⁷³ A coincidence in trends by itself cannot prove causation. However, an absence of coincidence 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".³⁷⁴ Apart from the coincidence analysis, the competent authority may also use other analytical tools to determine the existence of a causal link, for instance, an analysis of the conditions of competition between imported and domestic products.³⁷⁵ The relevance of the conditions of competition is confirmed by the text of Article 2.1 of the Agreement on Safeguards, which refers to the increased imports occurring "under such conditions" as to cause or threaten to cause serious injury to the domestic industry.³⁷⁶

7.237. The second sentence of Article 4.2(b) requires that a competent authority examine factors other than increased imports which are causing injury to the domestic industry simultaneously with the increased imports, and ensure that the injury caused by such other factors not be attributed to the increased imports. The Appellate Body clarified that in order to comply with this requirement a competent authority must "make an appropriate assessment" of the injury caused to the domestic industry by the other factors and provide a "satisfactory explanation of the nature and extent of the injurious effects of the other factors".³⁷⁷ Once a competent authority determines that there are other factors causing injury to the domestic industry, it "must separate and distinguish" the injurious effects of the increased imports from the injurious effects of other factors, and "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports".³⁷⁸

7.238. In order to demonstrate that increased imports are causing serious injury, a competent authority must find a "sufficiently clear contribution" by those imports and explain its determination in that regard. The Appellate Body has stated, however, that the increased imports do not need to be the sole cause of injury, and that the causal link between increased imports and serious injury may exist even though other factors are also contributing at the same time to the situation of the domestic industry.³⁷⁹ In addition, when a competent authority considers that there are no other factors causing injury to the domestic industry, this must be clearly indicated and explained in its determination.³⁸⁰

³⁷² Panel Reports, *Argentina – Footwear (EC)*, para. 8.229 (confirmed in Appellate Body Report, *Argentina – Footwear (EC)*, para. 145); *US – Wheat Gluten*, para. 8.91; and *US – Lamb*, para. 7.232.

³⁷³ Panel Reports, *US – Steel Safeguards*, para. 10.299. That panel also recognized that in some cases a lag may exist between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry. (*Ibid.*).

³⁷⁴ Panel Report, *Argentina – Footwear (EC)*, para. 8.238 (emphasis original). See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

³⁷⁵ Panel Reports, *US – Steel Safeguards*, paras. 10.314-10.316.

³⁷⁶ Appellate Body Report, *US – Wheat Gluten*, paras. 76-78.

³⁷⁷ Appellate Body Reports, *US – Hot-Rolled Steel*, para. 226; *US – Line Pipe*, para. 215.

³⁷⁸ Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

³⁷⁹ The Appellate Body in *US – Wheat Gluten* stated:

Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that "*other* factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing, "at the same time", to the situation of the domestic industry.*

(Appellate Body Report, *US – Wheat Gluten*, para. 67 (emphasis original); see also Panel Report, *China – Cellulose Pulp*, paras. 7.26-7.27).

³⁸⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.334.

7.9.3 Causal link analysis

7.239. Japan contends that India acted inconsistently with the first sentence of Article 4.2(b) by failing to determine the existence of a causal link between the increased imports and the serious injury and threat thereof to the domestic industry.

7.240. First, Japan submits that in the present case movements in imports and movements in injury factors did not coincide in time and were not directly correlated.³⁸¹ Japan argues that in its causal link analysis the Indian competent authority compared import trends with changes in only two injury factors, namely market share and domestic prices, and failed to take into account all injury factors in order to demonstrate the "overall coincidence".³⁸² Japan submits that most of the injury factors remained stable or even improved during the POI (i.e. production, sales, capacity utilization, employment, productivity, and inventories).³⁸³ Japan further submits that while the imports increased continuously over the POI, the profitability also increased and turned into losses only in the first quarter of 2015-2016. Similarly, the domestic prices remained stable over most of the POI and decreased only in the first quarter of 2015-2016. Japan adds that the Indian competent authority examined the relationship between movements in imports and injury factors by comparing the data at the beginning and at the end of the POI, without considering intermediate import trends and corresponding changes in injury factors over the POI.³⁸⁴

7.241. Second, Japan argues that if there is no overall coincidence between trends in imports and injury factors, a competent authority should provide a compelling explanation as to why the causal link exists.³⁸⁵ Japan submits that the Indian competent authority failed to explain why factors mentioned in the Final Findings showed that the increased imports of the product concerned caused serious injury to the domestic industry. In particular, Japan takes issue with the conclusion that imports (i) prevented the domestic industry from sustaining its prices; (ii) prevented the domestic industry from increasing its production and sales to meet the increased demand; and (iii) led to a sharp decline in profitability and to the losses suffered by the domestic industry.³⁸⁶ With respect to price analysis, Japan argues that the Indian competent authority's price analysis is distorted, since it is based on a simple comparison between a unit average price of imported products and a unit average price of domestic products, without addressing differences in categories and prices between various products.³⁸⁷ Japan also argues that the Indian competent authority based its analysis on an end-to-end comparison of prices and failed to consider intermediate trends.³⁸⁸ With respect to domestic production and sales, Japan submits that the Indian competent authority failed to explain its assumption that, in the absence of the increased imports, the domestic industry should have been able to increase its production and sales in proportion to the increase in demand.³⁸⁹ With respect to profitability, Japan argues that an end-to-end point comparison between profitability and import volumes and prices cannot show the existence of a causal link. Japan submits that between 2013-2014 and 2014-2015 the domestic industry was able to increase profitability and maintain its sales and prices, while the volume of imports increased and the import prices decreased.³⁹⁰ According to Japan, the Indian competent authority failed to take into account other factors that might have had an impact on the domestic industry's prices, profitability, and ability to increase its production and sales.³⁹¹

³⁸¹ Japan's first written submission, para. 350; second written submission, para. 193.

³⁸² Japan's first written submission, para. 355; second written submission, para. 194.

³⁸³ Japan's first written submission, paras. 355-356; second written submission, paras. 194-195.

³⁸⁴ Japan's first written submission, para. 354; second written submission, para. 196.

³⁸⁵ Japan's first written submission, paras. 345 and 357; second written submission, para. 197.

³⁸⁶ Japan's first written submission, paras. 357-359; second written submission, paras. 197-198.

³⁸⁷ Japan's first written submission, paras. 360-362; second written submission, para. 201.

³⁸⁸ Japan's first written submission, para. 363; second written submission, para. 202. Japan also argues that the Indian competent authority's price analysis did not allow drawing any meaningful conclusion because it was based on indexed data. (Japan's first written submission, para. 365; second written submission, paras. 203-204). We have rejected the same argument of Japan in para. 7.203 above in the context of Japan's claim under Articles 4.1(a) and 4.2(a). The same reasoning with regard to this argument stands in the context of Japan's claim under Article 4.2(b) and we see no reason to address this argument again.

³⁸⁹ Japan's first written submission, paras. 368-369; second written submission, paras. 205-206.

³⁹⁰ Japan's first written submission, paras. 371-375; second written submission, paras. 208-209.

³⁹¹ E.g. decline in the prices of raw materials (coal and iron ore), the increase of sales by the Indian producers outside the domestic industry, insufficient domestic production capacity, the domestic

7.242. India responds that its authority has established the existence of a causal link between the increase in imports and serious injury consistently with Article 4.2(b). India submits that an "overall" coincidence in movements in imports and injury factors is what matters in a causal link analysis. In India's view, a slight absence of coincidence in the changes of individual injury factors in relation to import trends does not preclude a finding of a causal link between increased imports and serious injury.³⁹² India submits that its authority recorded a coincidence of the increase in imports and changes in injury factors. In particular, when the imports increased, the domestic industry's market share and profitability declined. India underlines that the volume of imports in absolute terms increased almost three times while the domestic industry lost its market share (from 45% to 37%), the domestic prices declined, and the domestic industry suffered losses.³⁹³ India also argues that a competent authority is required to establish a relationship between movements in imports and those factors which are indicative of injury. India disagrees with Japan that a causation analysis with regard to all injury factors is required.³⁹⁴

7.243. India submits that the domestic industry's price declined from 100 to 83 and the import prices also declined from 100 to 78 (indexed). India argues that import and domestic prices moved in tandem throughout the POI, which demonstrates that the domestic industry could not have increased its prices in the presence of the increased imports.³⁹⁵ Regarding Japan's argument that the Indian competent authority failed to take into account different categories and prices of various products, India submits that the Agreement on Safeguards provides for a comparison of like or directly competitive products and Japan does not claim that the products subject to the safeguard measure are not "like or directly competitive" in terms of Article 2.1 of the Agreement on Safeguards.³⁹⁶ India clarifies that profitability had increased at the beginning of the POI due to a slight decrease in the costs (100 to 97 in 2014-2015), while the prices remained on the same level (100 to 99). This resulted in higher per unit profitability, but also in a loss of market share to the increased imports.³⁹⁷

7.244. In the present case, the Indian competent authority noted that the following factors indicated that the increased imports caused serious injury to the domestic industry:

- a. the volume of imports increased significantly from 100 points (1,252,441 tonnes) to 281 points (3,524,932 tonnes);
- b. the market share of imports increased from 5% to 13%, while the market share of the domestic industry declined from 45% to 37%;
- c. the decreasing import prices prevented the domestic industry from sustaining its prices;
- d. due to the low prices of the increased imports, the domestic industry was unable to increase its production and sales as compared to the rate of increase in demand of the product concerned in India; and
- e. the profitability of the domestic industry declined sharply during 2015-2016 (Q1) and the domestic industry recorded losses due to the increased imports.³⁹⁸

7.245. In the Final Findings, the Indian competent authority found that:

[T]here is a direct correlation between the increase in imports and serious injury suffered by the domestic industry as import in absolute term increased approximately three times during the year 2015-16 ([a]nnualised on the basis of Q1) as compared to base year 2013-14 and domestic industry is losing market share which has declined from 45% to 37%. The landed price of imports per ton has declined sharply.

industry's decision to increase captive transactions, and the increase in the demand for products that were not produced by the domestic industry. (Japan's first written submission, paras. 366, 369, and 375).

³⁹² India's first written submission, paras. 254-256 (quoting Panel Report, *US – Wheat Gluten*, para. 8.101).

³⁹³ India's first written submission, paras. 252 and 259 (referring to Final Findings, (Exhibit IND-11), para. 49(g)(ii)(b), p. 198).

³⁹⁴ India's first written submission, para. 261.

³⁹⁵ India's first written submission, para. 262.

³⁹⁶ India's first written submission, para. 263.

³⁹⁷ India's first written submission, paras. 272-273.

³⁹⁸ Final Findings, (Exhibits JPN-11/IND-11), para. 65, p. 202.

Consequently, the domestic industry has suffered losses. It is, thus, evident that injury to the domestic industry has been caused by the increased imports.³⁹⁹

7.246. The Indian competent authority concluded that there was "a direct correlation" between the import surge and the serious injury, given that the imports increased and the domestic industry's market share and prices declined, which led to the losses suffered by the domestic industry.

7.247. First, as discussed above, the Final Findings show that the volume of imports considerably increased and the domestic industry's market share declined over the POI. Japan does not dispute the fact that there was a coincidence between the increase in imports and the decrease in the domestic industry's market share.⁴⁰⁰ However, while the volume of imports was increasing during the entire POI, the domestic industry's prices remained stable during most of the POI and decreased only in the first quarter of 2015-2016. The domestic industry's profits grew significantly from 100 to 136 (indexed) in 2014-2015 compared to 2013-2014, while the imports increased from 100 to 211 (indexed) at the same time. The domestic industry experienced losses only in the first quarter of 2015-2016, while imports continued to increase, but at a lower rate. We recall that other injury factors did not show any significant change over that POI and remained stable, while the imports were increasing during the entire POI. Furthermore, there was no correlation between the decrease of the domestic industry's market share and the domestic industry's prices, although both were declining, but at considerably different levels, and with profits, because when the market shares and prices were declining, the domestic industry's profits grew significantly from 100 to 136. These findings of the Indian competent authority show that there was no overall coincidence in trends between movements in imports and movements in injury factors.

7.248. An overall coincidence in trends does not require an exact correlation since in some cases a lag may exist between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.⁴⁰¹ However, in such cases the competent authority should provide sufficient explanations to justify how an overall coincidence in movements has been found. We therefore conclude that the Indian competent authority failed to provide a sufficient explanation of why a causal link exists despite the lack of overall coincidence in trends between movements in imports and movements in injury factors.

7.249. Second, we recall that according to Article 4.2(b) of the Agreement on Safeguards, the determination regarding the existence of the causal link between the increased imports and serious injury shall be made "on the basis of objective evidence". The trends in imports and injury factors were examined during the POI, which includes two financial years, 2013-2014 and 2014-2015, and the first quarter of 2015-2016. For the purpose of examining the volume of imports and most of the injury factors, the Indian competent authority annualized the data for the first quarter of 2015-2016 to compare them to the full previous financial years.

7.250. As we have found in the preceding sections of this Report, the Indian competent authority failed to explain why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. For the same reasons, we conclude that the examination of a correlation between movements in imports and movements in injury factors was not based on objective evidence, since such examination was based at least partly on annualized data. In our view, the POI of two years and three months did not allow the Indian competent authority to examine a coincidence in trends, because in effect it provides only two points of comparison between movements in imports and movements in injury trends in 2013-2014 and in 2014-2015. With respect to the third point of comparison, 2015-2016, the Indian competent authority did not have objective evidence for the full financial year.

7.251. In addition, certain injury factors, including prices and profitability, were examined by comparing the data for the full two financial years to the first quarter of 2015-2016. As we have found above, the Indian competent authority failed to explain why valid conclusions may be drawn by comparing the average prices of full financial years to the average prices of a quarter.

³⁹⁹ Final Findings, (Exhibits JPN-11/IND-11), para. 66, p. 202.

⁴⁰⁰ Japan's second written submission, para. 195.

⁴⁰¹ Panel Reports, *US – Steel Safeguards*, para. 10.299.

7.252. Accordingly, we consider that the Indian competent authority failed to base its analysis of trends in imports and trends in injury factors on objective evidence, when it relied at least partly on annualized data and compared data for full financial years to data for a quarter.

7.253. Third, in its causation analysis, the Indian competent authority considered the price competition between imported and domestic products. In particular, the Indian competent authority stated that "[t]he decreasing import prices are preventing the Domestic Industry from sustaining its prices" and "[d]ue to increased imports on low prices, the Domestic Industry is unable to increase its production and sales as compared to the rate of increase in demand/consumption of product under consideration in India".⁴⁰²

7.254. The Indian competent authority compared price trends based on the average unit price of imported products and the average unit price of the like or directly competitive domestic products. During the investigation, several interested parties argued that the imported product included a heterogeneous group of products. Specifically, some of the importers of the subject goods in India (Maruti Suzuki India Limited) argued that the product concerned included a "heterogeneous set of products imported and thus they cannot be included in the same grade for comparison with the products manufactured by the domestic producers/petitioners".⁴⁰³ Several producers and exporters added that "[i]n the present investigation, the products classified under subheading 7225 are materially different from the articles classified under subheading 7208. Therefore, the products under the two headings which are not identical and which are plural or heterogeneous in nature cannot be put together in one basket to determine a single [product under consideration]".⁴⁰⁴ In response to a question from the Panel on whether and how the Indian competent authority addressed these arguments, India referred to the section of the Final Findings titled "Product under consideration".⁴⁰⁵ In this section the Indian competent authority considered the interested parties' arguments on whether certain products should be excluded from the scope of the investigation. However, this section does not discuss whether all products included into the scope of the investigation are alike and compete with each other.⁴⁰⁶

7.255. India argues that once products are included into the scope of a safeguard investigation, no further categorization is required, because the Agreement on Safeguards does not provide for the collection of detailed price information as it does not envisage any detailed price analysis.⁴⁰⁷ Although it is correct that the Agreement on Safeguards does not require a separate analysis of the prices of imports and domestic products, it also does not exclude such an analysis. In the present case, the Indian competent authority based its causation analysis fundamentally on price considerations. In the context of a safeguard investigation, if a competent authority supports its injury determination by relying on price trends of imported and domestic products, it should ensure that the products on both sides are sufficiently similar and that any price difference can reflect the conditions of competition between imported and domestic products, rather than differences in the composition of the two baskets of products being compared.⁴⁰⁸ This approach is consistent with the statement of

⁴⁰² Final Findings, (Exhibits JPN-11/IND-11), para. 65, p. 202.

⁴⁰³ See the arguments by Maruti Suzuki India Limited in Final Findings, (Exhibits JPN-11/IND-11), section B, XXXV(i), p. 146.

⁴⁰⁴ See the arguments by China Iron and Steel Association and several other producers and exporters in Final Findings, (Exhibits JPN-11/IND-11), section C, X(b), p. 154. See also the arguments by POSCO in Final Findings, (Exhibits JPN-11/IND-11), section D, XIV(j), p. 187.

⁴⁰⁵ India's response to Panel question No. 57.

⁴⁰⁶ Final Findings, (Exhibits JPN-11/IND-11), paras. 18-23, pp. 192-194.

⁴⁰⁷ India's responses to Panel question Nos. 58 and 114.

⁴⁰⁸ In the context of the anti-dumping investigation, the panel in *China – Broiler Products* stated: Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is **informative of the "price undercutting", if any, by the imported products. ... In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared.**

(Panel Report, *China – Broiler Products*, para. 7.483).

In addition, in *China – X-Ray Equipment*, the panel noted:

the panel in *Argentina – Footwear (EC)* regarding the determination of like or directly competitive products in the context of causation analysis:

We note in this regard that there would seem to be 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. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market.⁴⁰⁹

7.256. For the above reasons, we conclude that the Indian competent authority failed to properly examine the price competition between imported and domestic products, when it based its price comparison on the average unit price of imported products and the average unit price of the like or directly competitive domestic products.⁴¹⁰

7.257. In light of the foregoing, we conclude that India acted inconsistently with the first sentence of Article 4.2(b) of the Agreement on Safeguards, by failing to demonstrate the existence of a causal link between the increased imports and serious injury suffered by the domestic industry.

7.9.4 Non-attribution analysis

7.9.4.1 Introduction and general considerations relevant to Japan's claims on non-attribution analysis

7.258. Japan claims that India acted inconsistently with the second sentence of Article 4.2(b) of the Agreement on Safeguards, because it failed to examine "other factors" allegedly causing injury to the domestic industry at the same time with the increased imports and to ensure that the injury caused by those other factors was not attributed to the increased imports.⁴¹¹

7.259. Japan argues that the Indian competent authority failed to properly examine or to examine at all the following "other factors"⁴¹²:

- a. captive sales of the domestic industry and changes in the market share of other Indian producers not included in the definition of the domestic industry;
- b. the domestic industry's "own internal factors" (including high interest costs, depreciation, and fixed cost burden; high freight costs and poor infrastructure; raw material crisis; low capacity utilization; inability to meet the quality requirements of specific downstream industry); and
- c. other factors causing the decline in profitability (including stagnant sales, higher salaries and wages, higher usage of imported coal and higher depreciation of capitalization of new facilities, and reduction in interest earning on term deposits).

However, a number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration. (Panel Report, *China – X-Ray Equipment*, para. 7.65 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.13-7.76).

⁴⁰⁹ Panel Report, *Argentina – Footwear (EC)*, fn 557.

⁴¹⁰ We note the argument of Japan that the Indian competent authority failed to take into account other factors that might have had an impact on the domestic industry's prices, profitability, and ability to increase its production and sales. The enquiry regarding other factors causing serious injury to the domestic industry simultaneously with the increased imports is subject to the second sentence of Article 4.2(b). Such other factors, challenged by Japan under the second sentence of Article 4.2(b), are addressed in section 7.9.4 below.

⁴¹¹ Japan's first written submission, paras. 378 and 388; second written submission, paras. 210-211.

⁴¹² Japan's first written submission, paras. 391-394; second written submission, paras. 222-229.

7.260. India's main response to Japan's claim on the alleged lack of a non-attribution analysis is that the Indian competent authority did not consider that the "other factors" alleged by the interested parties during the investigation were "relevant". India submits that Articles 4.2(a) and 4.2(b) should be interpreted in a mutually consistent way.⁴¹³ India asserts that Article 4.2(a) requires a competent authority to evaluate all relevant factors "of an objective and quantifiable nature" which are "having a bearing on the situation" of the domestic industry. According to India, a competent authority has discretion to determine whether "other factors", apart from those specifically listed in Article 4.2(a), are "relevant" based on criteria "of an objective and quantifiable nature" and "have a bearing on the situation" of the domestic industry. India argues that the obligation to conduct a non-attribution analysis pursuant to the second sentence of Article 4.2(b) only arises when a competent authority has determined that a specific factor is "relevant".⁴¹⁴

7.261. We reject India's argument that the phrase "factors other than increased imports" in Article 4.2(b) has to be understood to refer to only those factors that have been found by a competent authority to be "relevant" under Article 4.2(a). The second sentence of Article 4.2(b) and Article 4.2(a) are interrelated to the extent that the analyses required under these provisions contribute to the ultimate determination whether the increased imports are causing or threatening to cause serious injury to the domestic industry.⁴¹⁵ Some "relevant factors" evaluated under Article 4.2(a) might be related to the "factors other than increased imports" allegedly causing injury to the domestic industry.⁴¹⁶ However, Article 4.2(a) and the second sentence of Article 4.2(b) set out different requirements that a competent authority must satisfy towards its determination that the increased imports are causing or threatening to cause serious injury to the domestic industry. Under Article 4.2(a) a competent authority must evaluate all "relevant factors" of objective and quantifiable nature having a bearing on the situation of the domestic industry. The second sentence of Article 4.2(b) requires a competent authority to examine "factors other than increased imports" that may be simultaneously causing serious injury to the domestic industry and to ensure that the injuries caused by such other factors are not attributed to increased imports. We recall that the increased imports do not need to be the sole source of injury caused to the domestic industry. A competent authority must appropriately assess any other sources of injury and "separate and distinguish" the injurious effects of those "other factors" from the injurious effects of the increased imports.⁴¹⁷

7.262. Therefore, in addressing Japan's claim under Article 4.2(b), we will consider whether the Indian competent authority properly examined factors other than increased imports allegedly causing injury to the domestic industry and whether the injury caused by those "other factors", if any, was distinguished and separated from the injurious effects of the increased imports.⁴¹⁸

7.263. Before turning to Japan's specific arguments, we note that the sections on causal link in the Preliminary and Final Findings do not contain any non-attribution analysis. However, the different sections of the Final Findings include a discussion of the interested parties' arguments regarding other factors causing injury to the domestic industry. Indeed, the section of the Final Findings regarding the causal link between the increased imports and the serious injury does not include an examination of "other factors" causing injury to the domestic industry. We recall that it is not decisive how a competent authority structures its report, as long as the competent authority's analysis, considered in its totality establishes the existence of both a serious injury and a causal link between the increased imports and such injury consistently with the Agreement on Safeguards.⁴¹⁹ Therefore, we will consider the Indian competent authority's entire determination in reviewing Japan's claims regarding the non-attribution analysis.

⁴¹³ India's first written submission, para. 276 (referring to Panel Reports, *US – Steel Safeguards*, para. 10.318).

⁴¹⁴ India's first written submission, para. 279; second written submission, paras. 16-19.

⁴¹⁵ Panel Report, *China – Cellulose Pulp*, para. 7.10 (in the context of Article 3 of the Anti-Dumping Agreement).

⁴¹⁶ E.g. capacity utilization is a factor to be evaluated under Article 4.2(a), while overcapacity may be an "other factor" causing injury to the domestic industry.

⁴¹⁷ Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

⁴¹⁸ Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

⁴¹⁹ Panel Reports, *US – Lamb*, para. 7.184; *China – Cellulose Pulp*, para. 7.155.

7.9.4.2 The captive sales of domestic industry and sales of producers outside the domestic industry

7.264. Japan refers to the argument made by the European Union during the investigation that captive sales and sales by other domestic producers should have been examined. Japan also argues that, although the Indian competent authority noted that the domestic industry's market share decreased by 2 percentage points while other Indian producers' market share increased by 2 percentage points, it failed to determine that this factor was not a cause of injury suffered by the domestic industry and failed to provide a reasoned and adequate explanation on this issue. According to Japan, the data show that the domestic industry's market share was partially taken by other Indian producers and that competition with other domestic producers is likely to be one of the causes of injury. Japan underlines the importance of providing sufficient explanation on this issue, given that the Indian competent authority relied on the decline in the domestic industry's market share in its finding of serious injury. Japan also argues that the Indian competent authority failed to consider whether the increase in captive sales by the domestic industry was one of the causes of the alleged injury.⁴²⁰

7.265. India responds that increased imports do not need to be the sole cause of serious injury. India refers to Japan's statement that the domestic industry's market share was only partially taken by other Indian producers. Regarding the analysis of captive sales, India reiterates that the Indian competent authority was required only to examine the "share of domestic market taken by the increased imports".⁴²¹

7.266. During the underlying investigation, the European Union noted that Indian producers that were not included into the domestic industry increased their "open market sales" by 42%. In this regard, the Indian competent authority observed that the market share of other Indian producers increased by 2 percentage points, while the market share of the domestic industry decreased by 2 percentage points during the period 2014-2015 and the first quarter of 2015-2016. It further stated that the increased imports had taken all the increase in demand of the product concerned. Specifically, in 2014-2015 demand (excluding captive) increased by 1,303,069 tonnes and imports increased by 1,392,470 tonnes.⁴²² The Indian competent authority did not examine further these two alleged "other factors".

7.267. The fact that other domestic producers gained market share, while the domestic industry was losing it, suggests that the performance of other producers might have contributed to the injury caused to the domestic industry. The Indian competent authority failed to explain whether performance of producers outside the domestic industry was a factor causing injury to the domestic industry and how it made sure that injury, if any, caused by this factor was not attributed to the increased imports. Regarding captive sales, the Indian competent authority simply restated its finding that imports increased along with the increase in demand, but failed to explain whether captive sales were a factor causing injury to the domestic industry.

7.268. If the Indian competent authority considered that the factors the interested parties raised were not causing injury to the domestic industry at the same time with the increased imports, it was nevertheless required to examine the alleged "other factors" and provide a reasoned and adequate explanation as to why these factors were not a source of injury to the domestic industry. As noted by the panel in *Ukraine – Passenger Cars*:

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. 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.⁴²³

⁴²⁰ Japan's first written submission, paras. 392-393; second written submission, paras. 226-228.

⁴²¹ India's first written submission, paras. 288-290.

⁴²² Final Findings, (Exhibits JPN-11/IND-11), para. 97, p. 207.

⁴²³ Panel Report, *Ukraine – Passenger Cars*, para. 7.334. (fn omitted)

7.269. Therefore, we conclude that the Indian competent authority failed to provide a reasoned and adequate explanation as to why the captive sales of the domestic industry and the sales of domestic producers outside the domestic industry were not a source of injury to the domestic industry.

7.9.4.3 The domestic industry's own internal factors

7.270. Japan submits that the Indian competent authority failed to properly examine the following "other factors" the interested parties raised during the investigation (i) high interest costs, depreciation, and fixed cost burden; (ii) high freight costs and poor infrastructure; (iii) raw material crisis; (iv) low capacity utilization; and (v) inability to meet the quality requirements of specific downstream industry.⁴²⁴ Japan argues that the Final Findings do not include a clear determination that the identified factors are not causing injury to the domestic industry nor any explanation in this regard.⁴²⁵ India responds that its authority considered that the factors raised by the interested parties were "very general" or were not supported by the facts. India submits that the domestic industry has existed for many years and performed well in the past.⁴²⁶

7.271. In paragraph 51 of the Final Findings, in the section regarding the determination of serious injury, the Indian competent authority noted the interested parties' arguments that the serious injury suffered by the domestic industry was due to the domestic industry's "own internal factors", including (i) high interest costs, depreciation, and fixed cost burden; (ii) high freight costs and poor infrastructure; (iii) raw material crisis; (iv) low capacity utilization; and (v) inability to meet the quality requirements of specific downstream industries.⁴²⁷ The Indian competent authority addressed these arguments in paragraph 52 of the Final Findings, as follows:

These claims are very general and without any facts and figures to support. The fact that injury has been caused due to increased quantities of imports of the [product under consideration] in India has already been established above. I find that the domestic industry has been in existence since many years and has been doing well in the past. Infrastructure and capacities are in place with the domestic industry to meet the demand of the [product under consideration]. The efficiency of a unit depends on several factors and if their efficiencies were of a higher order, probably there was no need for the DI to ask for safeguard action. Mere existence of inefficiencies in certain areas cannot be a reason to deny safeguard protection to the Domestic Industry. The very reason why safeguard protection is sought and given and is provided for under [the Agreement on Safeguards] is that the DI is unable to handle competition and can get some time to adjust to the International competition over a period of time. The main determining factor is that there should be a serious injury or threat of serious injury and there is a causal link with the increased imports. I observe that there is a significant increase in imports of the subject goods which have caused serious injury to the domestic industry which has been duly substantiated in the foregoing paras.⁴²⁸

7.272. The Indian competent authority noted that it had already found that the increased imports caused serious injury to the domestic industry and that the "[m]ere existence of inefficiencies in certain areas" was not a reason for not applying the safeguard measure. This statement of the Indian competent authority is not dispositive of the question of whether other factors were simultaneously contributing to the injury caused by the increased imports. As noted above, the increased imports do not need to be the sole source of injury caused to the domestic industry and a competent authority must assess other sources of injury and not attribute that injury to the increased imports. Having said that, paragraphs 51 and 52 of the Final Findings show that the Indian competent authority considered arguments made by the interested parties and rejected them, because in its view they were "very general and without any facts and figures to support".⁴²⁹ The Indian competent authority also stated that "the domestic industry has been in existence since many years and has been doing well in the past. Infrastructure and capacities are in place with the domestic industry to meet the

⁴²⁴ Japan's first written submission, para. 391 (referring to Final Findings, (Exhibit JPN-11), para. 51, p. 200).

⁴²⁵ Japan's first written submission, para. 391; second written submission, paras. 222-225.

⁴²⁶ India's first written submission, para. 278.

⁴²⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 51, p. 200.

⁴²⁸ Final Findings, (Exhibits JPN-11/IND-11), para. 52, p. 200.

⁴²⁹ Final Findings, (Exhibits JPN-11/IND-11), paras. iv(mm) and 52, pp. 176 and 200.

demand of the [product under consideration]".⁴³⁰ In response to a question from the Panel on the specific arguments the interested parties raised during the underlying investigation, Japan referred to the general summaries of interested parties' submissions provided in the Final Findings.⁴³¹ Japan failed to identify any specific evidence or facts on the record of the investigation that in its view the Indian competent authority failed to address. Although the Final Findings would have benefited from more elaborate and detailed explanation, Japan did not establish what facts or evidence the Indian competent authority failed to consider and what explanation is lacking regarding these factors.

7.273. Therefore, we conclude that Japan has not established that the Indian competent authority failed to provide a reasoned and adequate explanation regarding the following alleged "other factors" causing injury to the domestic industry: high interest costs, depreciation, and fixed cost burden; high freight costs and poor infrastructure; raw material crisis; low capacity utilization; and inability to meet the quality requirements of specific downstream industry.

7.9.4.4 Other factors causing the decline in profitability

7.274. Japan additionally submits that the Indian competent authority failed to consider the interested parties' arguments that the decline in profitability of the domestic industry was caused by factors other than the increased imports. Japan argues that consideration of these arguments is important given the different trends in the increase in imports and changes in profitability discussed above. Japan adds that the Final Findings state that the increased imports were the "major reason" for the decline in profitability, which suggests that there were other reasons for the losses suffered by the domestic industry.⁴³² India responds that increased imports do not need to be the sole cause of deterioration of the state of domestic industry.⁴³³ India refers to paragraph 52 of the Final Findings to note that any minor or insignificant factors affecting profitability were not "having a bearing" on the situation of the domestic industry.⁴³⁴

7.275. In the section titled "Submissions by Embassies and Delegations from countries", the Indian competent authority noted Turkey's submission that the profitability of the domestic industry declined due to factors other than the increased imports, such as "stagnant sales, higher salaries and wages[,] higher usage of imported coal and higher depreciation of capitalisation of new facilities, and reduction in interest earning on term deposits".⁴³⁵ The Indian competent authority did not provide any further examination of Turkey's argument. In response to a question from the Panel, India noted that these arguments were addressed in paragraphs 51 and 52 of the Final Findings together with other arguments of the interested parties regarding the domestic industry's own internal factors.⁴³⁶ The factors indicated in paragraph 51 do not include specific "other factors" affecting profitability raised by Turkey (see paragraph 7.271 above). Neither does paragraph 52 of the Final Findings include any discussion of the specific arguments relating to the domestic industry's internal factors Turkey raised regarding other factors affecting the domestic industry's profitability.

7.276. Furthermore, the Indian competent authority found that "[t]he *major* reason for decline in profitability of domestic industry is the increased imports at reduced prices".⁴³⁷ India admitted that there might have been other factors affecting profitability than the increased imports at reduced prices, but they were minor or insignificant and did not have a bearing on the situation of the domestic industry.⁴³⁸ As noted above, the increased imports do not need to be the sole source of injury to the domestic industry.⁴³⁹ Nonetheless, the Indian competent authority should have addressed any other alleged factors affecting profitability and to provide a reasoned and adequate

⁴³⁰ Final Findings, (Exhibits JPN-11/IND-11), para. 52, p. 200. See also *ibid.* para. iv(mm), p. 176.

⁴³¹ Japan's responses to Panel question Nos. 122 and 123 (referring to Final Findings, (Exhibit JPN-11), para. IX(m), p. 133; paras. XII(l), XII(m), XIII(h), and XIII(j), p. 136; paras. VIII(f) and IX(f), pp. 153-154; and para. XIII(g), p. 186).

⁴³² Japan's first written submission, para. 394; second written submission, para. 229.

⁴³³ India's first written submission, para. 290.

⁴³⁴ India's first written submission, para. 290 (referring to Final Findings, (Exhibit IND-11), para. 52).

⁴³⁵ Final Findings, (Exhibits JPN-11/IND-11), section C, VIII(f), pp. 153-154.

⁴³⁶ India's response to Panel question No. 61.

⁴³⁷ Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201. (emphasis added)

⁴³⁸ India's first written submission, para. 290 (referring to Final Findings, (Exhibit IND-11), para. 52).

⁴³⁹ See para. 7.238 above.

explanation of whether these factors were causing injury to the domestic industry and how it made sure that injury, if any, caused by these factors was not attributed to the increased imports.

7.277. We conclude that the Indian competent authority failed to provide a reasoned and adequate explanation regarding other factors causing a decline in the profitability of the domestic industry.

7.9.4.5 Conclusion

7.278. In light of the foregoing, we conclude that India acted inconsistently with the second sentence of Article 4.2(b) of the Agreement on Safeguards, by failing to conduct a proper non-attribution analysis.⁴⁴⁰

7.9.5 Consequential claims

7.279. Japan submits that the fact that India acted inconsistently with Article 4.2(b) also leads to a violation of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.⁴⁴¹ We have found above that India acted inconsistently with its obligations under Article 4.2(b) with regard to its causation and non-attribution analyses. In the preceding sections of this Report, we have also found that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In light of this, we see no need to address Japan's consequential claims whether India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its causation and non-attribution analyses. We therefore exercise judicial economy and decline to make findings on these claims.

7.10 Whether India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

7.280. Japan claims that India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 by failing to impose the safeguard measure only to the extent and for such time necessary to prevent or remedy serious injury. Japan argues that the second sentence of Article 4.2(b) serves as a context for interpreting Article 5.1 and that the phrase "to the extent necessary to prevent or remedy serious injury" means that safeguard measures shall be applied only to the extent that they address serious injury "attributed" to increased imports.⁴⁴² Japan refers to its claim under Article 4.2(b) of the Agreement on Safeguards and argues that since the Indian competent authority failed to demonstrate the causal link between the increased imports and the serious injury, it was consequently unable to ensure that the safeguard measure was applied only to the extent necessary to prevent or remedy serious injury caused by the increased imports.⁴⁴³

7.281. Japan further submits that the second sentence of Article 4.2(b) of the Agreement on Safeguards also serves as a context for interpreting Article 7.1. Japan argues that the requirement in Article 7.1 that safeguard measures shall be applied "only for such period of time as may be necessary to prevent or remedy serious injury" refers to the injury "attributed" to increased imports. Japan considers that this requirement also applies to Article XIX:1(a) of the GATT 1994. In Japan's view, considering that the Indian competent authority's causation and non-attribution analysis was inconsistent with Article 4.2(b), the Indian competent authority was consequently unable to ensure that the safeguard measure was applied "only for such period of time as may be necessary to prevent or remedy serious injury". Therefore, Japan submits that India acted

⁴⁴⁰ We also note Japan's argument that, for the purpose of non-attribution analysis, India failed to distinguish the impact of imports caused by unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons. (Japan's first written submission, para. 395). We have found above that India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its consideration of unforeseen developments and the effect of GATT obligations. We have also found that India's non-attribution analysis is inconsistent with Article 4.2(b). In light of these findings, we see no need to address this argument of Japan.

⁴⁴¹ Japan's first written submission, paras. 396-399; second written submission, para. 232.

⁴⁴² Japan's first written submission, para. 404 (referring to Appellate Body Report, *US – Line Pipe*, paras. 252 and 260).

⁴⁴³ Japan's first written submission, paras. 410-411; second written submission, para. 240.

inconsistently with Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.⁴⁴⁴

7.282. India responds that the obligation to justify that safeguard measures are applied "to the extent necessary" arises only in case of safeguard measures in the form of quantitative restrictions, as provided in the second sentence of Article 5.1.⁴⁴⁵ India submits that Japan failed to show that there is any obligation in Article 5.1 for competent authorities to provide explanations with respect to duties imposed as safeguards.⁴⁴⁶ India argues that a non-attribution analysis conducted under Article 4.2(b) itself ensures that the safeguard duties applied address only the serious injury attributed to the increased imports. India contends that the Appellate Body's interpretation of Articles 4.2(b) and 5.1 in *US – Line Pipe* means that once a non-attribution analysis has been conducted in accordance with Article 4.2(b), the measure *ipso facto* complies with Article 5.1.⁴⁴⁷ India argues that neither the Agreement on Safeguards nor Article XIX:1(a) of the GATT 1994 provide for the period of time that could be sufficient to remedy serious injury or to facilitate adjustment. India submits that it has fully complied with Article 4.2(b) and that Japan failed to substantiate its claim that India acted inconsistently with Article 7.1.⁴⁴⁸

7.283. The first sentence of Article 5.1 of the Agreement on Safeguards reads:

A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.284. Article 7.1 of the Agreement on Safeguards provides:

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.

7.285. Japan's claims under Articles 5.1 and 7.1 of the Agreement on Safeguards relate to the duration of the safeguard measure at issue and the level of the duties imposed. Since we have found above that the safeguard measure was inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards, as well as Article XIX:1(a) of the GATT 1994, we do not consider it necessary for the purposes of resolving this dispute to make additional findings on whether India has also acted inconsistently with its obligations under Articles 5.1 and 7.1. We therefore exercise judicial economy and make no findings on these claims. We also exercise judicial economy with regard to Japan's consequential claim in this regard under Article XIX:1(a) of the GATT 1994.

7.11 Whether India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards

7.286. Japan refers to its previous claims that the Indian competent authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its various determinations, namely concerning (i) unforeseen developments, (ii) the effects of the obligations incurred under the GATT 1994, (iii) the increase in imports, (iv) the definition of the domestic industry, (v) the serious injury and threat thereof, (vi) the existence of a causal link, and (vii) the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury. Consequently, Japan argues that India acted inconsistently with the last sentence of Article 3.1 and Article 4.2(c) of the Agreement on Safeguards by failing to set forth findings and reasoned conclusions for all pertinent issues of fact and law.⁴⁴⁹ India responds that it has demonstrated that its competent authority fully complied with the obligations under the Agreement

⁴⁴⁴ Japan's first written submission, paras. 417-419.

⁴⁴⁵ India's first written submission, paras. 293 and 296 (referring to Appellate Body Report, *Korea – Dairy*, paras. 98-100).

⁴⁴⁶ India's first written submission, para. 297.

⁴⁴⁷ India's first written submission, paras. 298-300.

⁴⁴⁸ India's first written submission, paras. 302-305.

⁴⁴⁹ Japan's first written submission, paras. 425-426; second written submission, para. 244.

on Safeguards and Article XIX of the GATT 1994 and provided reasoned and adequate explanations of its determination concerning "all pertinent issues of fact and law".⁴⁵⁰

7.287. Article 3.1 of the Agreement on Safeguards, in relevant part, reads as follows:

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

7.288. Article 4.2(c) of the Agreement on Safeguards, provides:

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.⁴⁵¹

7.289. We have found above that India (i) acted inconsistently with Article XIX:1(a) of the GATT 1994, by failing to provide a reasoned and adequate explanation that the increase in imports of the product concerned into India occurred as a result of unforeseen developments and the effect of the relevant obligations of the GATT 1994; (ii) acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994, by failing to objectively examine trends in imports and to provide a reasoned and adequate explanation with regard to its conclusions on increased imports; (iii) acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation regarding its evaluation of certain injury factors and its assessment of the situation of the domestic industry; (iv) acted inconsistently with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards, because the existence of a threat of serious injury was not adequately addressed or analysed in the findings of the competent authority; and (v) acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, by failing to conduct a proper causation and non-attribution analysis. We consequently conclude that India acted inconsistently with its obligations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards, by failing to provide reasoned conclusions on all pertinent issues of fact and law.

7.290. We have also found above that Japan has not demonstrated that India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards with regard to its definition of the domestic industry. Accordingly, we reject Japan's consequential claims in this regard under Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.291. Finally, we did not make findings on Japan's claims that India acted inconsistently under Articles 5.1 and 7.1 of the Agreement on Safeguards, by imposing the measure to the extent and for the time necessary to prevent or remedy serious injury. According, we also exercise judicial economy and make no findings in this regard under Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.12 Whether India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards

7.292. Japan refers to its claims above that the safeguard measure imposed by India is inconsistent with various provisions of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. Consequently, Japan argues that India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards.⁴⁵²

7.293. Article 11.1(a) of the Agreement on Safeguards provides that:

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.

⁴⁵⁰ India's first written submission, para. 314.

⁴⁵¹ In *US – Steel Safeguards*, the panel found that Article 4.2(c) of the Agreement on Safeguards is an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report. (Panel Reports, *US – Steel Safeguards*, para. 289).

⁴⁵² Japan's first written submission, para. 429; second written submission, para. 245.

7.294. We recall our findings above that the safeguard measure at issue is inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. We therefore do not consider it necessary, for the purposes of resolving this dispute, to make additional findings on whether India has also acted inconsistently with its obligations under Article 11.1(a) of the Agreement on Safeguards. We therefore exercise judicial economy and make no findings on this claim.

7.13 Whether India acted inconsistently with Article 12 of the Agreement on Safeguards in notifying its measure and providing opportunities for consultations

7.13.1 Japan's claim under Article 12.4 of the Agreement on Safeguards

7.13.1.1 Introduction

7.295. Japan claims that India acted inconsistently with Article 12.4 of the Agreement on Safeguards, because it notified the provisional safeguard measure to the WTO Committee on Safeguards after the measure had been taken.⁴⁵³

7.296. India does not dispute the facts. India argues, however, that its competent authority concluded that the provisional measure had to be imposed "on an urgent basis", because of the injury suffered by the domestic production, and because any delay in the application of a provisional safeguard duty would have caused damage which would have been difficult to repair. India adds that the provisional measure was imposed only for 200 days, which have since lapsed.⁴⁵⁴ India also argues that the notification requirement in Article 12.4 "is, at best, a procedural requirement" and that "the substantive right of a Member to address the 'critical circumstances' as envisaged in Article 6 would be substantially diluted if an action in terms of this Article is made contingent upon a mere notification requirement under Article 12.4".⁴⁵⁵

7.297. In response, Japan argues that India's defence "does not have any legal basis in the Agreement on Safeguards and must therefore be rejected by the Panel".⁴⁵⁶ Japan adds that the fact that the circumstances of the case necessitated an urgent imposition of the provisional safeguard measure does not relieve India from its obligation under Article 12.4. Japan also argues that provisional safeguard measures are by nature "urgent". In its view, "urgency" does not constitute an argument to escape the notification obligation under Article 12.4.⁴⁵⁷

7.298. The parties do not disagree on the relevant facts.

7.299. The Indian competent authority initiated the safeguard investigation at issue on 7 September 2015.⁴⁵⁸

7.300. On 9 September 2015, the Indian competent authority issued its Preliminary Findings, in which it concluded that (i) increased imports of the products concerned into India caused and threatened to cause serious injury to the domestic industry; and (ii) critical circumstances existed when any delay in the application of safeguard measures would cause serious damage which would be difficult to repair. The Indian competent authority imposed a provisional safeguard duty of 20% *ad valorem* for 200 days.⁴⁵⁹

7.301. On 14 September 2015, the Department of Revenue, Ministry of Finance, after considering the Indian competent authority's Preliminary Findings, imposed a provisional safeguard duty of 20% *ad valorem* on imports into India of the products concerned. The duty would have a

⁴⁵³ Japan's first written submission, paras. 438-439; second written submission, para. 246.

⁴⁵⁴ India's first written submission, para. 336.

⁴⁵⁵ India's response to Panel question No. 128.

⁴⁵⁶ Japan's opening statement at the first meeting of the Panel, para. 103. See also response to Panel question No. 65, para. 104; and comments on India's response to Panel question No. 128, para. 81.

⁴⁵⁷ Japan's second written submission, paras. 248-249; response to Panel question No. 65, para. 105.

⁴⁵⁸ Notice of Initiation, (Exhibits JPN-4/IND-4), pp. 5-8.

⁴⁵⁹ Preliminary Findings, (Exhibits JPN-7/IND-7), pp. 12-19.

200-day duration. The measure entered into force on 14 September 2015, the date in which the notification imposing the provisional safeguard measure was published in The Gazette of India.⁴⁶⁰

7.302. On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.⁴⁶¹ On 28 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.4 and Article 9, footnote 2, of the Agreement on Safeguards, of the application of the provisional safeguard measure.⁴⁶²

7.13.1.2 Evaluation by the Panel

7.303. Article 12.4 of the Agreement on Safeguards provides in relevant part that:

A Member shall make a notification to the Committee on Safeguards *before taking a provisional safeguard measure* referred to in Article 6.⁴⁶³

7.304. As noted above, the parties do not disagree on the relevant facts. The provisional safeguard measure at issue entered into force on 14 September 2015, whereas India notified the Committee on Safeguards of this measure on 28 September 2015, i.e. two weeks later. Both parties agree that the measure in question is a provisional safeguard measure of the type referred to in Article 6 of the Agreement on Safeguards. Consequently, as a matter of fact, India did not notify the Committee on Safeguards *before* taking the provisional safeguard measure at issue.

7.305. The circumstances that India raised (namely, that its competent authority concluded that provisional measures had to be imposed "on an urgent basis") do not exempt India from its obligation under Article 12.4.

7.13.1.3 Conclusion

7.306. For the reasons explained above, we conclude that India acted inconsistently with Article 12.4 of the Agreement on Safeguards by failing to notify the Committee on Safeguards before taking the provisional safeguard measure at issue.

7.13.2 Japan's claim under Article 12.1 of the Agreement on Safeguards

7.13.2.1 Introduction

7.307. Japan claims that India acted inconsistently with Article 12.1 of the Agreement on Safeguards, because it failed to notify the WTO Committee on Safeguards immediately upon (i) initiating the investigation relating to serious injury or threat thereof, (ii) making a finding of serious injury or threat thereof caused by increased imports, and (iii) taking a decision to apply a safeguard measure.

7.308. With respect to Article 12.1(a), Japan notes that India published the notice of the initiation of the safeguard investigation in The Gazette of India on 7 September 2015, while the WTO Committee on Safeguards was notified on 15 September 2015. Japan argues that the term "immediately" used in Article 12.1 should be examined on a case by case basis "considering in particular the complexity of the notification being made and the need for translation into one of the WTO's official languages".⁴⁶⁴ Japan submits that, in the present case there was no issue of translation since the Notice of Initiation was originally published in English in The Gazette of India. Moreover, the notification made to the WTO was relatively short (450 words), compared to previous cases, and the elements contained in the notification were the usual, were not complex, and were

⁴⁶⁰ Notification imposing a provisional safeguard measure, (Exhibits JPN-8/IND-8), p. 2.

⁴⁶¹ Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).

⁴⁶² Notification under Article 12.4 of the SA (28 September 2015), (Exhibits JPN-10/IND-10).

⁴⁶³ Emphasis added. Article 6 of the Agreement on Safeguards is the provision on Provisional Safeguard Measures.

⁴⁶⁴ Japan's first written submission, paras. 447 and 454. See also *ibid.* para. 443; and second written submission, para. 252 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 105).

already included in the Notice of Initiation itself.⁴⁶⁵ Japan concludes that the notification that India made to the Committee on Safeguards after eight days of the initiation of the safeguard investigation was not "immediate" and was therefore inconsistent with Article 12.1(a) of the Agreement on Safeguards.⁴⁶⁶ Japan adds that this 8-day delay is all the more problematic as India imposed the provisional safeguard duty on 14 September 2015, that is, before India notified the Committee on Safeguards of the initiation of the investigation. According to Japan, considering such a delay as an "immediate" notification would go against the purpose of Article 12, which is to ensure transparency, as WTO Members were not even informed of the initiation of the investigation at the time of the imposition of the provisional safeguard duty.⁴⁶⁷

7.309. With respect to Article 12.1(b), Japan notes that India published the Final Findings for the safeguard investigation in The Gazette of India on 15 March 2016, while the WTO Committee on Safeguards was notified on 21 March 2016. Japan argues again that the examination of the term "immediately" should be done considering the complexity of the notification being made and the need for translation into one of the WTO's official languages.⁴⁶⁸ Japan submits that, in the present case there was no issue of translation since the Final Findings were originally published in English in The Gazette of India. Moreover, the notification made to the WTO was relatively short (1,300 words).⁴⁶⁹ Japan concludes that the notification that India made to the Committee on Safeguards after six days of the Final Findings for the safeguard investigation was not "immediate" and was therefore inconsistent with Article 12.1(b) of the Agreement on Safeguards.⁴⁷⁰

7.310. With respect to Article 12.1(c), Japan notes that India published the decision to apply a definitive safeguard measure in The Gazette of India on 29 March 2016, while the WTO Committee on Safeguards was notified on 4 April 2016. Japan submits that, in the present case there was no issue of translation since the decision to apply the safeguard measure was originally published in English in The Gazette of India. Moreover, the notification made to the WTO was very short (330 words).⁴⁷¹ Japan concludes that the notification that India made to the Committee on Safeguards after six days of the decision to apply a definitive safeguard measure was not "immediate" and was therefore inconsistent with Article 12.1(c) of the Agreement on Safeguards.⁴⁷²

7.311. India does not dispute the facts as described by Japan. India states that it notified the Committee on Safeguards of each of the relevant decisions within six to eight days (four to six working days) from the date of initiation, the date of the findings of serious injury, and from the date of the imposition of the definitive safeguard measure, respectively.⁴⁷³

7.312. India notes that, once the competent authority under Indian legislation adopts the relevant decision, this decision is published in the Gazette of India and then notified with the relevant documents to the Ministry of Commerce, which is the department in charge of making notifications to the WTO. The Ministry of Commerce prepares a summary of the relevant decision in order to fulfill the requirements of Article 12 of the Agreement on Safeguards. The duration of this step depends on the complexities of the case. Once the notification is prepared, it must be approved by senior officials. The relevant documents are then sent to the Permanent Mission of India to the WTO, which files the relevant notification to the Committee.⁴⁷⁴

⁴⁶⁵ Japan's first written submission, para. 455. See also second written submission, para. 253.

⁴⁶⁶ Japan's first written submission, para. 455; second written submission, para. 255.

⁴⁶⁷ Japan's first written submission, para. 456.

⁴⁶⁸ Japan's first written submission, para. 458; second written submission, para. 252.

⁴⁶⁹ Japan's first written submission, para. 459. See also second written submission, para. 253.

⁴⁷⁰ Japan's first written submission, paras. 457 and 459; second written submission, para. 255.

⁴⁷¹ Japan's first written submission, para. 461. See also second written submission, para. 253.

⁴⁷² Japan's first written submission, paras. 460-461; second written submission, para. 255.

⁴⁷³ India's first written submission, paras. 323-326.

⁴⁷⁴ India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final findings in a safeguard investigation. (Japan's comments on India's response to Panel question No. 129, para. 82). There is no reason to assume, however, that those steps are different when notifying the initiation of an investigation or the decision to apply a safeguard measure.

7.313. In India's view, there was no undue delay in keeping the Members informed of the various steps of the investigation and therefore, India complied with the requirements of Article 12.1 of the Agreement on Safeguards.⁴⁷⁵

7.314. The parties do not disagree on the relevant facts.

7.315. The notice of the initiation of the safeguard investigation at issue by the Indian competent authority was published in The Gazette of India on 7 September 2015.⁴⁷⁶ On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.⁴⁷⁷ In other words, India notified the Committee on Safeguards eight days after the initiation of the investigation.

7.316. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016.⁴⁷⁸ On 21 March 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(b) of the Agreement on Safeguards, of the findings of serious injury or threat thereof caused by increased imports.⁴⁷⁹ In other words, India notified the Committee on Safeguards six days after making a finding of serious injury or threat thereof caused by increased imports.

7.317. On 29 March 2016, the Department of Revenue's Notification No. 1/2016-Customs (SG), whereby a definitive safeguard measure was imposed, was published in The Gazette of India.⁴⁸⁰ On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c) of the Agreement on Safeguards, of its decision to impose a measure.⁴⁸¹ In other words, India notified the Committee on Safeguards six days after taking a decision to apply a safeguard measure.

7.13.2.2 Evaluation by the Panel

7.318. Article 12.1 of the Agreement on Safeguards provides that:

A Member shall immediately notify the Committee on Safeguards upon:

- (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
- (b) making a finding of serious injury or threat thereof caused by increased imports; and
- (c) taking a decision to apply or extend a safeguard measure.

7.319. As noted above, the parties do not disagree on the relevant facts. India notified the Committee on Safeguards (i) eight days after initiating the investigation, (ii) six days after making a finding of serious injury or threat thereof caused by increased imports, and (iii) six days after taking a decision to apply a safeguard measure.

7.320. Article 12.1 requires that the notifications in question be made "immediately" upon the occurrence of the specified events. The word "immediately" can be defined as "without delay, at once, instantly".⁴⁸² 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 at issue and the character of the information supplied. The Appellate Body clarified in

⁴⁷⁵ India's first written submission, para. 326.

⁴⁷⁶ Notice of Initiation, (Exhibits JPN-4/IND-4), pp. 5-8.

⁴⁷⁷ Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).

⁴⁷⁸ Final Findings, (Exhibits JPN-11/IND-11), pp. 119-209.

⁴⁷⁹ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

⁴⁸⁰ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.

⁴⁸¹ Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

⁴⁸² *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1330.

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. The Appellate Body also cautioned that the amount of time to prepare and submit a notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".⁴⁸³

7.321. The Appellate Body has also stated that an "immediate" notification is that which allows the Committee on Safeguards, and Members in general, the fullest possible period to reflect upon and react to an ongoing safeguard investigation.⁴⁸⁴ This suggests that a determination of whether a notification was "immediate" does not require consideration of whether the Committee or Members had sufficient time to review the notification or whether individual Members suffered prejudice through an insufficiency in the notification period.⁴⁸⁵

7.13.2.2.1 Japan's claim under Article 12.1(a)

7.322. Japan asserts that by notifying the Committee on Safeguards of the initiation of the investigation eight days after the publication of the notice of the initiation of the safeguard investigation in The Gazette of India, India failed to comply with the requirement of "immediate" notification.⁴⁸⁶

7.323. India responds that it notified the initiation of the investigation at issue to the Committee on Safeguards within eight days (six working days) from the date in which the decision was published in The Gazette of India.⁴⁸⁷ India has referred to the internal administrative process by which the decision to initiate an investigation is notified to the Committee on Safeguards.⁴⁸⁸ In India's view, there was no undue delay in keeping the Members informed of the initiation of the investigation. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.⁴⁸⁹

7.324. As noted, the parties do not disagree on the relevant facts. The notice of the initiation of the safeguard investigation was published in The Gazette of India on 7 September 2015 and the Committee on Safeguards was notified on 15 September 2015. Accordingly, India's notification to the Committee on Safeguards of the initiation of the safeguard investigation occurred eight calendar days after the relevant triggering event (the publication of the initiation of the investigation in The Gazette of India).

7.325. The notification that India filed is a relatively short document (one and a half pages), which contains (i) the date of initiation of investigation, (ii) the POI, (iii) the product under investigation, (iv) the reasons for the initiation of the investigation, (v) the point of contact, and (vi) the deadlines for interested parties to make their views known and for any other party to submit a request to be considered as an interested party.⁴⁹⁰ The information is extracted from the notice of the initiation of the safeguard investigation which was published in English in The Gazette of India. The notification, however, does not merely reproduce the notice of the initiation of the investigation. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.326. Finally, we keep in mind that, in previous cases, the following periods between the initiation of a safeguard investigation and the notification to the Committee on Safeguards under Article 12.1(a) were found by the respective panels not to have been "immediate" (i) a 14-day period

⁴⁸³ Appellate Body Report, *US – Wheat Gluten*, para. 105.

⁴⁸⁴ Appellate Body Report, *US – Wheat Gluten*, para. 106.

⁴⁸⁵ Appellate Body Report, *US – Wheat Gluten*, para. 106.

⁴⁸⁶ Japan's first written submission, paras. 454-455; second written submission, para. 255.

⁴⁸⁷ India's first written submission, para. 323.

⁴⁸⁸ India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final decision to apply a safeguard measure. (See Japan's comments on India's response to Panel question No. 129). There is no reason to assume, however, that those steps differ considerably when notifying the initiation of an investigation.

⁴⁸⁹ India's first written submission, paras. 323 and 326.

⁴⁹⁰ Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).

by the panel on *Korea – Dairy*⁴⁹¹, (ii) a 16-day period by the panel on *US – Wheat Gluten*⁴⁹², and (iii) an 11-day period by the panel on *Ukraine – Passenger Cars*.⁴⁹³

7.327. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(a) of the Agreement on Safeguards of the initiation of the investigation eight days after the publication of the notice of initiation is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.2.2 Japan's claim under Article 12.1(b)

7.328. Japan asserts that by notifying the Committee on Safeguards of the Final Findings for the safeguard investigation six days after their publication in The Gazette of India, India failed to comply with the requirement of "immediate" notification.⁴⁹⁴

7.329. India responds that it notified its findings of serious injury or threat thereof caused by the increased imports to the Committee on Safeguards within six days (four working days) from the date in which the decision was published in The Gazette of India.⁴⁹⁵ India has referred to the internal administrative process by which the findings of serious injury or threat thereof are notified to the Committee on Safeguards.⁴⁹⁶ In India's view, there was no undue delay in keeping the Members informed of its findings of serious injury. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.⁴⁹⁷

7.330. As noted, the parties do not disagree on the relevant facts. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016 and the Committee on Safeguards was notified on 21 March 2016. Accordingly, India's notification to the Committee on Safeguards of the findings of serious injury or threat thereof occurred six calendar days after the relevant triggering event (the publication of the findings in The Gazette of India).

7.331. The notification that India filed is a four-page document, which contains (i) information on whether there is an absolute increase in imports (including information on the share of imports relative to production); (ii) information on serious injury or threat thereof caused by increased imports; (iii) information on the evidence of serious injury (including information on the market share, production, the change in level of domestic sales, capacity utilization, profits and losses, employment and productivity, inventories, and unforeseen developments); (iv) information on an adjustment plan; (v) information on the product involved; (vi) description of the proposed measure; (vii) further information; and (viii) proposed date of imposition of the safeguard measure. The same document also contains a notification pursuant to Article 9, footnote 2, of the Agreement on Safeguards.⁴⁹⁸ The information is extracted from the Final Findings for the safeguard investigation which was published in English in The Gazette of India. The notification, however, does not merely reproduce the Final Findings. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.332. Finally, we keep in mind that, in previous cases, the respective panels found the following periods between a determination of serious injury and the notification to the Committee on Safeguards under Article 12.1(b) not to have been "immediate" (i) a 40-day period by the panel on

⁴⁹¹ Panel Report, *Korea – Dairy*, para. 7.134.

⁴⁹² Panel Report, *US – Wheat Gluten*, para. 8.197. This finding was upheld by the Appellate Body. (Appellate Body Report, *US – Wheat Gluten*, para. 112).

⁴⁹³ Panel Report, *Ukraine – Passenger Cars*, para. 7.476.

⁴⁹⁴ Japan's first written submission, paras. 457-459; second written submission, para. 255.

⁴⁹⁵ India's first written submission, para. 324.

⁴⁹⁶ India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final decision to apply a safeguard measure. (See Japan's comments on India's response to Panel question No. 129). There is no reason to assume, however, that those steps differ considerably when notifying findings of serious injury or threat thereof caused by increased imports.

⁴⁹⁷ India's first written submission, paras. 323-324 and 326.

⁴⁹⁸ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

*Korea – Dairy*⁴⁹⁹, (ii) a 26-day period by the panel on *US – Wheat Gluten*⁵⁰⁰, and (iii) a period of more than 10 months by the panel on *Ukraine – Passenger Cars*.⁵⁰¹

7.333. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(b) of the Agreement on Safeguards of the findings of serious injury six calendar days after the publication of those findings is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.2.3 Japan's claim under Article 12.1(c)

7.334. Japan asserts that by notifying the Committee on Safeguards of the decision to apply a definitive safeguard measure six days after its publication in The Gazette of India, India failed to comply with the requirement of "immediate" notification.⁵⁰²

7.335. India responds that it notified its definitive safeguard measure to the Committee on Safeguards within six days (four working days) from the date in which the decision was published in The Gazette of India.⁵⁰³ India has referred to the internal administrative process by which the decision to apply a safeguard measure is notified to the Committee on Safeguards.⁵⁰⁴ In India's view, there was no undue delay in keeping the Members informed of its decision to apply a safeguard measure. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.⁵⁰⁵

7.336. As noted, the parties do not disagree on the relevant facts. The decision to apply a definitive safeguard measure was published in The Gazette of India on 29 March 2016 and the Committee on Safeguards was notified on 4 April 2016. Accordingly, India's notification to the Committee on Safeguards of the decision to apply a safeguard measure occurred six calendar days after the relevant triggering event (the publication of the findings in The Gazette of India).

7.337. The notification that India filed is a relatively short document (one and a half pages), which contains (i) the classification of the product under consideration, (ii) a description of the safeguard measure imposed, (iii) the date of introduction of the measure, (iv) the duration of the measure, and (v) further information (the website where the text of the decision can be accessed).⁵⁰⁶ The information is extracted from the notification on the imposition of a definitive safeguard measure which was published in English in The Gazette of India. The notification to the Committee on Safeguards, however, does not merely reproduce the notice published in The Gazette of India. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.338. Finally, in a previous case, a 23-day period between the decision to apply a safeguard measure and the notification to the Committee on Safeguards under Article 12.1(c) was found by the panel on *Korea – Dairy* not to have been "immediate".⁵⁰⁷ In contrast, the Appellate Body in *US – Wheat Gluten* found that a notification to the Committee on Safeguards made by the United States five days after having taken the decision to apply the safeguard measure (and one day after the decision had been published in the US Federal Register) was not inconsistent with Article 12.1(c).⁵⁰⁸ The panel on *Ukraine – Passenger Cars* also found that a notification to the

⁴⁹⁹ Panel Report, *Korea – Dairy*, para. 7.137.

⁵⁰⁰ Panel Report, *US – Wheat Gluten*, para. 8.199. This finding was upheld by the Appellate Body. (Appellate Body Report, *US – Wheat Gluten*, para. 116).

⁵⁰¹ Panel Report, *Ukraine – Passenger Cars*, para. 7.494.

⁵⁰² Japan's first written submission, paras. 460-461; second written submission, paras. 253-255.

⁵⁰³ India's first written submission, para. 325.

⁵⁰⁴ India's response to Panel question No. 129.

⁵⁰⁵ India's first written submission, paras. 323 and 325-326.

⁵⁰⁶ Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

⁵⁰⁷ Panel Report, *Korea – Dairy*, para. 7.145.

⁵⁰⁸ Appellate Body Report, *US – Wheat Gluten*, paras. 128-130.

Committee on Safeguards that Ukraine made seven days after having taken the decision to apply the safeguard measure was not inconsistent with Article 12.1(c) of the Agreement on Safeguards.⁵⁰⁹

7.339. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(c) of the Agreement on Safeguards of the decision to apply a definitive safeguard measure six calendar days after the publication of that decision is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.3 Conclusion

7.340. For the reasons explained above, we conclude that Japan has failed to demonstrate that India acted inconsistently with Articles 12.1(a), (b) and (c) of the Agreement on Safeguards by failing to immediately notify the Committee on Safeguards, respectively, of the initiation of a safeguard investigation relating to serious injury or threat thereof, the findings of serious injury in the investigation, and the decision to apply a definitive safeguard measure.

7.13.3 Japan's claim under Article 12.2 of the Agreement on Safeguards

7.13.3.1 Introduction

7.341. Japan claims that India acted inconsistently with Article 12.2 of the Agreement on Safeguards, because in making the notifications pursuant to Articles 12.1(b) and 12.1(c), it failed to provide the WTO Committee on Safeguards with "all pertinent information". According to Japan, India's notification of 21 March 2016 does not contain the following information (i) information on the causal link between the increased imports and the serious injury or threat thereof, (ii) a precise description of the product involved, (iii) a precise description of the scope of the proposed measure, and (iv) the proposed date of introduction of the proposed measure.⁵¹⁰

7.342. With respect to causation, Japan argues that in section 2 of its notification, entitled "serious injury or threat thereof caused by increased imports"⁵¹¹, India only explained the injury suffered by the domestic industry in general and the amount of increase in imports but not the causal link between the increased imports and the serious injury or threat thereof.⁵¹²

7.343. With respect to the description of the product involved, Japan argues that, by failing to identify in its notification the product types excluded from the general definition of the "product under consideration", India failed to provide a precise description of the product involved. Japan notes that, in section 5 of its notification, India describes the product under consideration as follows: "[h]ot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more ... classified under Chapter 72 of the Customs Tariff Act, 1975 under tariff heading 7208 and tariff item 72253090".⁵¹³ In Japan's view, this description does not reflect the product exclusion as listed in paragraph 2 of the Final Findings, at least with respect to American Petroleum Institute (API) grade steel.⁵¹⁴

7.344. Japan also argues that India failed to provide a precise description of the scope of the proposed measure. Japan states that section 6 of India's notification, entitled "Precise description of the proposed measure", only indicates that the Indian competent authority recommended the imposition of a "safeguard duty at the rate of 20% *ad valorem* for the first year, 18% *ad valorem* for the second year (for first 6-months), 15% *ad valorem* for second year (for next 6-months) and 10% *ad valorem* for third year (for 6-months)" on the products concerned.⁵¹⁵ According to

⁵⁰⁹ Panel Report, *Ukraine – Passenger Cars*, para. 7.502.

⁵¹⁰ Japan's first written submission, paras. 462 and 469; second written submission, para. 256.

⁵¹¹ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

⁵¹² Japan's first written submission, para. 470; second written submission, para. 258; response to Panel question No. 131, paras. 79-80; and comments on India's responses to Panel question Nos. 130 and 131, paras. 84-88.

⁵¹³ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.

⁵¹⁴ Japan's first written submission, paras. 471-473; second written submission, para. 259; and response to Panel question No. 132, paras. 81-82.

⁵¹⁵ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.

Japan, the notification did not mention that any anti-dumping duty paid would be deducted from the safeguard duty rates listed or that the safeguard duty should not be imposed on the subject goods imported at or above the Minimum Import Price set out in Notification No. 38/2015-2020 of 5 February 2016. In Japan's view, these elements determine the scope of the proposed measure.⁵¹⁶

7.345. Finally, Japan argues that India failed to notify the "proposed date of introduction" of the proposed measure. Japan states that section 8 of India's notification, entitled "proposed date of imposition of safeguard measure", only indicates that "[t]he safeguard measure will be applicable from the date of issue of notification in this regard by the Department of Revenue, Ministry of Finance, Government of India".⁵¹⁷ According to Japan, this does not amount to the identification of the proposed date of introduction of the safeguard measure as the notification does not identify any date.⁵¹⁸

7.346. In response, India submits that its notification to the WTO Committee on Safeguards of 21 March 2016 fully complied with the requirements under Article 12.2 of the Agreement on Safeguards.⁵¹⁹ India argues that section 2 of its notification specifically deals with the serious injury or threat thereof caused by "increased imports".⁵²⁰ In India's view, Article 12 does not require that a Member include in the notification any information with respect to the existence of a causal link between increased imports and the serious injury, nor with respect to non-attribution.⁵²¹

7.347. India also argues that, although its notification does not detail the exclusions from the product under consideration, this does not imply that the precise description of the product involved was not provided. In India's view, the description required under Article 12.2 refers only to the "product under consideration", which India detailed, while the exclusions are only as regards what was not included in the "product under consideration".⁵²² India adds that the requirement in Article 12.2 to provide the description of the product is to ensure that the exporting Member's right to defend itself is not hampered. According to India, when there are exclusions in the product covered by the investigation, no such right gets affected.⁵²³

7.348. India argues further that Article 12.2 only requires a description of the proposed measure, which was included in section 6 of its notification, and not of the manner of operation of the proposed measure. In India's view, the fact that any anti-dumping duty paid would be deducted from the safeguard duty rates listed, and that the safeguard duty should not be imposed on subject goods which were imported at or above the Minimum Import Price set out in Notification No. 38/2015-2020 of 5 February 2016, refer to the manner of operation of the measure and not to the description of the proposed measure.⁵²⁴ India adds that the precise description of the applied measure, which was less burdensome than the proposed measure, was contained in the Department of Revenue's Notification No. 1/2016-Customs (SG), dated 29 March 2016, which India notified on 4 April 2016.⁵²⁵

7.349. India additionally argues that its notification clearly indicates that the measure would be applicable from the date of notification by the Department of Revenue, Government of India, which corresponds to the identification of the "proposed date of introduction of the proposed measure".⁵²⁶ India submits that its notification, not only satisfies the requirements of Article 12.2, but also informs all interested Members where any further information would be available.⁵²⁷ India adds that, under

⁵¹⁶ Japan's first written submission, paras. 474-476; second written submission, para. 260; and comments on India's response to Panel question No. 133, paras. 89-91.

⁵¹⁷ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.

⁵¹⁸ Japan's first written submission, paras. 477-478; second written submission, para. 261; response to Panel question No. 134, paras. 83-86; and comments on India's response to Panel question No. 134, paras. 92-93.

⁵¹⁹ India's first written submission, paras. 327-328.

⁵²⁰ India's first written submission, paras. 329-330; response to Panel question No. 130.

⁵²¹ India's responses to Panel question Nos. 130 and 131; comments on Japan's response to Panel question No. 131, paras. 63-64.

⁵²² India's first written submission, para. 331.

⁵²³ India's comments on Japan's response to Panel question No. 132, paras. 65-66.

⁵²⁴ India's first written submission, para. 332.

⁵²⁵ India's response to Panel question No. 133 (referring to Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibit IND-14)).

⁵²⁶ India's first written submission, para. 333.

⁵²⁷ India's first written submission, para. 334.

Article 12.2, the notifying Member has the flexibility to introduce the safeguard measure in accordance with its domestic procedures and laws and there is no requirement to provide a precise date of introduction.⁵²⁸

7.350. The parties do not disagree on the basic relevant facts.

7.351. On 21 March 2016, India notified the Committee on Safeguards of its finding of serious injury or threat thereof caused by increased imports and of the measure it had proposed to impose pursuant to Article 12.1(b) and Article 9, footnote 2, of the Agreement on Safeguards.⁵²⁹

7.352. On 29 March 2016, the Department of Revenue's Notification No. 1/2016-Customs (SG), whereby a definitive safeguard measure was imposed, was published in The Gazette of India.⁵³⁰ On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c) of the Agreement on Safeguards, of its decision to impose a measure.⁵³¹

7.13.3.2 Evaluation by the Panel

7.353. Article 12.2 of the Agreement on Safeguards provides in relevant part 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.

7.354. As noted above, the parties do not disagree on the basic relevant facts. India notified the Committee on Safeguards of its findings of serious injury or threat thereof and of its proposed measure on 21 March 2016 pursuant to Article 12.1(b) of the Agreement on Safeguards. The notification that India filed is a four-page document, which contains sections on (i) information on whether there is an absolute increase in imports (including information on the share of imports relative to production); (ii) information on serious injury or threat thereof caused by increased imports (including information on serious injury and on threat of serious injury); (iii) information on the evidence of serious injury (including information on the market share, production, the change in level of domestic sales, capacity utilization, profits and losses, employment and productivity, inventories, and unforeseen developments); (iv) information on an adjustment plan; (v) information on the product involved; (vi) description of the proposed measure, including a timetable for its progressive liberalization; (vii) further information with respect to the date of publication of the Final Findings in The Gazette of India; and (viii) proposed date of imposition of the safeguard measure.⁵³²

7.355. On 4 April 2016, India notified its decision to impose a measure to the Committee on Safeguards, pursuant to Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards. The notification that India filed is a two-page document, which contains sections on (i) product classification, (ii) the safeguard measure imposed, including a timetable for its progressive liberalization, (iii) the date of introduction of the measure, (iv) the duration of the measure, and (v) further information on where the Department of Revenue's Notification No. 1/2016-Customs (SG), dated 29 March 2016, whereby the definitive safeguard measure was imposed, may be accessed.⁵³³

7.356. In a statement supported by the Appellate Body, the panel in *Korea – Dairy* noted that the notification in Article 12 serves essentially a transparency and information purpose:

In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding

⁵²⁸ India's response to Panel question No. 134.

⁵²⁹ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

⁵³⁰ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.

⁵³¹ Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

⁵³² Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

⁵³³ Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

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. This allows 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.⁵³⁴

7.357. In the same case, regarding the object and purpose of the notification requirements in Article 12, the Appellate Body added:

We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. 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, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the *Agreement on Safeguards*. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it.⁵³⁵

7.358. *With respect to causation*, Japan argues that India failed to provide pertinent information on the causal link between the increased imports and the serious injury or threat thereof. Sections 2 and 3 of India's notification of 21 March 2016 are entitled respectively "Serious injury or threat thereof caused by increased imports" and "Evidence of serious injury". In the relevant part, section 2 states that:

Evidence of serious injury has been analysed & explained in subsequent paragraphs. It is thus concluded that [the domestic industry] has suffered serious injury and increased imports of the product under consideration threaten to cause serious injury to the [domestic industry].⁵³⁶

7.359. Section 3 of the 21 March notification, entitled "Evidence of serious injury", also states that "[t]he increased imports of [the product under consideration] into India have caused serious injury to the domestic producers as reflected by the following parameters ...".⁵³⁷

7.360. Article 12.2 provides in its relevant part that, in making the notifications referred to in Articles 12.1 (b) and (c), the notifying Member shall provide the Committee on Safeguards with all pertinent information, *which shall include evidence of serious injury or threat thereof caused by increased imports*. In this respect, the Appellate Body noted in *Korea – Dairy* that:

To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 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.⁵³⁸

7.361. The factors that Article 4.2 of the Agreement on Safeguards requires competent authorities to evaluate in an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry are all relevant factors of an objective and quantifiable nature that have a bearing on the situation of that industry. The provision lists in particular the following (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 the increased imports,

⁵³⁴ Panel Report, *Korea – Dairy*, para. 7.126 (fn omitted). See also Appellate Body Report, *Korea – Dairy*, para. 111.

⁵³⁵ Appellate Body Report, *Korea – Dairy*, para. 111.

⁵³⁶ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 2, p. 2.

⁵³⁷ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 3, p. 2.

⁵³⁸ Appellate Body Report, *Korea – Dairy*, para. 109. (emphasis original)

(iii) changes in the level of sales, (iv) production, (v) productivity, (vi) capacity utilization, (vii) profits and losses, and (viii) employment.

7.362. Article 4.2(b) also provides that a competent authority may not reach a determination that increased imports have caused or are threatening to cause serious injury to a domestic industry unless (i) the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and the serious injury or threat thereof; and (ii) when factors other than increased imports are causing injury to the domestic industry at the same time, the injury has not been attributed to increased imports.

7.363. We note that India's notification of 21 March 2016 explicitly refers to the competent authority's determination that the domestic industry suffered serious injury caused by increased imports of the product under consideration into India, and that increased imports of the product under consideration also threatened to cause serious injury to the domestic industry. We consider that the information contained in this notification fulfils the requirement in Article 12.2 with respect to providing all pertinent information regarding the evidence of serious injury or threat thereof caused by increased imports. A Member who makes a notification under Articles 12.1 (b) and (c) may provide the Committee on Safeguards with pertinent information with respect to the determination of the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof and with respect to a non-attribution analysis. We find nothing in Article 12.2, however, that requires such information to be provided in a notification to the Committee on Safeguards under Articles 12.1 (b) and (c).

7.364. *With respect to the description of the product involved*, Japan argues that India failed to identify the products excluded from the general definition of the "product under consideration", at least with respect to API grade steel.

7.365. Section 5 of India's notification of 21 March 2016 is entitled "Product Involved" and notes:

The Product Under Consideration (PUC) is "*Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more*" and is classified under Chapter 72 of the Customs Tariff Act, 1975 under tariff heading 7208 and tariff item 72253090.⁵³⁹

7.366. However, API grade steel was excluded from the scope of the product under consideration from the beginning of the investigation.⁵⁴⁰ The Final Findings explicitly note that API grade steel is "not included in the scope of the product under consideration".⁵⁴¹

7.367. The precise description of the product involved is among the pertinent information that Members must provide in making a notification to the Committee on Safeguards under Articles 12.1 (b) and (c). This involves not only identifying the product at issue, but also the specific sub-products that are excluded from the definition of the product concerned. By not indicating the products that were excluded from the scope of the investigation, India failed to provide the Committee on Safeguards with a precise description of the product involved.

7.368. *With respect to the description of the proposed measure*, Japan argues that India failed to mention that any anti-dumping duty paid would be deducted from the safeguard duty rates listed and that the safeguard duty would not be imposed on the subject goods imported at or above the Minimum Import Price approved in February 2016.

7.369. Section 6 of India's notification of 21 March 2016 is entitled "Precise Description of the Proposed Measure" and states:

DG Safeguards, the competent authority, has recommended to impose safeguard duty at the rate of 20% *ad valorem* for the first year, 18% *ad valorem* for the second year (for first 6-months), 15% *ad valorem* for second year (for next 6-months) and 10% *ad*

⁵³⁹ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 5, p. 4. (emphasis added)

⁵⁴⁰ Notice of Initiation, (Exhibits JPN-4/IND-4), para. 3, p. 6.

⁵⁴¹ Final Findings, (Exhibits JPN-11/IND-11), para. 2, p. 119.

valorem for third year (for 6-months) on imports of Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more.⁵⁴²

7.370. The 21 March notification at issue does not mention that anti-dumping duties would be deducted from the safeguard duty rates. In contrast, the Final Findings of the Indian competent authority explicitly state that for each of the periods, the corresponding safeguard duty recommended would be "minus Anti-dumping duty, if any".⁵⁴³

7.371. The 21 March notification also fails to mention anything about subject goods imported at or above Minimum Import Prices. The fact that the proposed safeguard duties should not be imposed on subject goods imported at or above Minimum Import Prices is not mentioned in the Final Findings of the Indian competent authority either. Accordingly, this particular aspect does not seem to be part of the measure as recommended in the Final Findings. The notification of the definitive safeguard measure, however, does mention that:

The safeguard duty shall not be imposed on the subject goods which are imported at or above the Minimum Import Price in terms of the notification of the Government of India in the Ministry of Commerce and Industry (Department of Commerce) (Directorate General of Foreign Trade) No. 38/2015-2020, dated the 5th February, 2016 published in the Gazette of India (Extraordinary), Part II, Section 3, Sub-section (ii) vide S.O. 391(E) dated the 5th February, 2016.⁵⁴⁴

7.372. Article 12.2 requires a Member proposing to apply a safeguard measure to provide the Committee on Safeguards with all pertinent information, including at a minimum the items listed in the provision. As noted above, the panel in *Korea – Dairy* referred to the role that notifications under Article 12 play in informing Members of the circumstances of the case. This allows any interested Member to decide whether to request consultations with the importing country that may lead to modification of the proposed measures or compensation.⁵⁴⁵ As noted by Article 12.1, notifications to the Committee on Safeguards must be made immediately upon making a finding of serious injury or threat thereof caused by increased imports or upon taking a decision to apply a safeguard measure. Notifications must at the same time be complete, in the sense of providing all the pertinent information required by Article 12.2, and timely, to allow interested Members adequate opportunity to engage in consultations to review the information provided, to exchange views on the measure, and to exercise their rights under the Agreement on Safeguards.

7.373. As noted above, the fact that anti-dumping duties should be deducted from the respective safeguard duties is included in the proposed measure as described in the 15 March Final Findings of the Indian competent authority. This aspect should in our view be part of the precise description of the proposed measure, as it would affect the manner in which the safeguard measure would apply to different imports of the product at issue.

7.374. In contrast, there is no evidence that the measure as proposed in the Final Findings of the Indian competent authority contemplated that the safeguard duties should not be imposed on subject goods imported at or above the set Minimum Import Prices. The first mention on record to the exclusion of safeguard duties from goods imported at or above Minimum Import Prices is contained in the Ministry of Finance's notification imposing a definitive safeguard measure, dated 29 March 2016. Accordingly, it does not seem unreasonable to us that India's notification of 21 March 2016 did not include a mention to this aspect. Indeed, the desirability of a detailed notification that provides as much information as possible must be balanced against the requirement for a timely notification that, while providing all pertinent information required by Article 12.2, allows interested Members adequate opportunity to exercise their rights under the Agreement on Safeguards.

⁵⁴² Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 6, p. 4. (emphasis original)

⁵⁴³ Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 209.

⁵⁴⁴ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), para. 2, pp. 6-7.

⁵⁴⁵ Panel Report, *Korea – Dairy*, para. 7.126; Appellate Body Report, *Korea – Dairy*, para. 111.

7.375. Accordingly, we consider that, by not indicating that any anti-dumping duties would be deducted from the safeguard duties imposed, India failed to provide the Committee on Safeguards with a precise description of the proposed measure.

7.376. *With respect to the proposed date of introduction of the measure*, Japan argues that India failed to identify a precise date, by indicating only that the safeguard measure would be applicable from the date of issue of the respective notification by the Department of Revenue, Ministry of Finance.

7.377. Section 8 of India's notification of 21 March 2016 is entitled "Proposed date of Imposition of Safeguard Measure" and states:

The safeguard measure will be applicable from the date of issue of notification in this regard by the Department of Revenue, Ministry of Finance, Government of India.⁵⁴⁶

7.378. A "date" can be defined as "[t]he day of the month; the day of the month, the month, or the year of an event; the time or period at which something happened or the time at which something is to happen".⁵⁴⁷ On its face, the notification does not identify a date, expressed in terms of a day of the month, the month and the year, from which the safeguard measure would apply. It does, however, refer to an event, namely the date of issuance of the respective notification by the Department of Revenue of India's Ministry of Finance.

7.379. Article 12.2 of the Agreement on Safeguards requires the Member making a notification to the Committee on Safeguards under Articles 12.1 (b) and (c) to provide all pertinent information, including the proposed date of introduction of the proposed safeguard measure. In our view, it would be desirable that a notification provide the date of introduction of the measure in a manner as precise as possible. In some cases, however, it may not be possible to identify the precise day of the month, the month, and the year, in which the measure will be introduced, as the introduction of the measure may depend on some condition, such as a notification, a publication in an official journal, or even an approval by some other authority. In these cases, the date of introduction of the proposed safeguard measure may be expressed with reference to the act or event that must occur for the measure to enter into effect. Here too the desirability of a more precise date, which may only become known once the Department of Revenue adopts the final decision, must be balanced against the requirement for a timely notification that allows interested Members adequate opportunity to exercise their rights under the Agreement on Safeguards.

7.380. In any event, we note that, in contrast with the description of the product involved and of the proposed measure, Article 12.2 does not require a *precise* date of introduction. We are unconvinced that by referring to the date of issuance of the notification by the Department of Revenue of India's Ministry of Finance, India failed to provide the Committee on Safeguards a proposed date of introduction of the proposed measure.

7.13.3.3 Conclusion

7.381. For the reasons explained above, we conclude that India acted inconsistently with Article 12.2 of the Agreement on Safeguards by failing to provide the Committee on Safeguards with (i) a precise description of the product involved, and (ii) a precise description of the proposed measure. We also conclude that Japan has failed to demonstrate that India acted inconsistently with Article 12.2 by failing to provide the Committee on Safeguards with pertinent information with respect to (i) the determination of the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof and with respect to a non-attribution analysis; and (ii) a proposed date of introduction of the proposed measure.

⁵⁴⁶ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 8, p. 4.

⁵⁴⁷ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 607.

7.13.4 Japan's claim under Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994

7.13.4.1 Introduction

7.382. Japan claims that India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. In Japan's view, in its notification to the Committee on Safeguards made on 21 March 2016, India failed to provide Japan with an opportunity for prior consultations in respect of the proposed measure, and in particular with sufficient time and sufficient information to allow for the possibility for a meaningful exchange of views.⁵⁴⁸

7.383. Japan argues that India failed to provide *any opportunity* for prior consultations since in its 21 March notification it did not indicate the proposed date of introduction of the measure, which made it impossible for Japan to organize itself with a view to have consultations with India with regard to the safeguard measure at issue.⁵⁴⁹

7.384. Japan also argues that India failed to provide Japan with an *adequate opportunity* for consultations since it failed to provide exporting Members with sufficient time and sufficient information to allow for the possibility for a meaningful exchange on the issues identified.⁵⁵⁰ In Japan's view, India failed to provide Japan with *sufficient time* to allow for a meaningful exchange of views, because: (i) India notified the Committee on Safeguards eight days before the application of the safeguard measure, which did not provide Japan enough time to prepare itself for consultations with India; and (ii) Japan could not anticipate that the measure would be introduced so soon after the 21 March notification since India did not indicate the proposed date of introduction of the measure.⁵⁵¹ Japan also states that India failed to provide Japan with *sufficient information* to allow for the possibility of meaningful prior consultations, because it did not provide all pertinent information required by Article 12.2.⁵⁵²

7.385. In response, India submits that it has complied with the requirements in Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. According to India, its notification to the Committee on Safeguards made on 21 March 2016 provided all "pertinent information" as required by Article 12.2. India also argues that the notification provided Japan an eight-day advance period for consultations.⁵⁵³

7.386. The parties do not disagree on the relevant facts.

7.387. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016.⁵⁵⁴ On 21 March 2016, India notified the Committee on Safeguards of the findings of serious injury or threat thereof caused by increased imports pursuant to Article 12.1(b) of the Agreement on Safeguards.⁵⁵⁵

7.388. On 29 March 2016, Notification No. 1/2016 from Customs, whereby the definitive safeguard measure was imposed, was published in The Gazette of India.⁵⁵⁶

7.389. In other words, India notified the Committee on Safeguards of the proposed measure eight days before the safeguard measure entered in force.

7.390. The relevant facts with respect to the content of India's notification to the Committee on Safeguards of 21 March 2016 have been discussed in the preceding section.

⁵⁴⁸ Japan's first written submission, paras. 480 and 492-502; second written submission, paras. 263-266.

⁵⁴⁹ Japan's first written submission, para. 496.

⁵⁵⁰ Japan's first written submission, para. 497.

⁵⁵¹ Japan's first written submission, paras. 498-499; second written submission, para. 265; and responses to Panel question No. 135, para. 87-89, and No. 136, paras. 90-91.

⁵⁵² Japan's first written submission, paras. 500-501; second written submission, paras. 263-264.

⁵⁵³ India's first written submission, para. 335.

⁵⁵⁴ Final Findings, (Exhibits JPN-11/IND-11).

⁵⁵⁵ Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

⁵⁵⁶ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.

7.13.4.2 Evaluation by the Panel

7.391. Article 12.3 of the Agreement on Safeguards provides that:

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.

7.392. In turn, Article XIX:2 of the GATT 1994 in relevant part reads as follows:

Before any [Member] shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the [Members acting jointly] as far in advance as may be practicable and shall afford the [Members acting jointly] and those [Members] having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.

7.393. As noted by the Appellate Body in *US – Wheat Gluten*, Article 12.3 of the Agreement on Safeguards 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 a meaningful exchange on the issues identified. Accordingly, Article 12.3 requires that information on a proposed measure be provided in advance of the consultations, so that the consultations can adequately address that measure. In turn, Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3.⁵⁵⁷

7.394. The Panel has already found that, in its notification made on 21 March 2016, India failed to provide the Committee on Safeguards with a precise description of the product involved and a precise description of the proposed measure. To the extent that India failed to provide all pertinent information as required by Article 12.2 of the Agreement on Safeguards with respect to such aspects, India also failed to provide information that was needed to enable meaningful consultations to occur under Article 12.3.

7.13.4.3 Conclusion

7.395. For the reasons explained above, we conclude that India acted inconsistently with Article 12.3 of the Agreement on Safeguards by failing to provide Japan, and other Members 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 a precise description of the product involved and a precise description of the proposed measure.

7.14 Whether India acted inconsistently with Article II:1(b) of the GATT 1994

7.14.1 Introduction

7.396. Japan claims that India acted inconsistently with Article II:1(b) of the GATT 1994 because, through the measure at issue, it imposed "other duties or charges" in terms of the second sentence of Article II:1(b).⁵⁵⁸

7.397. Japan argues that the duties resulting from the safeguard measure at issue constitute "other duties or charges" within the meaning of the second sentence of Article II:1(b) of the GATT 1994, rather than "ordinary customs duties" under the first sentence, because they are of an "exceptional" or "extraordinary" nature and applied for a limited period of time in addition to the MFN applied tariff.⁵⁵⁹ Japan also submits that these duties are not recorded in India's Schedule of Concessions in

⁵⁵⁷ Appellate Body Report, *US – Wheat Gluten*, paras. 136-137.

⁵⁵⁸ Japan's first written submission, para. 503.

⁵⁵⁹ Japan's first written submission, paras. 512-519 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.86-7.87); second written submission, para. 269.

the column "other duties or charges" and they do not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, and therefore the duties resulting from the safeguard measure at issue are inconsistent with Article II:1(b) of the GATT 1994.⁵⁶⁰

7.398. India replies that the measure at issue was imposed in accordance with Article XIX of the GATT 1994, and therefore the obligation under Article II:1(b) *ipso facto* gets suspended and the question of its violation does not arise.⁵⁶¹ India also disagrees with Japan that under Article II:1(b) the measure should have been recorded in India's Schedule of Concessions in the column "other duties or charges".⁵⁶²

7.14.2 Article II:1(b) of the GATT 1994

7.399. We recall that Article II:1(b) of the GATT 1994 provides as follows:

The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], 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.

7.400. The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides that:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be **recorded in the Schedules at the levels applying on this date ...**

3. "Other duties or charges" shall be recorded in respect of all tariff bindings.

...

7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.

7.14.3 Evaluation by the Panel

7.401. Japan alleges that India acted inconsistently with the second sentence of Article II:1(b) of the GATT 1994. This sentence provides that imported goods shall "be exempt from all other duties or charges of any kind imposed on or in connection with the importation" if such duties or charges of any kind exceed those applied on the date of entry into force of the GATT 1994 or "those directly

⁵⁶⁰ Japan's first written submission, para. 520; second written submission, para. 270.

⁵⁶¹ India's first written submission, para. 344.

⁵⁶² India's first written submission, para. 350.

and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date".

7.402. We have already concluded that the safeguard measure at issue resulted in duties levied in customs on the importation of the products concerned into the territory of India.⁵⁶³ We have also concluded that such duties are not part of the measures listed in Article II: 2 of the GATT 1994, which are carved out from the obligations in Article II.⁵⁶⁴ We have indicated that the duties resulting from the measure at issue do not constitute "ordinary customs duties" for the purposes of Article II: 1(b).⁵⁶⁵ Accordingly, the duties resulting from the measure at issue are "other duties or charges ... imposed on or in connection with the importation", within the meaning of Article II: 1(b) of the GATT 1994.⁵⁶⁶

7.403. Having found that the measure at issue resulted in "other duties or charges" in the sense of Article II: 1(b) of the GATT 1994, the Panel must consider whether these duties were in excess of the other duties or charges imposed on the date of the GATT 1994 or "those directly or mandatorily required to be imposed thereafter by the legislation in force in the importing territory on that date", as they were recorded in India's Schedule of Concessions. In this connection, we note that pursuant to paragraphs 1, 2, 3, 4 and 7 of the Understanding on the Interpretation of Article II: 1(b) of the GATT 1994, Members were required to record in their Schedules of Concessions any other duties and charges applied in respect of all bound tariff lines.

7.404. In this respect, the panel in *Dominican Republic – Import and Sale of Cigarettes* noted that:

Reading Article II: 1(b) together with paragraphs 1, 2, 7 and 4 of the Understanding as context, the Panel considers that the obligation under Article II: 1(b), second sentence is for Members to record in their Schedules, within six months of the date of deposit of the instrument, all ODCs [other duties and charges] as applied on 15 April 1994 unless those levels breach previous bound levels of ODCs. In case any Member did not record the ODCs in the Schedule within six months of the date of deposit of the said instrument, the right to record it in the Schedule and to invoke it expired after six months. In the context of the recording requirements as prescribed in the Understanding, the meaning of Article II: 1(b), second sentence is specifically that *imported products shall be exempted from all "other duties or charges" of any kinds in excess of those as validly recorded in the Schedule of the Member concerned*.⁵⁶⁷

7.405. In other words, a Member that maintains or introduces an "other duty or charge" without having recorded it in the appropriate column in its Schedule of Concessions acts in a manner inconsistent with the second sentence of Article II: 1(b) of the GATT 1994.

7.406. In the present case, it is a fact undisputed by the parties that the column corresponding to other duties or charges in India's Schedule of Concessions in relation to the products concerned does not contain any record.⁵⁶⁸ In other words, India did not record in its Schedule of Concessions any duty corresponding to "other duties or charges" within the six months following the date on which the instrument was deposited. The Panel recalls its finding that the duties resulting from the measure at issue form part of other duties or charges and notes that India applied these duties during the time the safeguard measure was in force. In this respect, therefore, by applying on imports a duty that constitutes an "other duty or charge", India is acting inconsistently with its obligations under the second sentence of Article II: 1(b) of the GATT 1994.

⁵⁶³ See section 7.4.2 above.

⁵⁶⁴ See section 7.4.3.1 above.

⁵⁶⁵ See section 7.4.2 above.

⁵⁶⁶ See section 7.4.3.1 above.

⁵⁶⁷ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.88 (emphasis original; fn omitted). A similar conclusion was reached by the panel in *Chile – Price Band System*, para. 7.107.

⁵⁶⁸ Excerpt from India's Schedule of Concessions with respect to customs heading 7208, (Exhibit IND-21); India's opening statement at the first meeting of the Panel, para. 44. See also Japan's first written submission, para. 520; second written submission, para. 270; opening statement at the first meeting of the Panel, para. 113; and response to Panel question No. 11, para. 4.

7.407. As noted above, India has argued that, when a measure is applied under Article XIX of the GATT 1994, "there can be no question of violation" of Article II:1(b) of the GATT 1994.⁵⁶⁹

7.408. Although Article XIX of the GATT 1994 allows WTO Members to suspend obligations incurred by a Member under the GATT 1994, such suspension would only be valid when the safeguard measure at issue has not been found to be inconsistent with the respective Member's obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.409. Since we have already concluded that the measure at issue is inconsistent with India's obligations under Article XIX of the GATT 1994 and certain provisions of the Agreement on Safeguards, the measure at issue did not result in a valid suspension of India's obligation under Article II:1(b), second sentence, of the GATT 1994.

7.14.4 Conclusion

7.410. For the reasons explained above, we conclude that India has acted inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

7.15 Whether India acted inconsistently with Article I:1 of the GATT 1994

7.15.1 Introduction

7.411. Japan claims that India acted inconsistently with Article I:1 of the GATT 1994 when it did not apply the measure at issue to the products originating in certain countries. According to Japan, this constitutes an advantage that was not accorded immediately and unconditionally to like products originating in other WTO Members, including Japan.⁵⁷⁰

7.412. India responds that Article XIX of the GATT 1994 allows a Member to suspend obligations incurred under the GATT 1994, if the conditions in Article XIX are met. India also notes that, although the measure at issue does not apply to imports from developing countries (with the exception of China and Ukraine), Article 9 of the Agreement on Safeguards provides for an exception from the MFN principle contained in Article I:1 of the GATT 1994.⁵⁷¹

7.15.2 Article I:1 of the GATT 1994

7.413. We recall that Article I:1 of the GATT 1994 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.15.3 Evaluation by the Panel

7.414. Japan alleges that India acted inconsistently with Article I:1 of the GATT 1994. According to this provision, any advantage granted by a Member to products from any other country must be accorded immediately and unconditionally to the like products originating in all other Members.

7.415. The Appellate Body has indicated that the following elements must be demonstrated to establish an inconsistency with Article I:1 of the GATT 1994 (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products

⁵⁶⁹ India's first written submission, para. 337.

⁵⁷⁰ Japan's first written submission, paras. 531-535; second written submission, paras. 273-275.

⁵⁷¹ India's first written submission, paras. 342-343. Japan does not challenge the consistency of the measure at issue with Article 9 of the Agreement on Safeguards.

within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded has not been extended "immediately" and "unconditionally" to the "like" products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members.⁵⁷²

7.416. With respect to the first element, we have already concluded that the duties resulting from the safeguard measure at issue were duties or charges imposed on the importation of products into the territory of India. Accordingly, they fall within the scope of application of Article I:1.

7.417. With respect to the second element, we have already noted that the Ministry of Finance notification of 29 March 2016, which imposed the definitive safeguard measure, provided that:

Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries under clause (a) of sub-section (6) of section 8B of the Customs Tariff Act, other than [the] People's Republic of China and Ukraine.⁵⁷³

7.418. Notification No. 19/2016 published by the Ministry of Finance on 5 February 2016 contains a list of 132 developing countries which are in principle exempted from safeguard duties pursuant to Section 8B of the Customs Tariff Act, 1975.⁵⁷⁴

7.419. In previous cases, panels have found that when origin is the sole criterion distinguishing the products, it is unnecessary to establish the likeness of the relevant products in terms of the traditional criteria.⁵⁷⁵ In the present case, the measure at issue differentiates between (i) the treatment granted to the subject goods originating from certain developing countries listed in Notification No. 19/2016; and (ii) the treatment granted to the subject goods from all other origins, including developed countries, China, and Ukraine. Because the sole criterion differentiating what are essentially the same subject goods is the origin, the relevant products may be considered to be "like" products within the meaning of Article I:1.

7.420. With respect to the third element, the measure at issue exempted from the application of the resulting duties imports of the subject products originating in those developing countries listed in Notification No. 19/2016 (with the exception of China and Ukraine). This exemption constitutes the benefit or advantage conferred by the measure at issue.

7.421. With respect to the fourth element, the exemption granted to the subject goods imported from the developing countries listed in Notification No. 19/2016 was not extended to the like subject products originating in the territory of all WTO Members. Therefore, it was also not extended "immediately" and "unconditionally".

7.422. India has argued that "Article 9 [of the Agreement on Safeguards] provides for exceptions or waivers [from the] MFN principle".⁵⁷⁶ It has also indicated that, when a measure is applied under Article XIX of the GATT 1994, "there can be no question of violation" of Article I:1 of the GATT 1994.⁵⁷⁷

7.423. Paragraph 1 of Article 9 of the Agreement on Safeguards states that:

Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country

⁵⁷² Appellate Body Reports, *EC – Seal Products*, para. 5.86.

⁵⁷³ Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 7.

⁵⁷⁴ Notification No. 19/2016-Customs (5 February 2016), (Exhibits JPN-3/IND-3).

⁵⁷⁵ See, for example, Panel Report, *US – Poultry (China)*, para. 7.427.

⁵⁷⁶ India's first written submission, para. 342.

⁵⁷⁷ India's first written submission, para. 337.

Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.⁵⁷⁸

7.424. Conversely, paragraph 2 of Article 2 of the Agreement on Safeguards provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source".

7.425. Accordingly, the provision of Article 9.1 contains at the same time an obligation and an exception. In terms of the obligation, a Member applying a safeguard measure must exclude developing countries exporting less than the *de minimis* level provided in Article 9.1.⁵⁷⁹ Article 9.1 also contains an exception from the rule that safeguard measures should be applied in a non-discriminatory manner contained in Article 2.2 of the Agreement on Safeguards and from the MFN rule in Article I:1 of the GATT 1994.

7.426. For the purpose of this dispute, we note that Japan has not raised a claim that the measure at issue was applied in a manner inconsistent with India's obligations under Article 9.1 of the Agreement on Safeguards.

7.427. Nevertheless, India has suggested that Article 9.1 is an exemption from any discriminatory application of the safeguard measure at issue. Article 9.1 of the Agreement on Safeguards, however, can only operate as a valid exception for any discriminatory treatment of imports when the safeguard measure at issue has not been found to be inconsistent with the obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards. Similarly, although Article XIX of the GATT 1994 allows WTO Members to suspend obligations incurred by a Member under the GATT 1994, such suspension would only be valid when the safeguard measure at issue has not been found to be inconsistent with the obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.428. Since we have already concluded that the measure at issue is inconsistent with India's obligations under Article XIX of the GATT 1994 and certain provisions of the Agreement on Safeguards, the discriminatory application of the safeguard measure cannot be excused by Article 9.1. Likewise, the measure at issue did not result in a valid suspension of India's obligation under Article I:1 of the GATT 1994.

7.15.4 Conclusion

7.429. For the reasons explained above, we conclude that India has acted inconsistently with its obligations under Article I:1 of the GATT 1994. The discriminatory application of the measure at issue cannot be excused by Article 9.1 of the Agreement on Safeguards.

7.16 Special and differential treatment

7.430. Pursuant to Article 12.11 of the DSU:

[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.431. Article 12.10 of the DSU also provides the following:

[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.

7.432. In the present proceedings, and except for arguments concerning Article 9 of the Agreement on Safeguards which the Panel has already noted, none of the parties has referred to any provision in the WTO Agreements on special and differential treatment for developing country Members. In any event, when adopting and reviewing the timetable for the proceedings, the Panel made sure

⁵⁷⁸ Fn omitted.

⁵⁷⁹ Appellate Body Report, *US – Line Pipe*, para. 132.

that all parties, including India as a developing country respondent, had sufficient time to prepare and submit their respective arguments. The Panel found that no other provisions on differential and more favourable treatment for developing country Members were relevant for the resolution of the matter in the dispute.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. For the reasons explained in this Report, the Panel concludes that the measure at issue resulted in a suspension of obligations incurred by India under the GATT 1994. This measure was adopted by India as a temporary emergency action designed to remedy an alleged situation of serious injury to the domestic industry brought about by an increase in imports of the subject products. We accordingly conclude that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination of the claims raised in the present dispute.

8.2. The Panel concludes that India has acted inconsistently with the following provisions:

- a. Article XIX:1(a) of the GATT 1994, by failing to demonstrate that the increase in imports of the product concerned into India occurred as a result of unforeseen developments and the effect of relevant obligations of the GATT 1994;
- b. Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994, in the determination on the increase in imports;
- c. Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards, with respect to the determination of serious injury and the threat of serious injury;
- d. Article 4.2(b), first and second sentences, of the Agreement on Safeguards, by failing to demonstrate the existence of a causal link between the increased imports and the alleged serious injury suffered by the domestic industry and by failing to conduct a proper non-attribution analysis;
- e. Articles 3.1 and 4.2(c) of the Agreement on Safeguards, by failing to provide reasoned conclusions on all pertinent issues of fact and law;
- f. Article 12.4 of the Agreement on Safeguards, by failing to notify the Committee on Safeguards before taking the provisional safeguard measure at issue;
- g. Article 12.2 of the Agreement on Safeguards, by failing to provide the Committee on Safeguards with a precise description of the product involved and a precise description of the proposed measure;
- h. Article 12.3 of the Agreement on Safeguards, by failing to provide Japan, and other Members 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;
- i. Article II:1(b), second sentence, of the GATT 1994, by imposing measures on the importation of products which constitute "other duties or charges", which were not recorded in its Schedule of Concessions; and
- j. Article I of the GATT 1994, by having failed to extend immediately and unconditionally to the products of all WTO Members certain advantages granted to products originating in some countries. The discriminatory application of the measure at issue is not excused by Article 9.1 of the Agreement on Safeguards.

8.3. The Panel also concludes that Japan failed to demonstrate that India acted inconsistently with the following provisions:

- a. Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, and consequentially Articles 3.1 and 4.2(c) of the Agreement on Safeguards, with respect to the determination of the domestic industry; and
- b. Articles 12.1(a), (b) and (c) and 12.2 of the Agreement on Safeguards, with respect to the notifications to the Committee on Safeguards of the initiation of a safeguard investigation relating to serious injury or threat thereof, the findings of serious injury in the investigation, and the decision to apply a definitive safeguard measure.

8.4. In light of the findings above, the Panel has exercised judicial economy with respect to the following claims:

- a. Japan's consequential claim that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to its assessment of the situation of the domestic industry;
- b. Japan's consequential claim that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its causation and non-attribution analyses;
- c. Japan's claims under Articles 3.1, 4.2(c), 5.1, and 7.1 of the Agreement on Safeguards, and Japan's consequential claim under Article XIX:1(a) of the GATT 1994, with respect to the duration of the safeguard measure at issue and the level of the duties imposed; and
- d. Japan's consequential claim under Article 11.1(a) of the Agreement on Safeguards.

8.5. In accordance with Article 3.8 of the DSU, in cases when there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the agreement in question. In view of the foregoing, the Panel concludes that, insofar as India has acted in a manner inconsistent with Article XIX:1 of the GATT 1994 and several provisions of the Agreement on Safeguards, it has nullified or impaired benefits accruing to Japan under those agreements.

8.2 Recommendation

8.6. Pursuant to Article 19.1 of the DSU, having found that India acted inconsistently with certain provisions of the GATT 1994 and the Agreement on Safeguards, we recommend that, to the extent that the measure continues to have any effects, India bring it into conformity with its obligations under those agreements.



6 November 2018

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INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS518/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 10 October 2017

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 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.

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, India shall submit its response to the request in its first written submission. If India 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 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 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 of such exhibits 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. The Panel may grant

exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation within a deadline to be determined by the Panel.

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 (electronic copy provided), to the extent 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, indicating the submitting Member and the number of each exhibit on its cover page. 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 12h00 (noon) 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 India 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 17h00 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 India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by Japan. If India 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 17h00 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 12h00 (noon) 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 17h00 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.
- 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 section

18. The description of the arguments of the parties and third parties in the descriptive section 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 first written submissions, first opening and closing oral statements in accordance with the timetable adopted by the Panel. This summary may also cover the responses to questions following the first substantive meeting. Each party shall also submit a separate integrated executive summary of its written rebuttal, second opening and closing oral statements in accordance with timetable adopted by the Panel. This summary may also cover the responses to questions following the second substantive meeting and comments on such responses. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. 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.

23. 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.

24. 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

25. 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 two paper copies of all documents it submits to the Panel, including of any exhibits submitted to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.
- 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, including of any exhibits, preferably in Microsoft Word format, either on a CD-ROM, DVD, USB Key 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 XXX@wto.org and XXX@wto.org. If a CD-ROM, DVD or USB Key is provided, it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

- 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 17h00 (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 section, 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.
26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made a number of editorial changes, some of which were suggested by the parties, to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.¹

1.2. As a result of the changes that we have made, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Japan's specific requests for review

2.1.1 Paragraph 7.15

2.1. Japan requests that the Panel modify paragraph 7.15 in order to more completely reflect its arguments that the Panel should make findings and recommendations in the present dispute, despite the expiry of the measure at issue. India does not comment on this request.

2.2. We have modified paragraph 7.15 to better reflect Japan's arguments.

2.1.2 Paragraph 7.24

2.3. Japan requests that the Panel add a footnote after the phrase "[a]s indicated above" in the fourth sentence of paragraph 7.24 in order to clarify the relevant paragraph of the Report in which the same issue has been addressed. India does not comment on this request.

2.4. We have modified the fourth sentence of paragraph 7.24 to clarify the Panel's reasoning.

2.1.3 Section 7.4

2.5. Japan refers to the Panel's statement in paragraph 7.30 that both parties agree that the challenged measure is a safeguard within the meaning of Article XIX: 1(a) of the GATT 1994 and of the Agreement on Safeguards. Japan requests that the Panel summarize the parties' arguments in this regard and add a reference to the parties' relevant submissions.² India does not comment on this request.

2.6. In light of Japan's request, we have added footnote 74 to paragraph 7.30 to refer to the parties' submissions. We note that paragraph 7.30 introduces the question that the Panel addresses in section 7.4, i.e. whether the measure at issue falls within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. We summarize the parties' arguments in the subsequent paragraphs, including paragraphs 7.44, 7.54, and 7.64, in the manner and to the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning. We note that parties are free to reflect their arguments in their executive summaries,

¹ We have corrected typographical and non-substantive errors in paragraphs 7.106, 7.196, 7.227, and 7.246.

² In particular, Japan refers to its responses to Panel question Nos. 11 and 14, and its second written submission, paras. 276-279.

annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraphs 40-42, Annex B-2.

2.1.4 Paragraph 7.43

2.7. Japan requests that the Panel modify the penultimate sentence of paragraph 7.43, by adding the word "ordinary" before the phrase "customs duties". India does not comment on this request.

2.8. We have made the requested change to clarify the Panel's reasoning.

2.1.5 Paragraph 7.49

2.9. Japan requests that the Panel delete the phrase "as a matter of fact" in the last sentence of paragraph 7.49. India does not comment on this request.

2.10. We have made the requested change to clarify the Panel's reasoning.

2.1.6 Paragraph 7.62

2.11. Japan requests that the Panel modify paragraph 7.62 to reflect Japan's argument that the fact that imports from Ukraine and China were subject to the measure at issue due to their significant market shares indicated that India selected the sources of imports to be subject to the measure with a view to preventing or remedying serious injury.³ Japan also requests that the Panel address this argument of Japan. India does not comment on this request.

2.12. In light of Japan's request, we have added a new paragraph 7.60 to reflect Japan's argument on this issue and added footnote 118 to refer to Japan's submissions. The Panel's reasoning in paragraph 7.62 reflects its considerations of the arguments made by both parties in light of the evidence on the record. Therefore, there is no need to make any further changes in paragraph 7.62.

2.1.7 Paragraph 7.74

2.13. Japan suggests that the Panel use the term "measures at issue" in the first sentence of paragraph 7.74 in singular form in order to ensure consistency with the rest of the Report. India does not comment on this request.

2.14. We have made the requested correction.

2.1.8 Paragraph 7.95

2.15. Japan requests that the Panel modify paragraph 7.95 in order to more completely reflect its arguments. India made no comment on this request.

2.16. We have modified paragraph 7.95 to better reflect Japan's arguments.

2.1.9 Paragraphs 7.101 and 7.102

2.17. Japan requests that the Panel modify paragraphs 7.101 and 7.102 in order to more accurately reflect its arguments. India made no comment on this request.

2.18. We have modified paragraphs 7.101 and 7.102 to better reflect Japan's arguments.

2.1.10 Paragraph 7.117

2.19. Japan requests that the Panel modify the last sentence of paragraph 7.117 in order to more accurately reflect Japan's arguments. India does not comment on this request.

³ In particular, Japan refers to its second written submission, para. 285; and response to Panel question No. 11, para. 5.

2.20. We have modified the last sentence of paragraph 7.117 to better reflect Japan's arguments.

2.1.11 Section 7.6

2.21. Japan suggests that the Panel refer to paragraph (a) of Article 4.2 of the Agreement on Safeguards in the title of section 7.6. India does not comment on this request.

2.22. We have made the requested correction.

2.1.12 Paragraph 7.147

2.23. Japan requests that the Panel modify paragraph 7.147 in order to more completely reflect its arguments. India does not comment on this request.

2.24. We have modified paragraph 7.147 to better reflect Japan's arguments.

2.1.13 Paragraph 7.153

2.25. Japan suggests that the Panel use the word "determine" instead of the word "define", when summarizing Japan's arguments in the first sentence of paragraph 7.153, and add a footnote after this sentence to refer to Japan's submissions. India does not comment on this request.

2.26. We have made the requested correction.

2.1.14 Paragraphs 7.159 and 7.163

2.27. Japan requests that the Panel modify paragraphs 7.159 and 7.163 in order to more completely reflect its arguments with respect to the determination of the domestic industry. Japan also requests that the Panel include data on sales, market share, and production of the domestic industry as compared to the producers outside the domestic industry. India does not comment on this request.

2.28. We have modified paragraphs 7.159 and 7.163, and added footnote 273 to better reflect Japan's arguments. We have also added footnotes 274 and 275, and modified footnote 276 to reflect the data on sales, market share, and production of the domestic industry and the producers outside the domestic industry.

2.1.15 Paragraph 7.164

2.29. Japan refers to the Panel's statement in paragraph 7.164 that Article 4.1(c) does not require a competent authority to examine the domestic producers' market share and sales in order to define the domestic industry. Japan submits that the Panel has not addressed Japan's argument relating to differences in production trends of the domestic industry and producers outside the domestic industry. Japan requests that the Panel address this argument in the Report. India does not comment on this request.

2.30. In light of Japan's request, we have modified paragraph 7.165 to clarify the Panel's findings.

2.1.16 Paragraph 7.180

2.31. Japan requests that the Panel modify paragraph 7.180 to more completely reflect Japan's arguments regarding the Indian competent authority's evaluation of the share of the domestic market taken by increased imports. India does not comment on this request.

2.32. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.1.17 Paragraphs 7.187 and 7.191

2.33. Japan requests that the Panel elaborate further on its analysis of Japan's argument that the Indian competent authority focused its analysis on the non-captive segment of the domestic

industry. Japan repeats its argument that the market share of the domestic industry presented in the Final Findings (45% in 2013-2014 and 37% in 2015-2016 (annualized)) refers only to the market share of the non-captive segment.

2.34. India opposes Japan's request. India submits that the Panel's conclusion in paragraphs 7.187 and 7.191 is not based solely on the excerpts from the Final Findings quoted by the Panel in paragraph 7.186, but also on its analysis in the preceding paragraphs. In particular, India notes that Table 3 in paragraph 7.183 of the Report shows that the Indian competent authority's analysis of the changes in the market share was based upon the examination of both captive and non-captive segments of the market.

2.35. We have decided not to grant Japan's request. As explained in paragraph 7.181 of the Report, Article 4.2(a) of the Agreement on Safeguards requires a competent authority to evaluate "the share of the domestic market taken by increased imports", which is distinct from the language in the Anti-Dumping Agreement that refers to a "decline" in the domestic industry's market share. The Panel observes in paragraph 7.188 that the domestic industry lost sales and market share in the non-captive segment, while it was able to maintain its market share represented by the captive market. Paragraph 49(b) of the Final Findings (represented in Table 3, paragraph 7.183, of the Report) shows that the Indian competent authority considered both captive and non-captive segments of the market when examining sales of different market participants and share of the domestic market taken by imports.

2.1.18 Paragraph 7.188, footnote 306

2.36. Japan requests that the Panel add a reference to paragraph 288 of Japan's first written submission in footnote 306. India does not comment on this request.

2.37. We have decided not to grant Japan's request. Footnote 306 refers to the table presented on page 82 of Japan's first written submission (which corresponds to Table 4 of the Panel Report). In any event, in light of Japan's request, we have modified footnote 306 to refer to Table 4 of the Report.

2.1.19 Paragraph 7.189

2.38. Japan requests that the Panel reflect and address its argument that in the domestic investigation some interested parties mentioned the possibility that the domestic industry was not able to meet the increasing demand due to reasons other than increased imports, such as the fact that the increase in demand was for products that were not produced by the domestic industry. India does not comment on this request.

2.39. In light of Japan's request, we have added a footnote to paragraph 7.189 to clarify the Panel's reasoning.

2.1.20 Paragraph 7.216

2.40. Japan suggests that the Panel modify paragraph 7.216, by adding a sentence describing Japan's argument that the figures of inventories, production, and sales for a given year of the POI do not match. India does not comment on this request.

2.41. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 349. We see no reason to make the change requested by Japan.

2.1.21 Paragraph 7.221

2.42. Japan requests that the Panel modify paragraph 7.221 in order to fully and accurately reflect Japan's arguments regarding the Indian competent authority's alleged determination of threat of serious injury. Japan also requests that the Panel modify footnote 351 to provide more complete references to Japan's submissions. India does not comment on Japan's request.

2.43. We have modified paragraph 7.221 and added footnote 352 to better reflect Japan's arguments. We have also modified footnote 351.

2.1.22 Paragraph 7.228

2.44. Japan requests that the Panel modify footnote 367 in order to note that the domestic industry submitted the post POI data after the public hearings. India does not comment on this request.

2.45. We have decided not to grant Japan's request. The proposed change is unnecessary and Japan has not explained why the additional language is relevant to the analysis in paragraph 7.228.

2.1.23 Paragraph 7.232, footnote 369

2.46. Japan requests that the Panel modify the reference to its second written submission in footnote 369. India does not comment on Japan's request.

2.47. We have made the requested change.

2.1.24 Paragraph 7.240, footnote 384

2.48. Japan requests that the Panel add a reference to its second written submission in footnote 384. India does not comment on Japan's request.

2.49. We have made the requested change.

2.1.25 Paragraph 7.241

2.50. Japan requests that the Panel modify paragraph 7.241 to more completely reflect Japan's arguments regarding the causal link analysis. Japan also requests that the Panel add a reference to its second written submission in footnote 385. India does not comment on Japan's request.

2.51. We have modified paragraph 7.241 and added footnotes 388-390 and 410 to better reflect Japan's arguments and to clarify the Panel's reasoning. We have also added a reference to Japan's second written submission in footnote 385.

2.1.26 Paragraph 7.258, footnote 411

2.52. Japan requests that the Panel modify the reference to its second written submission in footnote 411. India does not comment on Japan's request.

2.53. We have made the requested change.

2.1.27 Paragraph 7.259

2.54. Japan requests that the Panel modify paragraph 7.259 to add a reference to its argument that the Indian competent authority failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the GATT obligations from the impact caused by other reasons. India does not comment on Japan's request.

2.55. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 440. We see no reason to make the change requested by Japan.

2.1.28 Paragraph 7.260

2.56. Japan requests that the Panel add a new paragraph between paragraphs 7.260 and 7.261 in order to reflect its arguments made in response to India's argument that the obligation to conduct a non-attribution analysis pursuant to the second sentence of Article 4.2(b) of the Agreement on Safeguards only arises when a competent authority has determined that a specific factor is "relevant" under Article 4.2(a). India does not comment on Japan's request.

2.57. We have decided not to grant Japan's request. We summarize the parties' arguments in paragraphs 7.259 and 7.260 in the manner and to the extent necessary and appropriate to capture

our understanding for the purposes of our own assessment and reasoning. We note that the parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraph 27, Annex B-2.

2.1.29 Paragraph 7.272

2.58. Japan requests that the Panel reflect in paragraph 7.272 that more detailed explanations of the interested parties' arguments summarized in the Final Findings were provided in the submissions of the interested parties to the Indian competent authority. India does not comment on Japan's request.

2.59. We have decided not to grant Japan's request. We see no reason to make the requested change, since Japan does not refer to any specific submission by interested parties on the record of the Panel that the Indian competent authority failed to consider.

2.1.30 Paragraph 7.280, footnote 443

2.60. Japan requests that the Panel add a reference to its second written submission in footnote 443. India does not comment on Japan's request.

2.61. We have made the requested change.

2.1.31 Paragraph 7.308

2.62. Japan requests that the Panel modify paragraph 7.308 in order to more completely reflect Japan's arguments in relation to its claim under Article 12.1 (a) of the Agreement on Safeguards. India does not comment on this request.

2.63. We have modified paragraph 7.308 and added footnote 467 to better reflect Japan's arguments.

2.1.32 Paragraph 7.379

2.64. Japan suggests that the Panel delete the words "the month" in paragraph 7.379, because they are used twice. India does not comment on this request.

2.65. The third sentence of paragraph 7.379 refers to "the precise day of the month" and "the month, and the year", which is consistent with the definition of the word "date" provided in the first sentence of paragraph 7.378. Therefore, we reject Japan's request.

2.2 India's specific requests for review

2.2.1 Section 7.3 (paragraphs 7.11-7.28)

2.66. India requests that the Panel review paragraphs 7.11-7.28 of the Report with respect to the continued effects of the measure at issue, and refrain from making any recommendations for the following reasons. India submits that the Panel has not fully evaluated India's arguments that the Panel's recommendation would be outside its mandate, retrospective in nature and in effect. India notes that it has clarified that the measure at issue does not have lingering effects. India argues that Japan failed to submit any evidence or documents to prove its contention that the measure at issue would have an effect after its expiry. India submits that Section 28 of the Indian Customs Act, 1962 is not designed for the imposition of duties, but only for the collection of duties, which were not levied, *inter alia*, due to the reason of collusion, wilful misstatement, or suppression of facts. India contends that Japan cannot refer to the collection mechanism to argue that the measure at issue still has an effect. India also notes that the Panel's recommendations discriminate against the product concerned that had been imported before the measure at issue expired and on which duties had been collected. In addition, India considers that the Panel's approaches in paragraphs 7.11-7.28 and paragraph 7.72 of the Report are contradictory, because in the latter the Panel considered that there must be a real demonstration of the conduct by the regional or local

authorities, while in the former the Panel did not mention any evidence or documents which would compel the Panel to make recommendations.

2.67. Japan opposes India's request. Japan recalls that pursuant to Article 15.2 of the DSU, a party may submit a written request to review "precise aspects" of the report. Japan submits that India refers to section 7.3, i.e. paragraphs 7.11-7.28 of the Report, without referring to specific paragraphs of that section. Japan contends that India resubmits its arguments or submits new arguments as to why the Panel findings in section 7.3 should be modified. Japan submits that the interim review stage of a panel proceeding is not the appropriate time for India to relitigate issues discussed during the panel proceedings. Japan notes that it submitted evidence that, even if the measure at issue expired, it continues to have legal effects and therefore the Panel has no basis to refrain from making a recommendation. Japan also submits that the Panel has examined in detail Section 28 of the Customs Act, 1962 in paragraphs 7.13-7.23 of the Report.

2.68. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel.⁴ Section 28 of the Customs Act, 1962 has been addressed by the Panel in paragraphs 7.13-7.27. India's comments would require us to engage in a new analysis of arguments and evidence on the record.

2.2.2 Section 7.4.3.2 (paragraphs 7.54-7.63)

2.69. India requests that the Panel review paragraphs 7.54-7.63 of the Report regarding India's obligations under Article I:1 of the GATT 1994. India disagrees with the Panel's observation that the suspension of India's obligation under Article I:1 was not designed to prevent or remedy serious injury to the domestic industry. India considers that this observation is based on an erroneous premise that Article 9.1 of the Agreement on Safeguards is relevant for determining whether a measure falls within the scope of Article XIX of the GATT 1994. India submits that, because the measure at issue was applied on a selective basis by excluding imports from certain developing countries, India had suspended its MFN obligations under Article I:1 of the GATT 1994.

2.70. Japan replies that India failed to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that although it shares India's view that the challenged measure suspended India's MFN obligation under Article I:1 of the GATT 1994, Japan notes that India failed to indicate any of its submissions to the Panel where the above arguments can be found.

2.71. We have decided not to grant India's request. The Panel addressed India's arguments as to whether India suspended its MFN obligation with the objective of preventing and remedying serious injury in paragraph 7.62 of the Report.

2.2.3 Section 7.4.3.3 and section 7.4.4 (paragraphs 7.64-7.75)

2.72. India requests that the Panel reconsider its decision with respect to the suspension of obligations under Article XXIV of the GATT 1994 in paragraphs 7.64-7.75 of the Report. India submits that the Panel failed to consider the specific arguments raised by India as to why the measure at issue resulted in a suspension of India's obligations under Article XXIV of the GATT 1994. In particular, India submits that, as long as there is an obligation which is incurred by a Member under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX of the GATT 1994 on the ground that it is not a positive obligation. India argues that Article XXIV is permissive only when a Member has the option to enter into an FTA. According to India, Article XXIV becomes a mandatory obligation once the FTA is entered into and a Member has to comply with provisions of Article XXIV. India further argues that since Article XIX does not differentiate between different GATT obligations, the Panel cannot make such differentiation.

2.73. India further notes the Panel's finding that there is no indication that the measure at issue resulted in regional or local authorities engaging in any conduct that was inconsistent with

⁴ Panel Report, *EU – Energy Package*, para. 6.18 (referring to Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; *India – Agricultural Products*, para. 6.5; and *Russia – Pigs (EU)*, para. 6.7).

India's obligations under the GATT 1994. India submits that this finding is based on incorrect premise. India argues that the Panel does not need to examine whether the measure has resulted in a *de facto* violation of obligations, rather the nature of the obligation should be a determinative factor while examining the scope of the provision in question. India reiterates that the Panel did not follow a consistent approach when interpreting the scope of Article XXIV:12 of the GATT 1994 and considering Japan's contention that the measure at issue has a continued effect. India submits that the regional or local authorities did not engage in any conduct that was inconsistent with India's obligation under the GATT 1994 in compliance with the obligation under Article XXIV:12.

2.74. Japan opposes India's request. Japan notes that India refers generally to the entire section 7.4.3.3 and section 7.4.4 and fails to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that India reargues the case and resubmits its arguments as to why the Panel should consider that the measure at issue resulted in the suspension of India's obligations under Article XXIV of the GATT 1994. Japan notes that the Panel addressed those arguments in paragraphs 7.70-7.72. Japan reiterates that the purpose of the interim review is not to relitigate the issues that have been discussed during the panel proceedings or to challenge the legal interpretations developed by the Panel.

2.75. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel. India's arguments regarding Article XXIV of the GATT 1994 have been addressed by the Panel in paragraphs 7.64-7.73 of the Report.

2.2.4 Section 7.5.5 (paragraphs 7.100-7.115)

2.76. India takes issue with the Panel's observations in paragraphs 7.108-7.110 of the Report, which address the question of logical connection between unforeseen developments and the increased imports. India submits that the Panel has not indicated the specific obligations which require competent authorities to conduct a country-specific analysis with regard to imports and unforeseen developments. India submits that Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards do not require country-specific analyses. India reiterates that considering the global nature of safeguard measures, there is no need to conduct a country-specific analysis.

2.77. India requests that the Panel modify paragraph 7.112 in order to reflect India's arguments regarding the analysis of unforeseen developments in relation to the product concerned submitted in India's responses to Panel question Nos. 16 and 90.

2.78. India also takes issue with the Panel's statement that the timing of unforeseen developments is a relevant consideration for showing that the unforeseen developments resulted in an increase in imports. India submits that neither Article XIX of the GATT 1994 nor the Agreement on Safeguards require that the unforeseen developments should necessarily coincide in time with the increase in imports. India further submits that the Panel did not reconcile this finding with the statement of the panel in *US – Steel Safeguards* that confluence of events can constitute unforeseen developments. India argues that if the Indian competent authority should elaborate on timing of unforeseen developments, it would mean that there is an obligation to explain each unforeseen development causing the increase in imports. India requests the Panel to review and modify the relevant part of the Report.

2.79. Japan opposes India's request. Japan submits that India repeats its arguments presented during the panel proceedings and challenges the Panel's findings. Japan reiterates that the purpose of the interim review is not to reargue the issues discussed during the panel proceeding or to challenge the legal interpretations developed by a panel. With respect to paragraphs 7.108-7.110, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report. Japan also notes that India fails to make any specific request with regard to changes that the Panel should make to paragraphs 7.108-7.110. With respect to paragraph 7.112, Japan notes that India's arguments in response to Panel question Nos. 16 and 90, namely that "[s]teel production worldwide is measured in terms of the crude capacity" and that "the proportion of the [product under consideration] remains the same *qua* the crude production for which data is available in public domain" have been addressed and rejected by the Panel in paragraphs 7.111 and 7.112 of the Report. With respect to paragraph 7.114, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report.

2.80. We have decided not to grant India's request. In its comments, India repeats arguments submitted during the panel proceeding that the Panel addressed in its Report. In particular, India's arguments regarding the country-specific analysis of unforeseen developments and the global nature of safeguard measures have been summarized in paragraph 7.104 and addressed in paragraphs 7.107-7.110 of the Report. India's arguments presented in its responses to Panel question Nos. 16 and 90 regarding the product concerned were addressed in paragraphs 7.111-7.112. In light of this request, however, we have modified footnote 188 in order to note India's response to Panel's question No. 90. India's arguments regarding the timing of unforeseen developments (including the fact that the confluence of events was identified as "unforeseen developments") were considered in paragraph 7.114 of the Report.

2.2.5 Section 7.5.6 and section 7.5.7 (paragraphs 7.116-7.122)

2.81. India requests that the Panel review paragraphs 7.116-7.122 of the Report. India notes that, even though the Panel has acknowledged the finding in *US – Steel Safeguards* that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product"⁵, it has found the specific reference to India's tariff concession in the Final Findings as being insufficient. India disagrees with the Panel's observation that the Indian competent authority cited, not the tariff concession, but the "low applied tariffs" as a reason for the increase in imports into India. India argues that "low applied tariffs" are clearly a result of India's tariff concessions.

2.82. **Japan opposes India's request. Japan submits that** India repeats its argument that evidence of the importing Member having a tariff concession for the relevant product itself proves the logical connection between tariff concessions and increased imports causing serious injury. Japan notes that the Panel has already considered India's arguments, as shown in paragraph 7.118 of Report.

2.83. We have decided not to grant India's request. In its comments, India repeats its arguments presented during the panel proceedings, which were summarised in paragraphs 7.118-7.119 and addressed in paragraphs 7.120-7.122 of the Report.

2.2.6 Section 7.6 (paragraphs 7.123-7.152)

2.84. India requests that the Panel revise paragraphs 7.123-7.152 of the Report. India reiterates that the first quarter of 2015-2016 has been annualized for an accurate comparison. India repeats that the annualization does not result in a change in the POI, but it is only a statistical tool used for comparing dissimilar periods. India submits that it is a uniform practice worldwide to annualize or extrapolate the data of a part of financial or calendar year to reflect the data of the complete financial or calendar year. India notes that the panel in *US – Lamb* considered that a focus on the interim data available pertaining to the end of an investigation period was logical and justified the extrapolation (annualization) of data.⁶ India refers to the panel report in *US – Line Pipe* to reiterate that in the absence of any provision in Article XIX of GATT 1994 or the Agreement on Safeguards with regard to the breaking down or manner of analysis of available data, the methodology adopted by India cannot be questioned unless it is apparent that such adopted methodology is unreasonable or biased.⁷

2.85. **Japan opposes India's request. Japan reiterates that the purpose of the interim review is to comment on "precise aspects" of the interim report** meaning that the parties' comments must be sufficiently specific and detailed. Japan notes that India has only specifically addressed paragraph 7.141. Japan submits that by referring to an entire section of the Interim Report covering almost 30 paragraphs without indicating which specific paragraphs should be amended, India's request cannot be considered as sufficiently specific and detailed. Japan further submits that the Panel has already addressed India's arguments in paragraphs 7.138 and 7.139 of the Report.

2.86. We have decided not to grant India's request. In its comments, India repeats its arguments submitted during the panel proceeding regarding the use of annualized data, which were summarised in paragraph 7.136 and addressed in paragraphs 7.137-7.145 of the Report. In light of

⁵ India's request for review of price aspects of the interim report (referring to India's first written submission, paras. 115-116, in turn quoting Panel Reports, *US – Steel Safeguards*, paras. 10.139-10.140).

⁶ Panel Report, *US – Lamb*, paras. 7.192-7.194.

⁷ Panel Report, *US – Line Pipe*, para. 7.203.

India's request, we have added footnote 219 in paragraph 7.136 of the Report in order to better reflect India's arguments.

2.2.7 Sections 7.8.3.2.2 and 7.8.3.3 (paragraphs 7.194-7.206 and 7.215-7.219)

2.87. India notes that the Panel's observation in paragraphs 7.194-7.206 and 7.215-7.219 of the Report is primarily based upon the premise that India used the annualized data of the first quarter of 2015-2016 for the purpose of its serious injury analysis. Therefore, India reiterates its comments regarding section 7.6 above.

2.88. **Japan opposes India's request.** Japan notes that India fails to explain which specific aspects of the Report it asks the Panel to review. Japan submits that India seeks to relitigate the issue of the use of annualized data by the competent authority without any explanation as to why such methodology was justified in the specific case at hand.

2.89. We have decided not to grant India's request. As noted, the Panel has discussed India's arguments regarding the annualized data in paragraphs 7.136-7.145 of the Report.

2.2.8 Section 7.8.4 (paragraphs 7.220-7.230)

2.90. India requests that the Panel modify section 7.8 of the Report in order to duly consider the arguments raised by India during the course of the panel proceeding. India reiterates that the Indian competent authority examined and made its conclusions with regard to serious injury as well as threat of serious injury in paragraphs 45-59 of the Final Findings. India notes that the expression "further" in paragraph 59 of the Final Findings was used in the context of the findings of the Indian competent authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.

2.91. **Japan opposes India's request.** Japan submits that in its comments regarding section 7.8.4 India challenges the Panel's findings and its legal interpretation of "threat of serious injury" within the meaning of Article 4.1(b). Japan reiterates that the parties cannot use the interim review stage to reargue their case if they disagree with the panel's findings. Japan also notes that the Panel carefully analysed the content of the Final Findings as well as India's arguments in paragraphs 7.224-7.229 of the Report, and reached the conclusion that the existence of a threat of serious injury was not adequately addressed in the Final Findings.

2.92. We have decided not to grant India's request. In its comments, India reiterates its contention that the Indian competent authority made a finding of both serious injury and threat of serious injury. The Panel has discussed this issue in paragraphs 7.220-7.230 of the Report.

2.2.9 Section 7.9 (paragraphs 7.232-7.278)

2.93. India requests that the Panel review and modify section 7.9 of the Report regarding the causal link between the increase in imports and serious injury. India submits that the Panel's observation regarding the absence of overall coincidence in trends between movements in imports and movements in injury factors is factually incorrect. India reiterates that the Indian competent authority discussed and reached a conclusion that, while the imports increased, the domestic industry lost its market share in the same period. India adds that the decline in profitability of the domestic industry occurred over the same period when the increased imports took place, and the entire injury analysis was for the period when the increased imports took place.

2.94. India submits that its competent authority found that there was a direct correlation between the increase in imports and the serious injury suffered by the domestic industry, as imports in absolute terms increased approximately three times during 2015-2016 (annualized) as compared to 2013-2014. India notes that the domestic industry's market share declined from 45% to 37% and the price of imports declined sharply, and consequently the domestic industry suffered losses. It is, thus, evident that the increased imports have caused serious injury to the domestic industry. India argues that its competent authority established a "direct correlation", rather than a mere "coincidence", between the increase in imports and serious injury suffered by the domestic industry.

2.95. India notes that the analysis in paragraphs 7.249-7.252 is based predominantly on the fact that the Indian competent authority used the annualized data of the first quarter of 2015-2016 for the purpose of its analysis. Therefore, India reiterates its comments regarding section 7.6 of the Report. Regarding the price competition between imported and domestic products, India reiterates that once the products are included into the scope of the investigation, then no further division or categorization is required with respect to covered products. India notes that the Agreement on Safeguards does not envisage a comparison of prices as required in Article 2.4 of the Anti-Dumping Agreement. India adds that the Panel did not consider the fact that, in the absence of the price related information from the relevant responding parties, India could not have examined the price competition between imported and domestic products.

2.96. Regarding the non-attribution analysis, India reiterates the arguments presented in its first written submission and requests that the Panel reconsider its findings in view of arguments advanced by India therein. India refers to the Panel's finding that the Indian competent authority failed to provide a reasoned and adequate explanation as to why the captive sales of the domestic industry and the sales of domestic producers outside the domestic industry were not a source of injury to the domestic industry. In this respect, India reiterates that Article 4 of Agreement on Safeguards requires competent authorities to only examine the "share of domestic market taken by the increased imports". India argues that its competent authority demonstrated that the share of imports had gone up, which leads to a conclusion that the share of the domestic market was reduced.

2.97. Japan opposes India's request. Japan submits that India repeats its arguments and attempts to reargue an issue that the Panel has already addressed. Japan reiterates that interim review stage is not the appropriate forum for relitigating arguments already put before the Panel. Japan notes that the Panel has already addressed India's arguments regarding the overall coincidence in trends between movements in imports and movements in injury factors in paragraphs 7.242-7.248 of the Report. Japan also notes that the Panel has addressed India's arguments regarding the price competition between imported and domestic products in paragraph 7.255 of the Report. Finally, Japan submits that India's comment regarding the non-attribution analysis is vague and it is unclear what specific aspects of the Panel's findings with regard to the non-attribution analysis India requests the Panel to modify and how.

2.98. We have decided not to grant India's request. In its comments, India reiterates its arguments regarding the causal link and non-attribution that were addressed by the Panel in its Report. In particular, the Panel addressed the question of whether there was an overall coincidence of trends in paragraphs 7.247-7.248. The Panel addressed India's arguments regarding the price analysis in the safeguard investigation and the products included into the scope of the investigation in paragraph 7.255 of the Report. The Panel addressed India's arguments regarding the non-attribution analysis, specifically regarding the domestic industry's captive sales and sales of producers outside the domestic industry, in paragraphs 7.264-7.269 of the Report.

2.2.10 Paragraphs 7.303-7.305

2.99. India requests that the Panel modify paragraphs 7.303-7.305 regarding the notification of provisional measures. India submits that the Panel should consider the difficulty faced by Members (especially developing countries), when the competent authorities reach a conclusion, upon the preliminary examination, that any delay in the imposition of the duties would cause damage which would be difficult to repair. In those circumstances, it might be difficult for a Member to notify the Committee on Safeguards prior to taking the provisional safeguard measures.

2.100. Japan opposes India's request. Japan submits that India's argument is a matter that should not be addressed through the interim review.

2.101. We have decided not to grant India's request. Article 12.4 of the Agreement on Safeguards does not provide any exception for developing countries with respect to the notification of provisional safeguard measures.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In the present dispute, Japan challenges the provisional and definitive safeguard measures imposed by India on imports of iron and steel products into India. These measures, together with the investigation that led to their imposition, violate several provisions of the Agreement on Safeguards and the GATT 1994. Japan respectfully asks the Panel to conclude that India acted inconsistently with its WTO obligations and to recommend the DSB to request India to bring its measures into compliance with the Agreement on Safeguards and the GATT 1994.

II. THE APPLICABLE STANDARD OF REVIEW

2. The Appellate Body in *Argentina – Footwear (EC)* clarified that the general standard of review set out in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards. Consequently, in a dispute involving the Agreement on Safeguards, the 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. This assessment can only be based on the report published by the competent authorities pursuant to Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards. In this case, the Preliminary Findings and the Final Findings constitute the "published report" within the meaning of Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards.

III. TEXTUAL AND CONTEXTUAL INTERPRETATION OF ARTICLE XIX OF THE GATT 1994
AND OF THE AGREEMENT ON SAFEGUARDS

3. Japan emphasizes the importance of the context in interpreting Article XIX of the GATT 1994 and the Agreement on Safeguards for a proper understanding of the requirements to be met by a WTO Member wishing to impose safeguard measures. In particular, the requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards cannot be interpreted in an isolated manner but must be interpreted together in light of their context.

4. More specifically, Article XIX: 1(a) of the GATT 1994 requires competent authorities to identify and establish the existence of certain circumstances as well as certain conditions in order to impose safeguard measures. Importantly, the competent authorities must establish a "logical connection" between these circumstances and conditions. This "logical connection" implies the following steps. First, the competent authorities must identify the "unforeseen developments" and explain how such unforeseen developments have resulted in increased imports causing serious injury or threat thereof to the domestic industry. Second, the competent authorities must demonstrate that the Member concerned incurred obligations under the GATT 1994 which prevented that Member from addressing the increased imports causing serious injury or threat thereof to the domestic industry. Third, the competent authorities must identify the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligation. Fourth, there must be a finding of serious injury or threat thereof to the domestic industry. In addition, such serious injury must be caused by the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligations.

IV. INDIA VIOLATED THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. *Failure to demonstrate the existence of "unforeseen developments"*

5. In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to *why* the identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. Merely identifying events and describing them as "unforeseen" without explaining why these events were unforeseen at the appropriate time does not satisfy the requirement laid down in Article XIX.

6. The Preliminary Findings and the Final Findings refer to a number of events raised by the applicants in their application. Japan submits that the Indian authority violated Article XIX:1(a) of the GATT 1994 since it failed to demonstrate why those events constituted "unforeseen developments". First, it is unclear whether the Indian authority considered that all or some of these events constituted "unforeseen developments" or whether these events together formed an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994. Contrary to what India argues, the mere fact that the Preliminary Findings and the Final Findings refer to the Panel Report in *US – Steel Safeguards* does not make it "evident that the Competent Authority considered that a confluence of all these events constitute [the] 'unforeseen developments'". Any explanation must be explicit and thus clear and unambiguous.

7. Second, regardless of whether the Indian authority considered these events, taken together or separately, as unforeseen development(s), the Indian authority did not discuss why these events could be considered as "unforeseen". In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide "as a minimum, some discussion by the competent authorities as to why [such developments] were unforeseen at the appropriate time". It also means that "[a] mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact". However, the Indian authority did not provide such explanation.

8. Third, Japan also notes that, while the Final Findings seem to indicate that certain developments were unforeseen by the domestic industry, it does not show that these developments were unforeseen by India for the purpose of Article XIX:1(a) of the GATT 1994.

2. *Failure to demonstrate a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry*

9. First, the Indian authority failed to demonstrate *how* imports increased as a result of the alleged unforeseen developments. Merely asserting that there is a "logical connection" cannot satisfy the requirement to provide a reasoned and adequate explanation as required under Article XIX. Japan submits that, in order to do so in this case, the Indian authority was required to provide a reasoned and adequate explanation regarding how and to what extent the alleged unforeseen developments changed the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry. This was necessary since, due to the nature of the events, there was no clear and automatic link between the allegedly identified events and an increase in imports into India.

10. Merely noting the "huge capacities" developed by certain exporting countries is insufficient since the existence of such capacities does not *per se* lead to the conclusion that it resulted in increased imports causing or threatening to cause serious injury to the Indian domestic industry. The same comment applies to the increase in demand in India and the fact that the US and the EU reduced their dependence on imported steel which is referred to in connection with excess capacities in certain countries as well as with regard to the other developments affecting these countries. Indeed, none of these events *per se* leads to increased exports from those countries to India. As there is no automatic link between the unforeseen developments examined above, taken separately or in conjunction, and the increase in imports into India causing or threatening to cause serious

injury, the Indian authority should have explained how these events changed the competitive relationship between imports and the domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry.

11. Furthermore, for those events which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis. Such explanation is, however, missing in the Preliminary Findings and the Final Findings.

12. Finally, the Indian authority should have demonstrated that the events identified as unforeseen developments occurred before imports started to surge. In the present case, however, the analysis does not indicate whether the alleged unforeseen developments occurred before the alleged surge in imports. Japan notes that the evidence on the record appears to indicate that some of the alleged unforeseen developments did not take place before the increase in imports and suggests that the increase in imports was caused by reasons other than the alleged unforeseen developments.

13. Second, the Indian authority failed to explain the impact of the unforeseen developments on the products concerned as the Preliminary Findings and the Final Findings refer to "steel" in general but fail to consider how the alleged unforeseen developments relate to the specific products at issue. Japan recalls that the Appellate Body in *US – Steel Safeguards* upheld the panel's findings that the factual demonstration of "unforeseen developments" must relate to the specific product covered by the specific measure at issue.

14. Third, the Indian authority's analysis is also deficient since the Preliminary Findings and the Final Findings do not provide any supporting data to substantiate its general assertion that the unforeseen developments resulted in the increase in imports causing or threatening to cause serious injury. As indicated by the panel in *US – Steel Safeguards*, an explanation that is not supported by relevant data cannot be seen as a reasoned and adequate explanation. Accordingly, Japan submits that simple assertions on the part of the Indian authority, without any supporting evidence, are insufficient to establish the existence of the "logical connection" between the alleged unforeseen developments and the increase in imports.

B. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

15. Under Article XIX:1(a) of the GATT 1994, the Member wishing to impose safeguard measures must demonstrate not only that it has incurred obligations under the GATT 1994 but also how the obligations incurred under the GATT 1994 prevented the WTO Member concerned from taking WTO-consistent measures to address the increase in imports causing or threatening to cause serious injury to the domestic industry.

16. In the present case, while the Indian authority noted that India's bound rate on the products concerned is 40%, it failed to explain how the tariff concession of 40% undertaken by India under the GATT 1994 had the effect of preventing India from taking WTO-consistent measures. In fact, the Indian authority acknowledged that there was no relationship between the effect of the 40% bound tariff rate India committed to and the alleged increase in imports since, according to the Indian authority, the alleged increase in imports was due to the effect of the "low applied tariffs" which are much lower than the bound tariff rate of 40%.

C. India violated Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

17. First, India failed to determine an increase in imports based on imports which arose "as a result of" the unforeseen developments and the effect of the obligations incurred under the GATT 1994. Since the Indian authority failed to demonstrate the logical connection between the increase in imports and the unforeseen developments and the effect of the obligations incurred under the GATT 1994, it improperly considered all imports in its analysis without ensuring that these

imports resulted from the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

18. Second, India failed to make a qualitative analysis of the increased imports by focusing solely on the quantitative change in the level of imports between 2013-2014 and the first quarter of 2015-2016.

19. In the present case, in order to determine whether the upward trend in imports – identified over a short-term period during the POI – could qualify as an increase in imports justifying the imposition of a safeguard measure, the Indian authority was required to conduct a qualitative analysis of this upward trend in imports. In order to make such a qualitative analysis, the Indian authority should have evaluated this short-term trend during the POI in light of longer-term trends or any other methods, taking into account that the short-term trend could appear simply as a recovery or return to a previous level of imports. The lack of qualitative analysis is striking in this case because, when the most recent data is examined in light of the data pertaining to 2011-2012 and 2012-2013, the increase in imports between 2013-2014 and 2014-2015 appears simply as a recovery or a return to the previous level of imports. Thus, without making a qualitative analysis of the increase in imports that occurred during the POI, e.g. without looking at this short-term increase in light of longer-term trends, India failed to make a determination of an increase in imports in accordance with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

20. Third, India failed to demonstrate an increase in imports based on "objective data". Indeed, the Indian authority annualized the data of Q1 of 2015-2016 without, however, explaining why this annualization was appropriate in light of the circumstances of the case. Japan does not argue that the annualization of data is not allowed in the context of a safeguard investigation. However, when used, the competent authorities must explain why such annualization is appropriate in light of the circumstances of the case. In the present case, the Indian authority failed to explain why it was reasonable to assume that data concerning Q1 of 2015-2016 was representative for the whole year. In fact, when one looks at quarterly figures for previous years, it is clear that there were fluctuations between different quarters and that it cannot be assumed that the figures for Q1 are representative for the entire year.

21. Fourth, India failed to demonstrate that the increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both in absolute and in relative terms, in light of the facts of the case. While the Final Findings use the words "sudden, sharp and significant" in the concluding paragraph of the section concerning the increased imports, they do not provide any explanation why the increase in imports in absolute or relative terms can be qualified as "sudden", "sharp" or "significant". An assertion that "[i]t is apparent" from the data "that there is a sudden, **sharp and significant surge in imports ... both in absolute terms as well as in relation to total domestic production**" without further explanation is clearly not sufficient.

D. India violated Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry

1. *India violated Article 4.1(c) of the Agreement on Safeguards*

22. When a domestic industry is defined as "a major proportion" under Article 4.1(c), it must encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production. This means that the competent authorities must ensure that the process of defining the domestic industry does not give rise to a material risk of distortion in the injury and causation determination. Japan claims that the determination of the "domestic industry" in this case does not comply with this standard.

23. In the Preliminary Findings and the Final Findings, the Indian authority considered that the applicants necessarily constituted "a major proportion" within the meaning of Article 4.1(c) of the Agreement on Safeguards merely because they represented at least 50% of the total production. However, the "major proportion" test is not a purely mathematical test. Indeed, it has both quantitative and qualitative connotations. In other words, the fact that domestic producers represent more than 50% does not necessarily mean that they constitute a "major proportion". Japan submits that the way in which the Indian authority defined the domestic industry gave rise to a material risk

of distortion. Indeed, while all domestic producers supported the Application, only three of them which were petitioners and replied to the questionnaires were included in the definition of the domestic industry. This self-selection process by the domestic producers introduced a material risk of distortion.

24. This is confirmed by the facts. Indeed, the examination of the information concerning the three domestic producers which were not included in the domestic industry showed positive trends in the injury factors for which information has been provided, namely sales, market share and production. Japan submits that, by concluding that the applicants represented a major proportion merely because they accounted for more than 50% and by disregarding that the information concerning the other domestic producers indicated positive trends with regard to some injury factors found to be critical to the finding of serious injury or threat thereof, the Indian authority introduced a material risk of distorting its analysis of the state of the domestic industry and therefore violated Article 4.1(c).

2. *India violated Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

25. Given that the domestic industry was defined in a manner that is inconsistent with Article 4.1(c), it must be concluded that the injury and causation determinations were consequently also inconsistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards as well as with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. India violated Articles 2.1, 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat thereof

1. *India violated Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards*

26. First, India failed to provide an adequate explanation of the "bearing" or "effect" that the relevant factors had on the situation of the domestic industry. Not any injury can justify the imposition of a safeguard measure. The Appellate Body underlined that the standard of "serious injury" is, on its face, "very high" and "exacting." To establish serious injury, the competent authorities must evaluate "all relevant factors". This evaluation is not simply a matter of form since the competent authorities must conduct a substantive evaluation of the "bearing" or "effect" that the relevant factors have on the situation of the domestic industry such as to be able to make a proper overall determination as to whether the domestic industry suffers serious injury or threat thereof. In carrying out this analysis, the competent authorities' explanation must "fully [address] the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data." In that regard, India errs when arguing that the competent authorities are not required to examine the bearing of the injury factors explicitly listed in Article 4.2(a). Furthermore, while Japan agrees that not all injury factors need to show a negative trend, contrary to what India argues, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend.

27. Turning to the facts of the case, Japan submits that the Indian authority did not conduct a substantive evaluation of all relevant factors such as to make a proper overall determination that the domestic industry is seriously injured by the increased imports. In particular, there is no adequate explanation of the "bearing" or "effect" that the decline in market share, prices and profitability had on the overall situation of the domestic industry.

28. The Indian authority first erred in its analysis of the "market share" of the domestic industry. To start with, the Indian authority failed to consider how the "decline in market share" of the domestic industry ties in with the overall position of the domestic industry in a market where domestic demand is expanding. Indeed, the Indian authority's analysis seems to rely on the assumption that the domestic industry should have maintained or expanded its market share in an expanding market. The Indian authority, however, did not provide any explanation as to why this assumption could be made. Then, the Indian authority failed to evaluate the captive segment in considering the decline in market share of the domestic industry. Finally, the Indian authority overestimated the impact of the decrease in market share of the domestic industry. Indeed, it appears that the decrease in the market share of the domestic industry in the non-captive segment

identified by India was partly due between 2013-2014 and 2014-2015 to an increase in the market share of the captive sales of the domestic industry.

29. The Indian authority also erred in its analysis of the "domestic prices". Indeed, while the Indian authority considered that the effect on domestic prices was an important factor for the determination of serious injury, it merely noted that the domestic prices decreased from 100 to 83 but did not make any analysis of the effect of this factor on the financial condition of the domestic industry, taking into account that cost reduction occurred simultaneously. Moreover, an explanation based exclusively on indexed data is insufficient to show that the decrease in domestic prices led to financial losses. Furthermore, the exclusion of information concerning the captive market left the Indian authority without explanation of the overall state of the domestic industry.

30. The Indian authority further erred in its analysis of the "profitability" of the domestic industry. Indeed, the Indian authority failed to take into account the data pertaining to the entire POI since it focused exclusively on the data from the most recent past. In addition, the Indian authority did not consider the captive segment of the domestic industry in evaluating profitability.

31. Finally, the Indian authority failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the findings of serious injury. Most injury factors in this case (namely production sales, capacity utilization, employment, productivity and inventories) showed a stable or positive trend during the POI. Taking into account that the injury evaluated in the context of the Agreement on Safeguards must be an "overall impairment in the position of the domestic industry" for which the standard is very high, the Indian authority was required to provide a substantive and detailed explanation as to why those factors showing a stable or positive trend did not negate the finding of serious injury. Such analysis is, however, lacking in the Final Findings.

32. Second, the Indian authority failed to make a determination of serious injury based on "objective data" as required by Article 4.2(a) of the Agreement on Safeguards for two reasons.

33. The first reason is that, when examining the figures of inventories, production and sales for a given year of the POI, these figures do not match. In other words, taking the figure of inventories at the beginning of the year, adding the production figure, subtracting the amount of sales and ending inventories, there remains a substantial amount. The export sales figures found in the Investigation File do not permit to explain this amount. This seems to imply that some of the figures concerning the injury analysis (production, inventories or sales) might have been misreported in the analysis of the Indian authority and therefore that the injury analysis was not based on "objective data".

34. The second reason is that, in examining the injury factors, the Indian authority treated data of Q1 of 2015-2016 as being representative for the entire year 2015-2016. In other words, the Indian authority annualized the Q1 data to cover the period until 31 March 2016. The Indian authority, however, failed to explain why annualization was reasonable. It therefore failed to make a determination of serious injury that is based on objective data.

2. *India violated Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards*

35. Japan submits that India acted inconsistently with the Agreement on Safeguards since it made a determination of "threat of *further* serious injury" or "*further* threat of *greater* serious injury" which is not provided under the relevant provisions of that Agreement. Indeed, the Agreement on Safeguards provides that safeguard measures may be applied if there is "serious injury" or "threat of serious injury". In fact, if there is "serious injury", there is no need to make a prospective analysis about how this serious injury may evolve in the future.

36. Even if it were to be concluded that the Indian authority made a determination of "threat of serious injury", it does not meet the standard set out in Articles 4.1(b) and 4.2(a) which involves making fact-based projections concerning future developments of the domestic industry's conditions.

37. First, there is no fact-based assessment of likely development in the near future because there is no analysis of factual data concerning "surplus production capacities". Moreover, the Indian authority failed to explain how and to what extent these surplus production capacities would lead to additional production being exported to the Indian market. Second, while "the competent authorities

must evaluate all relevant injury factors," the Indian authority failed to do so because it did not make any assessment *at all* regarding the other factors, namely production, sales, market share, profitability, etc. Third, even if India argues that the factors examined in determining serious injury to the domestic industry are also relevant in determining threat of serious injury to the domestic industry, such determination is also deficient for the same reasons as those described in the section concerning "serious injury".

3. *India violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

38. As demonstrated above, the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury to the domestic industry. Consequently, India also violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

F. India violated Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof to the domestic industry

1. *India violated Article 4.2(b) of the Agreement on Safeguards*

- a. Failure to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry

39. Japan submits that India violated Article 4.2(b) of the Agreement on Safeguards by failing to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry.

40. First, the Indian authority failed to show the existence of an overall coincidence in time between the movements in imports and the movements in injury factors. Indeed, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized). Furthermore, the Indian authority's analysis includes a comparison of the relationship between the movements in import volume with only two injury factors and thus not of *all* injury factors. In fact, the data reveal that there was no clear "overall coincidence" in time. It follows that there was no basis for a finding of existence of a causal link between the increased imports and the serious injury or threat thereof to the domestic industry.

41. Second, in the absence of an overall coincidence between the movements in imports and the movements in injury factors, it was necessary for the Indian authority to provide a compelling explanation as to why a causal link nevertheless existed. However, the Indian authority, failed to provide such an explanation.

42. Indeed, the Indian authority's conclusion that the decreasing price of the imports prevented the domestic industry from sustaining its prices is baseless. First, a simple comparison between the unit average price of imported products and the unit average price of domestic products is unreliable as it ignores the fact that large differences in categories and prices between the various products included in the "products concerned" may distort the comparability of the average prices. Second, no meaningful conclusion can be derived from an end-to-end comparison of the results in 2013-2014 and 2015-2016 (Q1) since such comparison cannot show the existence or the extent of causation. Third, the explanations are based on indexed data which do not allow the authority to draw any meaningful conclusion. Fourth, a simple comparison of two prices, whether it is based on actual figures or index data, does not explain whether there is any causation between the two prices or which price is the cause and which price is the effect because there may be other factors having an impact on domestic prices.

43. Furthermore, the Indian authority's conclusion that the imports prevented the domestic industry from increasing its production and sales compared in proportion to the increase in demand/consumption is also baseless. Indeed, this conclusion is based on the assumption that the domestic industry should be able to increase its production and sales in proportion to the increase in demand/consumption in the absence of increased imports. The Indian authority, however, failed to provide any explanation for this assumption. In fact, the Indian authority did not examine the

possibility that the domestic industry was not able to increase its production and sales proportionally to increased demand in the absence of increased imports because of factors other than increased imports.

44. Finally, the Indian authority's conclusion that the imports led to a sharp decline in profitability and to losses recorded by the domestic Industry also lacks any adequate explanation. Indeed, while the Indian authority's conclusion is based on its findings that the imports prevented the domestic industry from sustaining its prices and increasing its production and sales in proportion to the increase in demand/consumption, these findings are baseless for the reasons explained above. Moreover, with regard to the relationship between profitability, on the one hand, and import volumes/price and domestic volumes/price, on the other hand, no meaningful conclusion can be derived from an end-to-end point comparison

- b. Failure to demonstrate that the alleged serious injury and threat thereof caused to the domestic industry by factors other than the increased imports was not attributed to increased imports

45. Pursuant to 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 the injury caused by such other factors is not attributed to the increased imports. The competent authorities are required to explain the particular process they have used to separate and distinguish other causal factors and how they have ensured that injury caused by such other factors was not included in the assessment of the injury caused by increased imports. Furthermore, 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, must be stated explicitly in the published report, accompanied with an explicit and adequate explanation.

46. Contrary to what India claims, the text of Article 4.2 does not support the understanding that the obligation to carry out the non-attribution analysis under Article 4.2(b) is limited only to the factors that have been identified as "relevant factors" under Article 4.2(a). The "relevant factors of an objective and quantifiable nature having a bearing on the situation" of the domestic industry referred to in Article 4.2(a) are those that must be examined in the context of the serious injury analysis as they are indicative of the state of the domestic industry. The "other factors" examined under Article 4.2(b) are those which have an effect on the state of the domestic industry.

47. In the present case, India violated Article 4.2(b) by failing to ensure that the alleged serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports for the following reasons.

48. At the outset, it should be noted that the Indian authority did not conduct a specific non-attribution analysis as the sections concerning the causal link between increased imports and the serious injury or threat of serious injury in the Preliminary Findings and Final Findings are silent on the issue of other factors that could be causing injury to the domestic industry.

49. In any event, the analysis of the Indian authority attributing the alleged injury of the domestic industry solely to the increased imports does not meet the standard of a "reasoned and adequate" explanation. First, while in the Final Findings the Indian authority noted that "[i]nterested parties have submitted that injury being suffered by the domestic industry is due to their own internal factors", it failed to properly examine those factors. Indeed, its cursory analysis does not include a clear determination that the identified factors are not causing injury to the domestic industry nor an explanation why this is so. Second, while the Indian authority addressed the argument concerning the sales by other Indian producers, it failed to expressly determine that such factor is not causing injury to the domestic industry and did not provide a reasoned and adequate explanation why it is so. Third, with regard to the argument concerning captive sales, the Indian authority should have examined whether such factor was not causing injury to the domestic industry and should have provided a reasoned and adequate explanation why such factor did not or could not cause injury to the domestic industry. Fourth, while various interested parties pointed out during the investigation that the decline in profitability of the domestic industry might be the result of factors other than the alleged increased imports, the Indian authority failed to examine and determine that those other factors were not the cause. Finally, for the purpose of the non-attribution analysis, India failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

2. *India violated Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

50. The fact that India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury or threat thereof implies that India has violated not only Article 4.2(b) but also Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Furthermore, pursuant to Article 4.2(b), a causal link must be established, through an investigation described in Article 4.2(a), between the increased imports, on the one hand, and the serious injury or threat thereof, on the other hand. It follows that India also acted inconsistently with Article 4.2(a).

G. India violated Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

51. The requirements that a safeguard measure be limited to "the extent necessary" and "only for such period of time as may be necessary" to prevent or remedy serious injury" in Article 5.1, first sentence, and in Article 7.1 must be read as requiring that safeguard measures be applied only to the extent that they address serious injury attributed to increased imports. According to the Appellate Body, the violation of Article 4.2(b) is thus a sufficient basis to make a *prima facie* case that the safeguard measure has not been applied "to the extent necessary to prevent or remedy serious injury" under Article 5.1. This equally applies to the requirement of Article 7.1 and Article XIX:1(a) of the GATT 1994.

52. In the present case, the Indian authority failed to make a proper causation and non-attribution analyses, thereby violating Article 4.2(b) of the Agreement on Safeguards. The Indian authority was thus unable to ensure that the safeguard measures were applied only to the extent and only for such a period of time necessary to address the serious injury attributed to increased imports.

H. India violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

53. It has been demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its determination concerning the unforeseen developments, the effects of the obligations incurred under the GATT 1994, the increase in imports, the domestic industry, the serious injury and threat thereof, the causal link and of the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury. Thereby, Japan has also demonstrated that India violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards as the Preliminary Findings and the Final Findings do not set forth findings and reasoned conclusions for all pertinent issues of fact and law.

I. India violated Article 11.1(a) of the Agreement on Safeguards

54. Japan has demonstrated that the safeguard measures imposed by India violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. As a result, India also violated Article 11.1(a) of the Agreement on Safeguards.

V. INDIA ACTED INCONSISTENTLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

55. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards. That provision imposes an obligation for the Member imposing a provisional safeguard measure to notify such measure before taking it. India does not dispute the fact that the provisional measure was notified after the measure was taken. This constitutes a clear violation of Article 12.4.

56. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards. The notifications were made only after the following number of days passed, pursuant to Article 12.1(a) 8 days; pursuant to Article 12.1(b) 6 days and pursuant to Article 12.1(c) 6 days. Japan submits that as a result of such delays, the notifications were not "immediate", taking into account that the notifications were not complex and did not have to be translated.

57. Third, India violated Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 failed to provide the following information: information on the causal link between

the increased imports and the serious injury or threat thereof; a precise description of the product involved; a precise description of the scope of the proposed measure; and the proposed date of introduction of the proposed measure.

58. Fourth, India failed to comply with Article 12.3 of the Agreement on Safeguards. Indeed, India failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views on the issues identified.

VI. INDIA VIOLATES ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India violates Article II:1(b) of the GATT 1994

59. India violates Article II:1(b) of the GATT 1994 since, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. While the impugned measures are duties levied by customs, considering their design and structure, they are of an "extraordinary" nature and therefore qualify as "other duties or charges" and not as "ordinary customs duties" under Article II:1(b) of the GATT 1994. Since the duty at issue is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.

B. India violates Article I:1 of the GATT 1994

60. India violates Article I:1 of the GATT 1994 since the safeguard duty is not applied to the products concerned originating in certain countries and this constitutes an advantage that is not accorded immediately and unconditionally to the like products originating in other WTO Members including Japan.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF JAPAN

I. INDIA ACTED INCONSISTENTLY WITH THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. *India failed to demonstrate the existence of "unforeseen developments"*

1. First, by failing to clearly indicate in the Preliminary Findings and the Final Findings whether it was the confluence of events rather than the events taken separately that were considered as the "unforeseen developments", the Indian authority failed to properly identify the alleged unforeseen developments. Contrary to what India argues, the mere reference to the Panel Report in *US – Steel Safeguards* does not make it evident that the Indian authority considered that it was the confluence of events that constituted the "unforeseen developments".

2. Second, India failed to provide a reasoned and adequate explanation *why* the relevant events constituted the "unforeseen developments". India's interpretation that Article XIX:1(a) of the GATT 1994 only requires a "discussion" and not an "analysis" of unforeseen developments whereby the competent authorities should merely identify events that they present as being unforeseen is manifestly erroneous. Indeed, as clarified by the Appellate Body, in order to satisfy the requirement to demonstrate the existence of "unforeseen developments" the competent authorities must discuss or offer an explanation "as to why [the identified] changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994."

3. Third, the fact that the Indian authority concluded that the events were unforeseen for the domestic industry does not mean that these events were unforeseen for India, as required by Article XIX of the GATT 1994. India failed to rebut Japan's argument.

2. *India failed to demonstrate the existence of a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry*

4. Although India agrees that there must be a logical connection between the unforeseen developments and the increase in imports causing serious injury or threat thereof, India appears to implicitly consider that merely claiming that there is a "logical connection" is sufficient to comply with Article XIX. According to India the "logical connection" test is of a lesser threshold when compared to the "causal link" test. This interpretation of the "logical connection" requirement must be rejected. First, the issue is not to determine whether the "logical connection" is of a lesser or a higher threshold than the "causal link" test. Second, there is no textual support to the position that the "logical connection" requirement is of a lesser threshold than the "causation" requirement. Third, India errs in considering that merely claiming that there is a "logical connection" between the unforeseen developments and the increased imports is sufficient to comply with Article XIX:1 of the GATT 1994. Indeed, the "logical connection" entails the obligation for the competent authorities to explain *how* the unforeseen developments have the *effect* or *outcome* of resulting in an increase in imports which has caused or is threatening to cause serious injury to the domestic industry.

5. In the present case, the Indian authority failed to demonstrate the existence of the "logical connection" for three reasons. First, the Indian authority failed to explain *how* imports of the products concerned increased *as a result* of the alleged unforeseen developments. In that regard, Japan submits that since there is no clear and automatic link between the identified events and the increased imports into India causing or threatening to cause serious injury to the domestic industry, the Indian authority was required to provide a more detailed analysis including the examination of how the alleged unforeseen developments have modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in

an increase in imports causing or threatening to cause serious injury to the domestic industry. Furthermore, to the extent the Indian authority relied on events which relate to certain specific countries, it had to explain why each of those events resulted in increased exports from those countries and why this caused other countries, with respect to which India failed to provide any explanation, to export more to India, in order to explain that those "unforeseen developments" collectively resulted in the alleged increase in imports causing serious injury to its domestic industry. Finally, since the increase in imports must occur "as a result of" unforeseen developments, the Indian authority was required to demonstrate that the events identified as unforeseen developments occurred before the imports started to surge. The fact that in its response to the Panel's questions India stated that "the 'unforeseen developments' occurred prior to the increase in imports of PUC into India" cannot cure the deficiency of the Indian authority's published report. In any event, such statement lacks any basis and contradicts the information on the record.

6. Second, the Indian authority failed to explain the impact of the "unforeseen developments" on the specific products at issue as the relevant developments refer to "steel" in general. India's responses to the Panel's questions confirm that India failed to examine the relation between the alleged unforeseen developments and the increase in imports of the specific products concerned, thereby failing to demonstrate the "logical connection" required by Article XIX:1(a) of the GATT 1994.

7. Third, the Indian authority failed to provide supporting data to substantiate the assertion that the unforeseen developments *resulted in* the increase in imports causing or threatening to cause serious injury to the domestic industry. Contrary to what India argues, the fact that the Indian authority provided data concerning the increase in imports is not sufficient. The lack of supporting data is confirmed by India's responses to the Panel's questions. Indeed, while India refers to the data submitted by the applicants with regard to the alleged huge production capacities developed in China, Russia, Ukraine, Japan and Korea, Japan has failed to find those data in the Application. In any event, the analysis included in the Final Findings contains no reference to the specific evidence submitted by the applicants. India also confirmed that, while the Indian authority concluded that India was the "natural choice" for export, it failed to establish the connection between the alleged excess capacities in certain exporting countries and the increase in imports into India by not examining whether there were alternative markets with increasing demand and high prices that could absorb those excess capacities.

B. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

8. First, India mischaracterizes the obligation to demonstrate a "logical connection" between tariff concessions and increased imports. Contrary to what India argues, merely indicating that the importing Member has made tariff concessions does not in itself prove a logical connection between those concessions and the increase in imports. Rather, the "logical connection" entails the obligation for the competent authorities to explain *how* the GATT obligations prevented the importing member from addressing the increase in imports allegedly causing serious injury or threat thereof to the domestic industry.

9. Second, contrary to what India argues, the Final Findings fail to demonstrate the logical connection between the obligations incurred by India under the GATT 1994 and the increase in imports. While the Final Findings identify India's bound rate of 40%, the Indian authority failed to demonstrate how that concession of 40% prevented it from addressing the increase in imports causing or threatening to cause serious injury.

10. Third, India's reference to the obligations incurred under Article XXIV of the GATT 1994 is without merit. Indeed, the Indian authority did not identify Article XXIV of the GATT 1994 as one of the obligations incurred under the GATT that was constraining its freedom of action and, in any case, Article XXIV of the GATT 1994 does not impose an obligation on the importing Member to apply a specific duty rate on imports from its FTA/RTA partners.

C. India acted inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

11. Japan submits that, contrary to what India argues, Japan has substantiated its claim under Article 2.1 of the Agreement on Safeguards and thus India's argument that the Panel cannot make findings under Article 2.1 should be rejected.

12. Japan further submits that since the Indian authority has failed to demonstrate the logical connection between the unforeseen developments and the effect of the obligations incurred under the GATT 1994, on the one hand, and the increased imports, on the other hand, it has failed to demonstrate an increase in imports based on imports arising "as a result" of the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

13. Japan has also demonstrated that the Indian authority failed to make a qualitative analysis of the "increase in imports" since its analysis did not enable it to ensure that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury. More specifically, by focusing on the occurrence of an increase in imports between 2013-2014 and the first quarter of 2015-2016, the Indian authority could not ensure that this upward trend over such a short period was not simply a recovery or a return to a previous level of imports. The lack of qualitative analysis is particularly striking when the data of the imports relating to 2011-2012 and 2012-2013 is examined. In order to make a qualitative analysis, the Indian authority should have evaluated the real significance of this short-term trend during the POI in light of longer-term trends or any other methods such as to ensure that this short-term upward trend was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively.

14. Furthermore, India failed to demonstrate an increase in imports that is based on "objective data" because India relied on annualized data for 2015-2016 without explaining why annualization was appropriate in light of the circumstances of this case. While Japan does not take issue with the annualization of data *as such*, Japan considers that, when using that method, the competent authorities are required to explain why the yielded results are representative for the entire year and why the simple annualization of data is appropriate for the purpose of comparison with the annual data from previous years.

15. Finally, Japan submits that, even if it were to be concluded that the Indian authority did not fail to make a qualitative analysis that is based on "objective data," India nonetheless acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 since it failed to provide a reasoned and adequate explanation on how it determined that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury". India did not address that claim.

D. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry

1. *India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards*

16. In all circumstances where the domestic industry does not cover the producers of the product concerned as a whole, the competent authority needs to ensure that the manner in which it defines the domestic industry does not introduce a material risk of distortion. Contrary to what India argues, the mere fact that the domestic producers represented 67% of the domestic production does not automatically imply that there was no material risk of distortion in the definition of the domestic industry. In fact, the "major proportion" test is not a purely quantitative test. A "major proportion" should be understood as "a relatively high proportion that substantially reflects the total domestic production". It has "both quantitative and qualitative connotations".

17. In the present case, there is a material risk of distortion that stemmed from the self-selection process of the domestic producers included in the definition of the domestic industry. Indeed, the domestic producers themselves selected those producers to be included in the domestic industry. The purely quantitative approach followed by the Indian authority, whereby it accepted the domestic

industry as proposed by the applicants simply because they represented more than 50% of the domestic production, cannot exclude the possibility that the domestic producers purposively decided to include in the domestic industry only the low performing producers while ignoring the high performing producers. The information submitted in the application to the Indian authority clearly show that the domestic producers not included in the domestic industry performed substantially differently from those included in the domestic industry. This confirms that the domestic industry did *not substantially reflect* the total domestic production.

2. *India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

18. Since the domestic industry has been defined in a manner that is inconsistent with Article 4.1(c), the injury and causation determinations are consequently also inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat thereof

1. *India's determination of serious injury is inconsistent with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards*

19. First, Japan submits that India mischaracterizes the standard of "serious injury". Indeed, contrary to what India appears to argue, not *any* injury can justify the imposition of a safeguard measure. India also misrepresents the obligations imposed on the competent authorities in the context of the serious injury analysis. Article 4.2(a) expressly states that the competent authorities shall "evaluate" all relevant factors including those specifically listed in that provision. While not all injury factors need to show a negative trend, the competent authorities are nonetheless required to carefully analyze each of the injury factors before they can make an overall determination as to whether there is a serious injury. This also implies that, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend. Without such an explanation, the competent authorities are not in a position to reach a reasoned and adequate conclusion with regard to the existence of serious injury.

20. Second, India failed to explain the "bearing" of the relevant injury factors on the situation of the domestic industry. With respect to the analysis of market share, India erroneously argues that it only had to establish that the domestic industry lost its market share to imports. The substantive evaluation required by Article 4.2(a) implies that the Indian authority should have considered the decline in market share against the domestic industry's sales in absolute terms as well as other elements. In any event, India failed to establish that "the market share of the domestic industry has [been] taken away by the increased imports" since no meaningful conclusion could be drawn from merely comparing the change in the market share of the imported and domestic products. Japan also submits that by looking only at the figures relating to non-captive market, the Indian authority examined only one part of the domestic industry. While India argues that the captive segment did not have "any bearing on the performance of the domestic industry", there is nothing on the record that would support this assertion. At the very least the Indian authority should have explained why the performance of the captive segment did not negate its finding of serious injury and threat thereof based on the examination of the non-captive segment of the market.

21. With respect to the analysis of prices, Japan reiterates that without absolute figures or an adequate explanation, it is impossible to draw any meaningful conclusions regarding the "bearing" that the price decrease had on the financial situation of the domestic industry. Furthermore, to the extent that the information concerning captive sales was excluded from the price analysis, the Indian authority was required to conduct a separate analysis of such captive sales or explain why such analysis was not necessary despite the fact that it had relevant data regarding the captive segment of the domestic industry. With respect to the Indian authority's analysis of profitability, although India argues that it "has adequately analyzed the profitability over the entire investigation period", the Preliminary Findings and the Final Findings refer only to the decrease in profitability that occurred in Q1 of 2015-2016 and thus fail to take into account the increase in profitability that took place between 2013-2014 and 2014-2015. Furthermore, as confirmed by India, the Indian authority did

not consider the captive segment of the domestic industry in evaluating profitability. While India argues that the captive production should be considered in the context of all injury factors except sales and profitability, this position has no textual basis in the Agreement on Safeguards. Furthermore, accepting India's position would lead to a distorted analysis of the situation of the domestic industry as the captive market would be analysed in the context of some injury factors but not others. Finally, the Indian authority erred in its evaluation of the overall position of the domestic industry because it failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the competent authority's findings of serious injury. While Japan agrees that not all injury factors need to show a negative trend in order to warrant a finding of a serious injury, when certain injury factors demonstrate a positive trend, it is up to the competent authority to explain how this fact affects the finding of an overall serious injury. This understanding is supported by the panel's findings in *Dominican Republic – Safeguards Measures*, which contrary to what India argues are relevant to the present case.

22. Third, India failed to base its determination on "objective data". First, India does not rebut Japan's *prima facie* case that the determination of serious injury is not based on "objective data" when taking into account the data available in the record which, clearly do not match. Indeed, although India asserts that the exact matching of the figures of inventories, production and sales for a given year of the POI is not possible, it failed to substantiate that assertion. Second, India's argument that the annualization of data for Q1 of 2015-2016 was performed to "make figures of different periods comparable", ignores the fact that the Indian authority should have explained why the yielded results were representative for the entire year and why the simple annualization of data was appropriate for the purpose of comparison with the annual data from previous years.

2. *India's determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards*

23. Japan submits that India's determination of "further threat of greater serious injury" lacks any legal basis in the Agreement on Safeguards which provides for a determination of "serious injury" and "threat of serious injury". In any event, such a determination is irrelevant because a determination of further threat of greater serious injury" is entirely dependent on a prior finding of "serious injury". To the extent India is now trying to argue that the Indian authority made a determination of "threat of serious injury" within the meaning of the Agreement on Safeguards, this constitutes an *ex post* explanation that has no support in the text of the Final Findings and should be rejected by the Panel. In any event, even if the finding of "further threat of greater serious injury" made by the Indian authority was to be considered as a finding of "threat of serious injury" – *quod non* – that finding fails to comply with the various requirements set out in Articles 4.1 and 4.2 of the Agreement on Safeguards.

3. *India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994*

24. Since the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury, it follows that the conditions for the imposition of safeguard measures were not met and, as a consequence, India also acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

F. India acted inconsistently with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof to the domestic industry

1. *India violated Article 4.2(b) of the Agreement on Safeguards*

a. India failed to establish the existence of a causal link

25. India has failed to rebut Japan's arguments that there was no basis for a finding of a causal link. Japan maintains that the Indian authority failed to demonstrate an "overall coincidence" in time between the movements in imports and the movements in injury factors, let alone a direct correlation between the two, as argued by India. In the present case, the analysis of all injury factors shows that there was no overall coincidence in time between the movements in imports and the movements in injury factors (other than market share). It follows that there was no basis for concluding that the increase in imports has caused serious injury or threat thereof to the domestic industry. India did not respond to the argument that it failed to examine the relationship between the *movements* in imports and the *movements* in injury factors because instead of looking at the *trends* in imports and the injury factors, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized).

26. Furthermore, the Indian authority failed to provide a compelling explanation as to why, in the absence of the coincidence in time, there was nevertheless a causal link between the alleged increase in imports and the alleged serious injury or threat thereof. First of all, the conclusion that the decreasing price of the imports prevented the domestic industry from maintaining its prices is baseless as the Indian authority failed to explain why the comparison of the average price of imported products and the average price of domestic products was appropriate given the numerous types of products concerned with very different prices. The competent authorities can only reach a reasonable conclusion regarding the impact of the prices of imports on the domestic prices if they have first established that there is a price-based competition between the imported and domestic products. In any event, the explanations provided by the Indian authority are not reasoned and adequate to the extent that they are based solely on the comparison of indexed data and since the analysis is based on an end-to-end comparison of the results in 2013-2014 and Q1 of 2015-2016. Second, the conclusion that the imports prevented the domestic industry from increasing its production and sales compared to increase in demand/consumption is baseless. Since several elements could have an impact on the domestic industry's inability to increase its production and sales in relation to the increase in demand/consumption despite the existence of spare capacity, without addressing such factors, the Indian authority could not properly explain why it considered that it was the imports that *prevented* the domestic industry from increasing its production and sales compared to increase in demand/consumption. Moreover, while India argues that "there was sufficient spare capacity available with the domestic industry and there were no constraints on their ability to increase its production and sales," the arguments submitted by the interested parties suggest otherwise. To the extent the Indian authority relied on the assumption that the domestic industry was able to increase its production and sales, it was required to explain the basis for making such assumption. Third, Japan has demonstrated that the explanation provided by the Indian authority in the Preliminary and Final Findings did not warrant the conclusion that profitability declined and the domestic industry recorded losses in the degree presented in the Final Findings *due to* the increased imports. The limited *ex post* explanation provided by India in its first written submission cannot cure the deficiencies in the Indian authority's findings.

b. India failed to carry out a proper non-attribution analysis

27. Japan has demonstrated that India acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because it failed to ensure that the serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports. Contrary to what India argues, the obligation to carry out the non-attribution analysis is not limited only to the factors that have been identified as "relevant factors" in the context of the injury analysis under Article 4.2(a). India also errs when arguing that Article 4.2(b) does not require any "independent evaluation" in addition to the analysis carried out under Article 4.2(a). Contrary to what India argues, Articles 4.2(a) and 4.2(b) impose distinct obligations on the competent authorities. While Article 4.2(a) focuses on the elements to be considered by the competent authorities in order to

demonstrate the existence of serious injury (or threat thereof), Article 4.2(b) relates to the demonstration of the causal link between such serious injury and the increased imports.

28. In the present case, the Indian authority failed to meet its obligations under Article 4.2(b) because it failed to properly examine the other factors invoked by the interested parties in order to ensure that the injurious effects of those factors were not attributed to the increased imports. First, with regard to five factors addressed by the Indian authority at paragraphs 51-52 of the Final Findings, the Indian authority failed to provide a clear determination that these factors were not causing serious injury to the domestic industry or an explanation why this is so. Second, the Indian authority failed to address at all other factors raised by the interested parties, namely (i) changes in the market share of other Indian producers not included in the definition of the domestic industry, (ii) captive sales of the domestic industry, and (iii) other factors causing the decline in profitability. By ignoring such other factors, the Indian authority failed to make a proper non-attribution analysis.

29. India did not address Japan's argument that it failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

- c. India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

30. Since India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury and threat thereof, India acted inconsistently not only with Article 4.2(b) but also with Articles 2.1 and 4.2(a) of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

G. India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

31. Japan claims that India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to apply the safeguard measures at issue only to the extent and for such time as necessary to prevent or remedy serious injury. Indeed, since the Indian authority failed to make a determination of the causal link between the increased imports and the alleged serious injury and/or threat thereof in accordance with Article 4.2(b), it was unable to ensure that the safeguard measures were applied only to the extent necessary and only for such a period as necessary to address serious injury attributed to increased imports. As confirmed by the Appellate Body in *US – Line Pipe*, the violation of the non-attribution obligation under Article 4.2(b) constitutes a sufficient basis to make a *prima facie* case of violation of Articles 5.1 and 7.1.

H. India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards

32. Japan has demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its various determinations. Thereby, Japan has also demonstrated that India acted inconsistently with its obligations pursuant to Articles 3.1 and 4.2(c) of the Agreement on Safeguards to publish a report that contains a detailed analysis of the case and sets forth findings and reasoned conclusions covering all pertinent issues of fact and law.

I. India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards

33. It has been demonstrated that the challenged safeguard measures are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. It follows that they are also inconsistent with Article 11.1(a) of the Agreement on Safeguards.

II. INDIA FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

34. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards since it notified the provisional safeguard measures to the Committee on Safeguards after the provisional safeguard measures have been taken. Contrary to what India argues, the fact that the measures allegedly had to be imposed "on an urgent basis" does not relieve India from the obligation to notify the Committee on Safeguards before taking the provisional measures. In fact, the notification obligation in Article 12.4 has been imposed taking into account the "urgent" nature of provisional measures.

35. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards because the notifications made after 8 days or 6 days fail to comply with the requirement of "immediate" notification under Article 12.1, taking into account that the notifications were not complex and did not have to be translated. Japan also notes that domestic procedures described by India cannot constitute a justification for failing to make the required notifications pursuant to Article 12.1 of the Agreement on Safeguards "immediately" upon the occurrence of the specified events.

36. Third, India acted inconsistently with Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 does not contain information on (i) the causal link between the increased imports and the serious injury or threat thereof; (ii) a precise description of the product involved; (iii) a precise description of the scope of the proposed measure and; (iv) the proposed date of introduction of the proposed measure. With regard to the first element, contrary to what India argues, the requirement to include information regarding the causal link between increased imports and serious injury clearly follows from the words "caused by" in Article 12.2 which refers to "evidence of serious injury or threat thereof caused by increased imports." With regard to the second element, Japan notes that India's notification failed to indicate which sub-categories of products falling within the scope of the "product under consideration" were excluded from the scope of the safeguard measures. With regard to the third element, Japan submits that India's notification did not indicate that the anti-dumping duty paid would be deducted from the safeguard duty rate nor that the duty should not be imposed on goods imported at or above the MIP. Finally, with regard to the fourth element, contrary to what India argues, the "proposed date" does not mean a "theoretical date" but the actual date on which the safeguard measures will be applied.

37. Fourth, India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because it failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views. In light of the Appellate Body's findings in *US – Line Pipe*, Japan submits that the period of 8 days in the present case was clearly insufficient for Japan to have a meaningful exchange of views within the meaning of Article 12.3. This is even more so as Japan did not know the effective date of application of the measures.

III. INDIA ACTS INCONSISTENTLY WITH ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India acts inconsistently with Article II:1(b) of the GATT 1994

38. India acts inconsistently with Article II:1(b) of the GATT 1994 because, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. Japan notes that India agrees that the measures at issue constitute "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994. Thus, since the safeguard duty is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, there is a violation of Article II:1(b) of the GATT 1994. India's defense that there is no violation of Article II:1(b) of the GATT 1994 because, given that the measure was imposed pursuant to Article XIX, India's obligations under Article II:1(b) *ipso facto* gets suspended must be rejected. Indeed, the fact that a measure is taken pursuant to Article XIX does not automatically imply that there cannot be an inconsistency with Article II:1(b).

B. India acts inconsistently with Article I:1 of the GATT 1994

39. India acts inconsistently with Article I:1 of the GATT 1994 because the measures at issue are not applied to the products originating in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in other WTO Members including Japan. India's argument that there is no violation of Article I:1 of the GATT 1994 since the discriminatory treatment was done in accordance with Article 9 of the Agreement on Safeguards must be rejected. Indeed, the fact that a measure is applied in accordance with Article 9 of the Agreement on Safeguards does not mean that that measure is consistent with Article I:1 of the GATT 1994.

IV. THE CHALLENGED MEASURES ARE SAFEGUARD MEASURES WITHIN THE MEANING OF ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

40. Japan submits that there is no requirement for this Panel to examine, as a preliminary step, whether the measures at issue constitute "safeguard measures" as a result of which the Agreement on Safeguards would be applicable. Indeed, there is no definitional language of what is a "safeguard measure" in Article XIX of the GATT 1994 understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports". At best, it can be deduced from that provision that Article XIX of the GATT 1994 and the Agreement on Safeguards can be relied upon by a Member applying a measure that would otherwise be inconsistent with a GATT obligation provided that the measure complies with all the substantive and procedural requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards. Since the measures at issue which are inconsistent with the GATT obligations have been imposed by India pursuant to Article XIX of the GATT 1994 and notified in advance by India to the WTO Members pursuant to Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, this Panel has to examine whether the measures at issue are consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

41. Furthermore, even if the Panel were to conclude that it is required to examine whether the measures at issue constitute "safeguard measures" understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports", the measures at issue fulfil those conditions, and therefore, constitute "safeguard measures". Indeed, the measures at issue suspend both the obligation under Article II:1(b) of the GATT 1994 in relation to "all other duties or charges" and the most-favoured-nation obligation under Article I:1 of the GATT 1994 with the purpose of preventing or remedying serious injury to the domestic industry.

42. Although India argues that the obligations suspended by the measures at issue also include Article XXIV of the GATT 1994, and, more specifically, Article XXIV:4, XXIV:8 and XXIV:12, Japan submits that none of those provisions imposes an obligation on Members to establish a customs union or a free trade area nor to apply a particular duty rate on imports of products from certain FTA/RTA partners. It follows that India has failed to demonstrate how the measures at issue suspend an obligation under Article XXIV of the GATT 1994.

V. INDIA'S CLAIM THAT JAPAN'S CASE IS NOT COMPLIANT WITH ARTICLE 3.7 OF THE DSU MUST BE REJECTED

43. Japan submits that the Panel should reject India's objection based on Article 3.7 of the DSU and make findings and recommendations with respect to the challenged measures in accordance with its terms of reference.

44. First, with regard to India's claim under the first sentence of Article 3.7 of the DSU that the panel proceedings are not fruitful since the measures imposed by India expired on 13 March 2018, Japan submits that pursuant to the text of that provision, it is before bringing a case that a Member must exercise its judgment as to "whether action under these procedures would be fruitful". Therefore, the fact that the measure expires or is withdrawn during the panel proceedings should not be relevant to the determination as to whether "before bringing a case" the Member exercised its judgement as to "whether action under these procedures would be fruitful".

45. Furthermore, as recognized by the Appellate Body, given the largely self-regulating nature of the requirement of Article 3.7, first sentence, it must be presumed that whenever a Member submits a request for the establishment of a panel, it does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful". India actually does not dispute "the discretion to be enjoyed by any Member in deciding whether to bring a case against another Member under the DSU" nor that "Japan's request for the establishment of a panel was [made] in good faith." It follows that the claim of inconsistency with Article 3.7 of the DSU is manifestly misplaced and, in any event, has no legal merit.

46. Second, with regard to India's claim under the second sentence of Article 3.7 of the DSU that the alleged expiry of the measures at issue should somehow affect the outcome of these proceedings, Japan recalls the Appellate Body's finding that "the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure." In light of the guidelines provided in previous WTO cases, Japan submits that the Panel should not refrain from making findings with regard to the measures at issue.

47. Indeed, the challenged measures were identified in the panel request and thus are within the Panel's terms of reference. Furthermore, since India continues to argue that its measures are fully consistent with its WTO obligations and since Japan, as the complaining party, continues to request that the Panel make findings, there is still a dispute between the parties as to the consistency of the challenged measures with the relevant provisions of the Agreement on Safeguards and the GATT1994. Japan also notes that India could take measures that may give rise to certain of the same, or materially similar, WTO inconsistencies. With regard to India's argument that, because of Article 7.5 of the Agreement on Safeguards which imposes restrictions on imposition of the same measures, there is no possibility of the measures to be easily re-imposed, Japan notes that Article 7.5 only provides for a time limit during which a safeguard measure should not be re-imposed and thus, it does not prevent India from re-imposing the measures once such time limit expires. In any event, India acknowledges that there is no provision in its domestic legislation that would explicitly prevent the Indian authorities from re-imposing the measures. Finally, given the temporary nature of safeguard measures and the increasing delays in dispute settlement proceedings, concluding that no findings should be made where the measures have expired would raise systemic concerns as it would amount to preventing Members from effectively challenging safeguard measures.

48. Japan submits that the Panel should also make recommendations with regard to the challenged measures. Indeed, pursuant to Article 19.1 of the DSU, if a panel makes findings that a challenged measure is inconsistent with a covered agreement, it "shall" recommend that the Member concerned bring the measures into conformity with that agreement. Previous WTO cases suggest that recommendations are to be made in particular with respect to measures that, despite their expiry, continue to exist or to have legal effects. In that regard, Japan submits that, even assuming that the challenged measures have expired (something that India has failed to demonstrate), those measures continue to have effect as they may still apply to imports of the products concerned that took place during the time the safeguard measures were in force but for which the duties were not collected, for instance, due to errors in customs declarations. India has failed to rebut Japan's argument. In particular, India has not shown that an *a posteriori* collection of the challenged safeguard duty is prohibited. There is therefore no basis for the Panel to refrain from making recommendations with respect to the challenged measures given the clear language of Article 19.1 of the DSU.

49. Lastly, refraining from making findings and recommendations would introduce a fundamental risk of circumvention of the dispute settlement procedures under the DSU. Indeed, assuming, for the sake of argument, that India introduces a new measure with effects similar to those of the challenged safeguard measures – whether or not such new measure would be subject to the Agreement on Safeguards – in the absence of findings and recommendations of the Panel, Japan may not be able to challenge the new measure through compliance proceedings pursuant to Article 21.5 of the DSU. Indeed, the newly adopted measure may be found not to be a "measure taken to comply" given that the lack of recommendations to bring the measures into conformity with the relevant agreements may be interpreted as meaning that any measure adopted thereafter is not a "measure taken to comply".

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF INDIA

I. Introduction

1. In the present dispute, Japan has challenged the provisional and definitive safeguard measures imposed by India on imports of certain iron and steel products into India. Japan alleges that India, by way of the present measures, have violated various provisions of the 'Agreement on Safeguards' ('the Safeguard Agreement') and its obligations under the GATT 1994.

2. However, India submits that the measures taken were in full compliance with India's obligations under GATT 1994 and the provisions of the Safeguard Agreement.

II. Standard of Review to be followed by the Panel under Article 11 of the DSU

3. Article 11 of the DSU provides for the panel's standard of review. A panel has to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case. The panel has to also examine 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 for in the covered agreements.

4. "Objective assessment" has been understood as mandating neither a *de novo* review (i.e. the complete repetition of the fact-finding conducted by national authorities) nor "total deference" to domestic authorities (i.e. the simple acceptance of their determination).¹

5. India considers that the appropriate standard of review is to assess, if a reasoned and adequate explanation is discernible from the Competent Authority's findings, and further, that in the event another plausible interpretation is proffered by the complainant, whether that interpretation can supersede the explanation provided by the Competent Authority. The burden of proof that the Competent Authority's findings do not provide a reasoned and adequate explanation rests on the complainant (as opposed to suggestions on the manner in which the Competent Authority ought to have, or could have conducted the determination). Further, if such burden is not discharged by the complainant, the explanation of the competent authority must automatically prevail.

III. Burden of Proof to establish that India acted inconsistently with its obligations

6. Under the Agreement, the complainant bears the burden of proof to demonstrate an inconsistency. Unless the complainant discharges that burden with regard to a particular measure, there would be no basis for the Panel to find that measure to be inconsistent with the WTO Agreement.² India submits that the complainant has not met its burden to establish a *prima facie* case with respect to the claims contained in its panel request. The complainant has merely relied upon unsubstantiated assertions without any supporting evidence or legal support.

IV. India has fully complied with its obligations under Article XIX:1(a) of the GATT 1994

7. India submits that the requirement under Article XIX:1(a), is to show that the developments which led to a product being imported in such increased quantities must have been "unexpected". Therefore, the term "unforeseen developments" covers any change that the negotiators did not foresee when they undertook obligations or tariff concessions with regard to the product subject to the measure. The appropriate focus is on what was actually "foreseen" rather than "theoretically foreseeable".

8. India states that what is required to be demonstrated is a "logical connection" between the "unforeseen developments" and "increased imports". The Final Findings of the Competent Authority

¹ Appellate Body Report, *EC – Hormones*, para. 117.

² Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192 /R.

(i) contains a separate discussion on "unforeseen developments";³ (ii) clearly refers to the panel report in *US – Steel Safeguards*, and, indicates that a confluence of events/circumstances can constitute "unforeseen developments";⁴ and, (iii) contains an identification and discussion of circumstances/events, the confluence of which is regarded as "unforeseen developments" by the Competent Authority.

9. India further submits that the Final Findings clearly demonstrate the factum of "increased imports" of the PUC,⁵ the existence of "unforeseen developments", and, the logical connection between the "unforeseen developments" and the "increased imports". The clear conclusion of the Competent Authority, after detailed discussion on the issue in the findings, is that there was a significant increase in imports of the PUC in absolute terms, and, that the increase in imports of the PUC was linked to "unforeseen developments".⁶ The Preliminary Findings⁷ and the Final Findings⁸, make it clear that a confluence of events/circumstances has been taken to constitute "unforeseen developments" by the Competent Authority. India submits that the demonstration of the "logical connection" referred above, is to be seen in the context of the confluence of events/circumstances treated as 'unforeseen developments' and "increased imports", and not between each such individual event/circumstance. India has fully demonstrated the "logical connection" existing between the "unforeseen developments" and an increase in imports of the product that is causing and threatening to cause serious injury.

10. The panel in *Argentina – Peaches*⁹, has noted that the demonstration of 'unforeseen developments', should at a minimum have some discussion by the competent authorities as to why they were unforeseen at the appropriate time. India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact'¹⁰, and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. Japan seeks to assert¹¹ that in order to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to why identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994. Such understanding of Japan would be tantamount to reading in an additional condition into Article XIX:1(a), which does not emanate from the plain text of Article XIX:1(a).

11. India's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such increased quantities and under such conditions as to cause serious injury. India's analysis also showed that the increased imports and the conditions which caused injury were a result of unforeseen developments. India has addressed the issue of correlation between the unforeseen developments and the subject goods in both the Preliminary Findings¹² as well as the Final findings.¹³ India has also examined the relevant evidences set out as Exhibit IND-20.

12. India expressed its view that the effect of depreciation of currency is felt across products including the PUC, as also observed in the findings of the Competent Authority in terms of the falling prices from these countries. This has been specifically dealt with in the Final Findings¹⁴ and in the Preliminary findings¹⁵ of the Indian Competent Authority.

13. The FTAs entered into by India with Korea and Japan under the aegis of Article XXIV of the GATT 1994 is an 'obligation' under the GATT 1994. India therefore, does not view the fact of lowering of duties as an 'unforeseen development' but considers it as an act in compliance with its obligations

³ Final Findings, (Exhibit IND-11), paras. 71-82.

⁴ Final Findings, (Exhibit IND-11), para. 74.

⁵ Final Findings, (Exhibit IND-11), paras. 34-42.

⁶ Final Findings, (Exhibit IND-11), paras. 102(i) and 102(iii).

⁷ Preliminary Findings, (Exhibit IND-7), para. 24.

⁸ Final Findings, (Exhibit IND-11), para. 79.

⁹ Panel Report, *Argentina – Peaches*, para. 7.23.

¹⁰ Appellate Body Report, *US – Lamb*, para. 76.

¹¹ Japan's first written submission, para. 104.

¹² Preliminary Findings, (Exhibit IND-7), paras. 18-24.

¹³ Final Findings, (Exhibit IND-11), paras. 75 -78 and 79-82.

¹⁴ Final Findings, (Exhibit IND-11), paras. 76-77 and 79 (which incorporates the findings from the Preliminary Findings).

¹⁵ Preliminary Findings, (Exhibit IND-7), paras. 21-22.

under Article XXIV of the GATT 1994. India reiterates that any obligation taken by a member under Article XXIV is also an obligation referred to in the first part of Article XIX:1(a) of the GATT 1994. The subsequent spur of imports (i) in view of the confluence of developments was indeed considered to be an "unforeseen development" which was further triggered by (ii) the effect of India's obligations under the said FTAs under Article XXIV of the GATT 1994.

14. India believes that there is no requirement that the "unforeseen developments" should necessarily coincide in time with the increase in imports. The only legal requirement is that the "increased imports" must be an effect or outcome of the "unforeseen developments". It has not been disputed by any of the interested parties that the currency devaluation indeed took place and also the fact that the imports increased in the more recent part of the Period of Investigation (POI). India also submitted that the interested parties have also not denied the occurrence of the individual circumstances/events - the confluence of which was treated as "unforeseen developments". Therefore, India is of the view that it would be illogical to suggest that the "unforeseen developments" should occur and its effects felt exactly at the time of increase in imports.

15. India states that an investigation for safeguard duties is initiated on the basis of an application by the Domestic Industry. Under the rules, it is incumbent upon the Domestic Industry to provide information on all aspects of the factors which need to be examined by the Competent Authority. The Final Findings at paragraphs 82 and 102(iii) clearly show that the Indian Competent Authority has concluded that the domestic industry was able to demonstrate that the developments in the market, which resulted in a surge in imports of the PUC, were indeed unforeseen. It is therefore, evident that the discussions¹⁶ and conclusions as regards the existence of "unforeseen developments", are only that of the Competent Authority as set out at paragraph 81(g) of India's First Written Submissions.

16. In the context of a request by the Panel to elaborate India's argument that the "logical connection test" under the first part of Article XIX:1 is distinct from the "causal link test" under the second part of Article XIX:1, India submitted that since separate and different expressions are used in the said Article, complete meaning must be given to the use of such separate and distinct expressions. India's contention in this regard also draws support from Article 31.1 of the Vienna Convention on Law of Treaties, which *inter-alia* states that "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

17. India's understanding is that the requirement under Article XIX:1(a) necessitates the existence of a logical connection between the "unforeseen developments" and the increased imports. India submits that Article XIX:1(a) itself uses two distinct expressions namely - "as a result of" and "as to cause or threaten". The expression "as a result of" has been interpreted by the Appellate body in *Argentina- Footwear (EC)*¹⁷ to mean that there should be a "logical connection" between the "unforeseen developments" and the increased imports. The "causation analysis" referred to in the second part of Article XIX:1(a), is therefore, clearly distinct from the "logical connection test" emanating from the first part of Article XIX:1(a). The "logical connection" test is clearly of a lesser threshold when compared to the "causation analysis"/ "causal link test" prescribed in the second part of Article XIX:1(a). In India's view, the logical connection test is limited to the demonstration of a "logical link" between "unforeseen developments" and the increase in imports. However, the causal link test puts an obligation on the party to show a "cause and effect" relationship.

18. The Panel sought India's views in the context of the Appellate Body report in *Korea - Dairy* wherein it is stated 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" (paragraph 85 of the Appellate Body Report). India's understanding on what the "logical connection" entails is set out in detail at paragraphs 82 to 84 of its First Written Submissions.

19. As regards India's views on the scope of discussion - the competent authority's determination should entail regarding 'unforeseen developments' under Article XIX of the GATT 1994, India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the

¹⁶ Final Findings, (Exhibit IND-11), paras. 71-82.

¹⁷ Appellate Body Report, *Argentina - Footwear (EC)*, para. 92.

manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact', and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. The discussion, as opposed to explanation, on 'unforeseen developments' is to be on why identified events/circumstances could be regarded as "unforeseen developments". The test is to consider what was and was not actually "foreseen" rather than what might or might not have been theoretically "foreseeable". Broadly, India considers that there should be some discussion regarding the existence of "unforeseen developments" and there is no requirement of establishing a cause and effect relationship with increased imports. India's understanding is more fully reflected at paragraphs 78 to 80 of India's First Written Submissions.

20. India clarifies that steel production worldwide is measured in terms of the crude capacity and the proportion of the PUC remains the same with respect to the crude production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. The analysis is fully reflected in the Preliminary Findings¹⁸ and the Final Findings¹⁹

21. India submits that its obligation is only to examine whether any unforeseen developments resulted in an increase in imports of the PUC into India. There is no requirement to evaluate the demand pattern in other countries as it is not the case of India that India was the only "natural choice". India is of the view that the determination required to be undertaken under Article XIX: 1(a) of the GATT 1994 was limited only to the extent whether the result of the unforeseen developments was an increase in imports of PUC into India. Since India was not obligated under Article XIX: 1(a) of the GATT 1994 to determine whether there were alternate markets with increasing demand and high prices, no such exercise was required to be undertaken. India states that this examination has been done by the Indian Competent Authority, and the specific findings with respect to increase in imports of as a result of "excess capacity of major exporting nations" are clearly set out at paragraphs 19, 21, 24 of the Preliminary finding of the Indian Competent Authority and also at paragraphs 75, 79 and 82 of the Final Findings of the Indian Competent Authority. As regards the observation relating to decrease in demand in European Union and the United States, the Indian Competent Authority has examined the facts and data on record. The said facts and evidences can be found at pages 101-190 of Exhibit- IND 20.

V. India has demonstrated a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing serious injury

22. India expressed its view that the measure in question is a 'safeguard measure' under Article XIX of GATT 1994. India believes that by way of the impugned measures India has suspended its obligations under Article II and Article XXIV of the GATT 1994. Being in the category of "all other duties or charges of any kind" in terms of article II: 1(b) of the GATT 1994, measures adopted by India lead to the suspension of the obligations of India under Article II: 1(b), second sentence, of the GATT 1994. By way of the impugned measures, India has also suspended obligations incurred under Article I: 1 of GATT in as much as the measures did not apply to imports of subject goods from developing countries other than China PR and Ukraine. India's measures have also suspended its obligation with respect to the FTAs/RTAs formed under Article XXIV of the GATT 1994. Section 13 of Article XXIV: 12 of the "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" provides that "*Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory*". In the *EC-Customs Matters*²⁰, the Panel has noted that Article XXIV:12 of the GATT 1994 is drafted as a positive obligation rather than as a defence. More specifically, the use of the word 'shall' in Article XXIV: 12 of the GATT 1994, indicates that that Article imposes an obligation on Members to take all reasonable measures to ensure that local authorities comply with WTO obligations.

23. The panel decision in *US-Steel Safeguards*²¹, holds that - "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the

¹⁸ Preliminary Findings, (Exhibit IND-7), para. 24.

¹⁹ Final Findings, (Exhibit IND-11), paras. 71-82.

²⁰ Panel Report, *EC – Customs*, para. 7.144.

²¹ Panel Report, *US – Steel Safeguards*, paras. 10.139-10.140.

importing Member has tariff concessions for the relevant product". The Final Findings²² issued by the Competent Authority clearly identifies that India has incurred obligations under the GATT 1994 including tariff concessions and clearly indicate²³ why India has chosen to initiate measures under the Safeguard Agreement and not any measures under the respective Free Trade Agreements.

24. In the context of the recent panel report in *Indonesia – Iron or Steel Products*²⁴, where the panel noted that Article XXIV of the GATT 1994 is a permissive obligation and does not impose any positive obligation to enter into a FTA or to provide a certain level of market access to its FTA partners through bound tariffs (paragraph 7.20 of the panel report), India is of the view that as long as there is an obligation which is incurred by a contracting party under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX on the ground that it is not a positive obligation. A plain reading of Article XIX does not allow any distinction to be made for obligations under different provisions of the GATT 1994. Needless to state that such categorization of obligations in terms of Article XIX would tantamount to adding words to the plain language and further qualifying the plain expressions of Article XIX which is completely against the general rules of interpretation of treaties, the customary rules of interpretation of public international law and the Vienna Convention on the Law of Treaties. Further, the panel report was in the context that Indonesia had no binding tariff obligation with respect to galvalume inscribed into its Schedule of Concessions for the purpose of Article II of the GATT 1994. In India's view, Article XXIV is permissive insofar as the Member country has the option to enter or not enter into a FTA/RTA. However, Article XXIV becomes a mandatory obligation, once the FTA/RTA is entered into and accordingly the Member has to necessarily comply with the provisions of the same. Article XXIV cannot be a defence against other binding obligations unless it confers an obligation in itself. Only if Article XXIV confers an obligation in itself, can, the reduced tariff rates under Article XXIV not be violative of Article I and Article II of the GATT. Such a reading is also consistent when Article XXIV is harmoniously read with the other article of GATT 1994. The interpretation adopted as to the construction of Article XXIV of the GATT 1994 should be consonant with the larger objective of making trade free and without barriers. This interpretation is furthered only if Article XXIV is treated as an obligation under the GATT 1994.

25. As regards the effect of the obligation referred to in Article XIX of the GATT 1994, these have been expressly dealt with at paragraphs 80, 81 and 82 of the Final Findings of the Competent Authority. Paragraph 82 of the Final Findings clearly identifies the effect of the obligations as being the increase in imports of PUC in a sudden, sharp, significant and recent manner into India.

VI. India has complied with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of an increase in imports

26. India submits that Japan's claims regarding the violation or breach of Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994 are not only unsubstantiated but also do not have any legal support. After evaluation of all the factors, the Competent Authority found that the significant increase in imports of the PUC in absolute terms, and the increase in imports of PUC was linked to "unforeseen developments".²⁵ The Preliminary Findings²⁶ and the Final Findings²⁷ make the existence of unforeseen developments abundantly clear and also establish a clear correlation between the confluences of events/circumstances constituting "unforeseen developments" and the spurt in imports.

27. India submits that there is no obligation, direction or even guideline under the Safeguard Agreement regarding the selection of the period of investigation. It has been held by successive panels and the Appellate Body, that selection of a period of investigation is the discretion of the investigating authorities so long as it is established that the period selected by the importing member allows it to focus on the recent imports and the period selected by the investigating Authority is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.

²² Final Findings, (Exhibit IND-11), paras. 80-81.

²³ Final Findings, (Exhibit IND-11), para. 55.

²⁴ Panel Report, *Indonesia – Iron or Steel Products* (under appeal to the Appellate Body).

²⁵ Final Findings, (Exhibit IND-11), paras. 71-82, 102(i) and 102(iii).

²⁶ Preliminary Findings, (Exhibit IND-7), para. 24.

²⁷ Final Findings, (Exhibit IND-11), para. 79.

28. India asserts that the selection of the period of investigation and its breakdown was consistent with Article 2.1 of the Safeguard Agreement and Article XIX. The selection of the period of investigation by the Competent Authority fulfills the requirements as enunciated by the panels and Appellate Body. India considers that the period of investigation selected by the Competent Authority was long enough to establish the requirement of increased imports as well as to allow appropriate conclusions to be drawn regarding the state of the domestic industry. The same has been detailed in the initiation notification²⁸ and the provisional findings²⁹ issued by the Competent Authority.

29. The selection of the period of investigation is the sole discretion of the investigating authorities and cannot be questioned unless it is clearly demonstrated that the selected period of investigation presented a distorted picture of the market. Japan's claim that selection of a longer period would have given a different picture, is also not supported by the facts on record. Even assuming that the period of investigation ought to have started from 2011-12, the trends with regard to the imports would have revealed that the imports had indeed gone up in absolute terms as well as in relation to the domestic production. India submits that its selection of the period of investigation fully enabled the Competent Authority to examine the recentness of the imports in the context of the long-term trends and concluded that increase evidenced a certain degree of *recentness, suddenness, sharpness and significance*.

30. Japan's claim that India was required to examine the data preceding the period of investigation is contrary to the Appellate Body report in the *US Steel safeguards* case. India further submits that annualization of data is actually the most obvious and logical methodology available where the data of unequal periods is required to be compared.

VII. India's determination of 'domestic industry' is compliant with Articles 2.1, 4.1(a), (b), (c), 4.2(a) and (b) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994

31. India submits that there is no violation of Article 4.1(c) of the Safeguard Agreement. Article 4.1(c) of the 'Agreement on Safeguards' provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry".

32. Under the second option, the term "domestic industry" shall be understood as producers that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". The definition does not prescribe any specific percentage of total production to qualify the test of "a major proportion", presumably for the reason that such a prescription would have created practical and conceptual difficulties. In the context of the Anti-Dumping Agreement, the panel in *Argentina – Poultry*³⁰, had an occasion to consider whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The panel considered different dictionary definitions and noted that the word "major" is also defined as "important, serious, or significant". The panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.

33. The panel in *US – Wheat Gluten*³¹ had the occasion to examine the link between the phrase "a major proportion" and the question of data coverage, and, has concluded that the 'major proportion' criteria in the definition of 'domestic industry' implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage".

34. India submits that the portion of the domestic producers considered by the Competent Authority in the facts of the present case as "domestic industry" is accounting for more than 67% of the total domestic production and, therefore, it cannot be said to be a low percentage even

²⁸ Initiation Notification (Exhibit- 4), para. 4.

²⁹ Preliminary Findings, (Exhibit IND-7), para. 9.

³⁰ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341-7.343.

³¹ Panel Report, *US – Wheat Gluten*, paras. 8.54-8.56.

arithmetically, relative to the total production in India. Though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.³² The present case is not a case in which Competent Authority excluded producers that filed information but is a case in which rest of the producers did not cooperate.

35. The fact that the Competent Authority has examined data of 67% of the total domestic production leaves no basis to presume that either the injury or the causation determination could have been distorted. In India's view, a portion of the domestic producers who account for "the major proportion" of the total domestic production, can, under no circumstances, be said to be not "a major proportion" of the total domestic production. In other words, "the major proportion" is invariably "a major proportion" but the vice versa may not be true. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehension.

36. Thus, India submits that the 'domestic industry' was defined in a manner that was consistent with Article 4.1(c). Consequently, the injury and causation determinations were also consistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Safeguard Agreement as well as with Article 2.1 of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994. India has also clarified that the data taken by the Competent authority covers both captive and non-captive segments of the domestic production.

VIII. India's measures are compliant with Articles 2.1, 4.1(a) & (b) and 4.2(a) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of serious injury

37. India submits that it has appropriately determined the serious injury and threat thereof as required by Articles 4.1(a), 4.1(b) and 4.2(a) of the Safeguard Agreement. Further, Japan has failed to demonstrate that the increased imports are not the cause of serious injury to the domestic industry.

38. India evaluated each of the enumerated factors under Article 4.2(a) of the Safeguards Agreement in its Final Findings that were "of an objective and quantifiable nature" and that were "having a bearing on the situation" of the domestic industry. The Competent Authority has thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".³³ As regards the factors specifically mentioned under Article 4.2(a), it is settled position that they have to be necessarily evaluated being *ipso facto* "relevant". However, with regard to the "other factors", the text of Article 4.2(a) specifically empowers the Competent Authority to make a judgment whether a particular factor is relevant or not, based on the twin criteria referred above. It is only after the Competent Authority decides about the "relevance" of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise.

39. There is no specific or implied obligation on the competent authorities to give a detailed explanation as to how the trend of each of the factors individually ties in with the findings of serious injury. There is also no obligation to provide any explanation of the "bearing" or "effect" of each of the factors individually on the situation of the domestic industry.

40. Apart from the existing injury, the Competent Authority in the Final Findings, has clearly analyzed as to why there is threat of injury to the domestic industry. The Competent Authority has held that there is a serious injury to the domestic industry due to the surge of imports and the most recent trend of import volumes entering India. It is clear that the findings of the Competent Authority are based on the analysis of the most recent trend of imports which have admittedly shown a sharp increase over the investigation period.

41. India has clarified that the Period of investigation is 1 April 2013 to 30 June 2015. First quarter of the financial year 2015-16 has been annualized for proper comparison with the preceding years. While determining the period of investigation, the Indian Competent Authority took the most recent data in the context of reasonable and sufficiently longer term trends preceding the POI. India

³² Final Findings, (Exhibit IND-11), para. 2.

³³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis. The detailed reasoning has been explained in paragraphs 139 and 140 of India's First Written Submissions. The analysis of the Competent Authority was solely based on the imports which had already taken place in the first quarter of the financial year 2015-2016 at the time and there has been no forecasting. Annualization does not mean a futuristic comparison or analysis but it is a simple methodology to compare the data of one quarter of that year with a 12 months' data of previous year. However, for the purpose of a fair comparison, the most recent data of the second quarter was considered by the Competent Authority³⁴ for threat of "serious injury" analysis.

42. India submits that the panel statement in *US- Line Pipe* has been referred at paragraph 30 of the Final findings only to highlight the fact that there is no prescription on how long the POI should be under the 'Agreement on Safeguards' and that it is the discretion of the Competent Authority to select the period of investigation. The two factors which require examination while choosing a POI are (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered while fixing the POI as evident from a reading of the Final Findings³⁵ of the Indian Competent Authority.

43. As regards the decision of the Competent Authority not to use the data on volume of imports in 2011-2012 and 2012-2013, India is of the view that under the 'Agreement on Safeguards', there is no prescription on how long the Period of Investigation ('POI') should be. India clarified that it is the discretion of the Competent Authority to select the POI. The two factors which require examination while choosing a POI, as has been noted in the panel statement in *US – Line Pipe* are, (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered by the Indian Competent Authority while fixing the POI as evident from a reading of paragraphs 30 and 31 of the Final findings of the Indian Competent Authority. Without prejudice, India submits that it has already demonstrated in its first written submissions (paragraph 130) that even if the data of previous years had been taken, the trend would have remained the same. In view thereof, India restricted its analysis for the period of investigation only.

44. In the context of paragraph 189 of Japan's First Written Submissions, India submits that there has not been any drop in imports in 2013-14 which requires explanation, as the Competent Authority is only mandated to look at the import trend during the POI and not compare the same to periods preceding the POI.

45. India considers that the expression used in Article XIX:1(a) of the GATT 1994 is "*to cause or threaten serious injury to domestic producers*". Therefore, actual serious injury or threat of serious injury can both be considered simultaneously as there is no such prohibition under the 'Agreement on Safeguards'. The Indian Competent Authority has analyzed³⁶ and given its conclusions with regard to "serious injury" as well as "threat of serious injury".

46. India clarifies that the captive production has been considered for production, demand, inventory and capacity utilization while examining the serious injury to the Domestic Industry, and, that captive production has not been considered for sales and profitability, as no sales transactions are involved. India's view is that imports can certainly affect production meant for captive use as such imports can displace the goods produced for captive use. Fall in production leads to increased costs per unit which has a direct impact on the overall profitability. Consequently, imports can lead to loss of market share even when goods are destined for captive use. India clarifies that the 'Domestic Industry' keeps relevant costs data separately for captive production and non-captive sales. There are no sales data for captive segment as legally or commercially, no sales are involved. As regards Japan's contention concerning captive sales, India submits that the Competent Authority is required to examine the "share of domestic market taken by the increased imports". The Competent Authority has clearly demonstrated³⁷ that the share of imports had gone up which leads to the inescapable conclusion that the share of the domestic market was reduced.

³⁴ Final Findings, (Exhibit IND-11), paras. 27-28 and 100-101.

³⁵ Final Findings, (Exhibit IND-11), paras. 30-31.

³⁶ Final Findings, (Exhibit IND-11), paras. 45-59 and 100-101.

³⁷ Final Findings, (Exhibit IND-11), para. 49.

47. In India's view, once the products are covered under "Products under Consideration" ('subject goods'), then no further division/categorization is required with respect to the goods covered under PUC. Consequently, there is no requirement of any such price comparison for categories within such PUC. India submits that in contradistinction to anti-dumping, a safeguard investigation does not envisage detailed model-wise or source-wise price analysis as the focus of the investigation is "increased imports".

48. India submits that increasing or stable trends in injury factors do not necessarily suggest a positive development in the situation of the domestic industry. For example, if the demand in the market has increased and the sales of the domestic producers remain constant, it could still be an indicator of "serious injury" as the entire growth in the market has been taken away by increased imports. Even if some trends suggest a positive development, the conditions may still be sufficient to meet the standard of serious injury. India's view is that only other "relevant factors" and not all "other factors" are required to be examined in the context of injury determination.³⁸

49. India submits that the imposition of safeguards measures by India are only in relation to "Products under Consideration" ('PUC') and that all the comments of interested parties have been fully dealt with while determining the 'PUC'.³⁹

IX. India has complied with Articles 2.1, 4.2(a) and 4.2(b) of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof

50. India submits that it has fully established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b) of the Safeguard Agreement. India has also adequately determined that the increased imports have caused or are threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994.

51. India submits that in its causation assessment, it has evaluated all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. India has based its assessment on the principles set out in the panel report in *Korea – Dairy*.⁴⁰ India submits that Japan has failed to point out any "other factors" which "are of a quantifiable and objective nature" and "have a bearing" on the situation of the domestic industry.

52. India submits that the panel in *US – Wheat Gluten* expressed its views that "overall coincidence" is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the Competent Authority has considered. India further submits that detailed findings have been recorded in respect of the coincidence of increased imports and the factors which the Competent Authority has considered as relevant. Therefore, Japan's claim that India has failed to establish overall coincidence in time between the movements in imports and the movements in injury factors, does not have either the factual or legal support. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan that the Competent Authority must carry out the causation analysis of all injury factors. The Competent Authority has also adequately analyzed the movement of the decreasing price of the imported products and the decreasing price of the domestic products.⁴¹

53. India submits that the entire analysis of the Competent Authority is based on the actual data made available to it, keeping in view the obligations under Article 3.2 of the 'Agreement on Safeguards'. Further, no 'What if' type analysis were undertaken by India, as there is no such obligation under the 'Agreement on Safeguards'.

54. India refutes Japan's claim that the Final Findings do not contain any non-attribution analysis in the section entitled "Causal Link between Increased Import and Serious Injury or Threat of Serious Injury". The Competent Authority has clearly determined that for the purpose of determining causation, all relevant factors of an objective and quantifiable nature having a bearing on the

³⁸ India's first written submission, paras. 181-192.

³⁹ Final Findings, (Exhibit IND-11), paras. 18-23.

⁴⁰ Panel Report, *Korea – Dairy*, paras. 7.89-7.90.

⁴¹ Preliminary Findings, (Exhibit IND-7), para. 25(g); Final Findings, (Exhibit IND-11), para. 49(g)(ii).

situation of that industry have been evaluated⁴². There was no occasion to refer to any other factor in view of the determination by the Competent Authority that none of the "other factors" can be considered as relevant on account of the fact that they were neither objective nor quantifiable in nature, nor did they have a bearing on the situation of the industry.

55. India also clarifies that imports from all sources including those from Japan and Korea have been considered as a "relevant factor of an objective and quantifiable nature having a bearing on the situation of [domestic] industry". In India's view, it is not permissible to carry out the injury analysis in the context of any particular country or a group of countries as the entire analysis is in the context of "imports" alone irrespective of its source. Further, any bilateral safeguard proceedings under the respective FTAs would not have addressed the imports from other sources which are not a part of the relevant FTA.

56. In view of the above, India submits that it has fully complied with its obligations and appropriately demonstrated the causal link between the increased imports and the serious injury or threat thereof.

X. India's safeguard measures are in accordance with Articles 5.1 and 7.1 of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994

57. India submits that the safeguard measure adopted by India clearly reflect that India levied the safeguard duties only to the extent and duration necessary to prevent and remedy serious injury to its domestic industry in terms of Article 5.1 & 7.1 respectively of the 'Agreement on Safeguards'. Further, there is no obligation as such to provide any justification or reasoning to demonstrate the necessity of the measures except when there are quantitative restrictions. India further submits that Japan has failed to show any obligations emanating from Article 5.1, which make it imperative for the Indian Authority to have "explained and attributed" the serious injury due to increased imports and decided upon the extent of applicability of safeguard measures explaining a nexus between serious injury due to increased imports and the extent of safeguard measures applied. India further submits that Japan has not provided any reason in support of their claim nor have they established as to how there is a violation of Article 7.1 when India has fully complied with its obligations under Article 4.2(b).

58. India clarifies that there is no indication or even a suggestion in the text of the Agreement that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Safeguard Agreement.

XI. India acted in full compliance with Articles 3.1 and also 4.2(c) of the Safeguard Agreement and its obligation thereto.

59. India submits that the analysis of the panel in *US – Steel Safeguards* dispute⁴³ makes it abundantly clear that the requirement as to reasoned conclusion under Article 3.1 is limited to "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the Safeguard Agreement only. In other words, Article 3.1 does not require any additional explanation than what is expressly prescribed under Agreement on Safeguards or Article XIX of the GATT 1994. Further, Article 4.2 (c) requires the Competent Authority to publish a report containing detailed analysis of the case under investigation and to demonstrate relevance of the factors examined. India submits that the report of the Competent Authority was clearly in accordance with the above provisions, fulfilling every condition required therein.

60. Also, India has clearly demonstrated in the previous sections that the Indian Competent Authority has fully complied with its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 and has provided a reasoned and adequate explanation of its determination concerning "all pertinent issues of facts and law". Therefore, India has not violated any of its obligations under Agreement on Safeguards or under Article XIX:1(a) of the GATT 1994.

⁴² Final Findings, (Exhibit IND-11), para. 65.

⁴³ Appellate Body Report, *US – Steel Safeguards*, para. 304.

XII. India has complied with Article 11.1(a) of the Safeguard Agreement.

61. India submits that since the safeguard measures imposed by India are fully in compliance with the provisions of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994, there can be no violation of Article 11.1(a) of the Safeguard Agreement.

XIII. India has complied with Article 12 of the 'Agreement on Safeguards'

62. India submits that the Competent Authority had come to a conclusion that increased imports of subject goods into India has caused and threatened to cause serious injury to the domestic industry of subject goods, and, that any delay in application of provisional safeguard duties would have caused damage which would have been difficult to repair. Imposition of provisional safeguard duties ('*which measure has now elapsed*') on an urgent basis was necessitated due to the existence of critical circumstances. India had immediately thereafter notified the fact of imposition of a provisional safeguard measure to the "Committee on Safeguards". India states that it notified the relevant requirements in all instances to the Committee of safeguards within 6-8 days of the date of initiation, findings of serious injury or the imposition of definitive safeguard measures and has complied with the requirement under Article 12.1 of the Safeguard Agreement as interpreted by the panel in *US – Wheat Gluten*.

63. The nature of information provided by India in the notification to the "Committee on Safeguards" is in accordance with the requirements under Article 12 of the "Agreement on Safeguards" as interpreted by the Appellate Body decision in *Korea -Dairy*. Further, the notification by India contained all the necessary facts and information which were required to be provided to the committee on Safeguards.

XIV. There is no violation of India's obligations under Article I:1 or Article II:1(b) of the GATT 1994

64. India submits that since the measures at issue were imposed in pursuance of Article XIX of GATT 1994, the obligation of India under Article II:1(b) and Article I:1 *ipso facto* gets suspended. Since the measures at issue was imposed in the form of a safeguard duty in terms of Article XIX of GATT 1994 and the Safeguard Agreement, the question of any violation of Article II:1(b) or Article I:1 of GATT does not arise.

65. Under the Indian legislation, safeguard duties are not "ordinary customs duties" as they can only be imposed only through the application of the law on safeguards, strictly adhering to all the conditions prescribed therein like progressive liberalization, facilitation of adjustment and the obligation to impose it only for the time and to the extent necessary. Therefore, under the Indian legislation too, like Article II:1(b) of GATT, safeguard duties would be considered as "any other type of duties". India is of the view that as long as a measure has been taken under the provisions of the 'Agreement on Safeguards' and 'Article XIX of the GATT 1994', it can only be regarded as a "safeguard measure".

XV. Conclusion

66. Firstly, India and Japan both unanimously agree that the measures in issue are Safeguard measures and have been levied under Article XIX:1(a) of the GATT 1994 read with the Safeguard Agreement. In this regard, India submits that India considers the measures in dispute as "other duties and charges" in terms of Article II:1(b) of the GATT 1994.

67. Secondly, Japan seems to be not too sure about the fruitfulness of the dispute or its outcome.

68. Thirdly, both India and Japan agree that the requirement in the first part of Article XIX, i.e., the test of "as a result of" is different from the "causation analysis" mentioned in the second part of Article XIX:1(a) of the GATT 1994.

69. Fourthly, Japan accepts that the "change in the competitive relationship between the imports and the domestic sales" is not emanating out of the text of either the Safeguard Agreement or the GATT 1994.

70. Fifthly, India understands that both the parties agree that the requirement with regard to "unforeseen developments" has to find "at least some discussion" in the Final Findings of the Authority as opposed to an elaborative analysis.

71. Sixthly, Japan does not dispute the fact that the examination of both injury as well as the threat to injury is possible under the Safeguard Agreement.

72. India submits that it has adequately demonstrated that the measures in dispute have not violated any requirement emanating from its international obligations. In particular, there were no violation with respect to India's determination with regard to unforeseen developments, domestic industry, serious injury or threat to serious injury determination, causal link and any other specific provisions contained in GATT 1994 or in Agreement on Safeguards.

73. For the foregoing reasons, India requests the Panel to find that the measures that the Complainant has challenged are not inconsistent with India's WTO obligations that the Complainant has cited.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF INDIA

1. In its First Written Submission, Second Written Submission and in its oral statements in the first and second substantive meetings, India clearly established that the measure taken by India is in compliance with its obligations under the Agreement on Safeguards and the GATT, 1994. Further, in India's reply to the questions posed by the Panel and its comments on Japan's responses to the questions posed by the Panel, India has elaborately explained why the issues raised by Japan do not hold any factual or legal merit.

2. One of the preliminary issues in the current dispute remains whether the Panel should give its ruling in the present dispute and whether such a ruling would serve the objective set out in terms of Article 3.7 of the DSU. In this regard, the Panel had raised a specific question¹ to Japan regarding India's request that the Panel specifically determine whether the complaint brought by Japan in these proceedings is in accordance with Article 3.7 of the DSU. Japan, in its response², submitted that it is the discretion of the Members to decide upon bringing a case against another Member under the DSU.

3. In this context, India reiterates that it does not question the discretion enjoyed by any Member in deciding whether to bring a case against another Member under the DSU. However, in India's view, this Panel may appreciate the relevance of the second part of Article 3.7 which refers to the possible remedy or outcome of any decision of the DSB. Even if this Panel rules that the measures imposed by India are not consistent with its obligations under the WTO Agreements, the only possible outcome in the present case would be withdrawal of the measures by India. Since the measures imposed by India have already expired on 13 March 2018, it is clear that no useful purpose would be served if Japan wishes to pursue with its claims.

4. In its Second Written Submissions India clarified that the measure at issue has expired on 13.03.2018.³ In its oral statement at the second substantive meeting, Japan stated that even if the measures have expired, "those measures will continue to have effect after their alleged expiry".⁴ India in its response to the question posed by the Panel clarified that Section 28 of the Customs Act, 1962, which Japan has referred to, cannot be applied to any imports subsequent to the date of the expiry of the measure in dispute i.e., after 13 March, 2018.⁵ India also submitted that since the safeguard measure in question has already lapsed, it cannot be renewed under any circumstances. In fact, India is proscribed from even imposing a fresh safeguard measure against the products in question in terms of Article 7.5 of the Agreement on Safeguards for the period equivalent to the period in which the measure in dispute was in force i.e., for two years and six months from 13 March, 2018.⁶ Japan also contended that India failed to demonstrate that the measure in dispute has indeed expired.⁷ In this regard, India submits that the document imposing the measure in question itself categorically states that the measure shall be in force only until 13 March, 2018.⁸ Further, India's notification dated 04.04.2015 to WTO Committee on Safeguard also clearly states that the measure is in force only until 13 March, 2018.⁹ Thereafter, in its Second Oral Statement, India has formally clarified that the measure has not been extended beyond 13 March 2018 and that it has expired on that date.¹⁰

¹ Panel question No. 13.

² Japan's response to Panel question No. 23.

³ India's second written submission, para. 2.

⁴ Japan's opening statement at the second substantive meeting of the Panel, para. 19.

⁵ India's response to Panel question No. 76.

⁶ India's response to Panel question No. 75. See also, India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para. 17.

⁷ Japan's response to Panel question No. 72.

⁸ Customs Notification No. 1/2016 (SG) dated March 29, 2016 (Exhibit – IND 13).

⁹ Notification under Article 12.1(b) of the Agreement on Safeguards, notification pursuant to Article 12.1(c) of the Agreement on Safeguards, notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, dated 04.04.2016 (Exhibit – IND 14).

¹⁰ India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para 12.

5. Japan claims that India has failed to demonstrate that the challenged measure has expired on the basis of the provisions of section 28 of the Customs Act.¹¹ India submits that Japan has failed to appreciate that Section 28 of the Customs Act, 1962 is a provision meant only for collection of duties which were not levied or have been short levied or erroneously refunded. Section 28 is not even remotely connected with the imposition of duties. India submits that the existence or expiry of a measure is to be understood in the context of "levy" or "imposition" alone and not with reference to its "collection". Therefore, any reference to a collection mechanism of a duty (which was otherwise due at the time of importation) for making a claim that the effect of the measure still survives, is completely misplaced.¹² India would also submit that non-collection of any duty which was due prior to the expiry of the measure as a consequence of a ruling of the Panel, would amount to giving effect to the Panel's recommendations retrospectively which would be contrary to the decision of the Appellate Body in *US – Cotton case* and the text and interpretation of the DSU.¹³

Japan's claims regarding "unforeseen developments" are without merit

6. India submits that it has fully complied with its obligations under Article XIX:1(a) of the GATT 1994. India states that the entirety of Japan's claims regarding "unforeseen developments" are premised on (i) erroneous interpretations which do not find support from either the text of Article XIX:1(a) or the 'Agreement on Safeguards'; (ii) reading in additional words/obligations into the text of Article XIX:1(a) which is impermissible; (iii) incorrect application of the decisions of the panels or the Appellate Body; (iv) a "what if" kind of analysis based on assumptions and presumptions instead of countering the analysis carried out by Competent Authority on merits, and (v) erroneous and incomplete reading of the Preliminary Findings and Final findings of the Competent Authority.¹⁴

7. While India's understanding is that Article XIX of the GATT, 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated, India has, as a matter of fact, provided adequate explanation as to why they were unforeseen at the appropriate time. In fact, Japan itself in its Second Written Submission at paragraphs 8 and 15 clearly accepts that the requirement as per the panel and Appellate body decisions is only of "some discussion" in the published report.¹⁵ The Final findings of the Competent Authority clearly refer to the panel report in *US – Steel Safeguards*, which observes that a confluence of events can constitute 'unforeseen developments',¹⁶ and, thereafter, contains an identification and discussion of circumstances/events, the confluence of which constitutes "unforeseen developments". The Preliminary Findings,¹⁷ also clearly indicate that a confluence of circumstances/developments, has been taken to constitute "unforeseen developments" by the Competent Authority¹⁸. Japan itself does not dispute that a confluence of circumstances can together form the basis of "unforeseen developments"¹⁹.

8. Further, Japan is not correct in believing that the obligation of demonstrating the existence of "unforeseen developments" should be only with respect to the specified products. India states that while the determination of "increased imports" should be with respect to the PUC, the existence of "unforeseen developments" need not be limited to the PUC alone. Japan's interpretation is based on an erroneous reading of Article XIX:1(a). Also, the specific findings in the Final Findings under the heading "increased imports", clearly demonstrate that the determination of "increased imports" has been made only in relation to the PUC²⁰.

9. While Japan asserts that the "unforeseen developments" should modify the competitive relationship between the imported and domestic products, it has not addressed the issue raised by the Panel as to what are the elements demonstrating the change of competitive relationship to the detriment of domestic products resulting in increased imports causing serious injury to the domestic

¹¹ Japan's opening statement at the second substantive meeting of the Panel.

¹² India's comments on Japan's response to Panel question No. 72, para. 4.

¹³ India's comments on Japan's response to Panel question No. 72, para. 5.

¹⁴ India's opening statement at the second substantive meeting of the Panel, para. 9.

¹⁵ Japan's second written submission, paras. 8 and 15.

¹⁶ Final Finding, (Exhibit IND-11), para. 74.

¹⁷ Preliminary Findings, (Exhibit IND-7), para. 24.

¹⁸ India's first written submission, para. 81.

¹⁹ Japan's second written submission, para. 10.

²⁰ Final Findings, (Exhibit IND-11), paras. 34-42. See India's opening statement at the second substantive meeting of the Panel, para. 10(c).

industry. India submits that such obligation/requirement does not flow from Article XIX: 1(a) and that Japan is trying to read in additional obligations/requirements into Article XIX: 1(a), where none exists. India believes that since there is no such requirement under the GATT or the Agreement on Safeguards, it would neither be necessary nor possible to identify elements demonstrating the same.²¹

10. Japan has, apart from a mere assertion that it is a complex matter, not discharged its burden of proof to demonstrate that how the present investigation can be considered as a complex matter²² as it involves only a single safeguard measure. India's understanding is that a complex matter, requiring a more detailed discussion, would be in the nature of that referred to in the panel report in *US – Steel Safeguards*, which dealt with ten safeguard measures applied by the USA on imports of ten different products.²³ Thus, India has fully complied with its obligations under Article XIX: 1(a).

11. While Japan has claimed that for those developments which are specific to certain exporting countries, the Competent Authority should have made an analysis on a country-specific basis²⁴, Japan does not cite any basis/authority in support of its claim. India submits that Japan's assertion that India has to show a causal link between "unforeseen developments" with respect to some specific countries and increase in imports from all the sources, is misplaced. The Agreement on Safeguards or the GATT does not require a member to impose safeguard duties only against the sources from where there has been an increase in imports or the sources with respect to which "unforeseen developments" have occurred. Such a requirement would indeed result in creating a paradoxical situation where the Competent Authority would have to impose the duties against sources from where there has been no increase in imports even after an express finding that they are not causing serious injury in terms of Article 4.²⁵

12. As regards Japan's contention regarding the need to explain the impact of the "unforeseen developments" on the specific product at issue,²⁶ India reiterates that steel production worldwide is measured in terms of the crude steel capacity. The proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. Japan has, apart from making certain bare allegations²⁷, not provided any evidence to prove to the contrary. In fact, Japan itself proceeds on the assumption that the production of PUC increases in the same proportion as the production of crude steel.²⁸

13. Japan further asserts that the Preliminary Findings and Final Findings do not contain any explanation with regard to crude capacity. In this regard India submits that paragraph 24 of the preliminary findings clearly refers to the report published in *World Steel Dynamics* while concluding that the world excess capacity and increasing Indian demand are the reasons of increase in imports.²⁹ Since it is a known fact that the steel production worldwide is measured in terms of the crude steel capacity, it is apparent that the steel capacity mentioned in the above analysis of the Competent Authority is the crude steel capacity. India reiterates that the proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain.³⁰

14. India vehemently disagrees with Japan's contention that the conclusions regarding "unforeseen developments" in the Final Findings are that of the domestic industry. India reiterates its submissions made in response to question 23 of the Panel that paragraph 102 of the Final Findings indeed reflects the conclusion of the Competent Authority. That the events constituted "unforeseen developments", is clearly a conclusion reached by the Competent Authority in the Final Findings at

²¹ India's second written submission, paras. 9-10.

²² India's second written submission, para. 88.

²³ India's opening statement at the second substantive meeting of the Panel, para. 10(e).

²⁴ Japan's first written submission, para. 124.

²⁵ India's comments on Japan's response to Panel question No. 89, para. 24.

²⁶ Japan's second written submission, para. 53.

²⁷ Japan's second written submission, paras. 57-58.

²⁸ Japan's second written submission, para. 59. See also, India's comments on Japan's response to Panel question No. 89, para 27.

²⁹ India's comments on Japan's response to Panel question No. 89, para. 27.

³⁰ Refer to pages 82 to 86 of the petition filed by DI on 27.07.2015, which was a part of the public file (Exhibit – IND 20).

paragraph 82 and 102(iii). These are the conclusions of the Competent Authority on the basis of which the safeguard measures were notified. The mere fact that submissions of domestic industry in this context were accepted by the Competent Authority, does not make them the conclusions of the domestic industry. The conclusion clearly remains that of India's Competent Authority.³¹

15. In view of India's submissions, Japan's claim that India did not properly determine whether the unforeseen developments resulted in increased imports in such quantities and under such conditions so as to cause or threaten to cause serious injury to the domestic industry, deserves to be rejected by the Panel.

Japan's claims regarding absence of logical connection between increase in imports and unforeseen developments are baseless

16. Japan disputes India's understanding that the "logical connection" requirement is a test of lesser threshold as compared to the "causation" requirement.³² It states that there is no textual basis to argue that one is of a lesser threshold than the other and that they merely relate to different elements examined in a safeguard investigation.³³ India submits that the said statement of Japan is contradictory to its own response to the question 24 asked by Panel³⁴ wherein Japan has stated that the logical connection test requires demonstrating how the increase in imports causing serious injury or threat thereof is connected or linked to the unforeseen developments and the effect of the obligations incurred under the GATT 1994.³⁵ Japan further states that the causal link test requires demonstration of the existence of a causal link, i.e., a genuine and substantial relationship of cause and effect between the increased imports and the serious injury or threat thereof suffered by the domestic industry.³⁶ It is evident from Japan's own submission that the logical connection test requires merely a connection or link whereas the causal link test requires the demonstration of a genuine and substantial relationship. Evidently, the requirement of demonstrating a connection or link is of a lower threshold than that of demonstrating a genuine and substantial connection.³⁷ Further, Japan while acknowledging that the two tests are inherently different³⁸, denies the difference in the threshold in any of the tests. However, as stated above, Japan itself contradicts its stance wherein it has clearly expressed its understanding as to how the logical connection test is of a lower threshold as compared to that of the causation test.³⁹

17. Japan further argues that increase in imports would occur when imported products replace domestic products, resulting in both an increase in imports as well as a decrease in sales of domestic products in absolute or relative terms.⁴⁰ Japan's interpretation does not emanate from the plain text of the GATT 1994 or the Agreement on Safeguards which requires the Competent Authority to merely demonstrate an increase in imports in absolute or relative terms.

18. In view of the above, India submits that Japan has clearly failed to indicate any flaw in the examination of the Competent Authority with regard to unforeseen developments and its logical connection to increased imports.

Japan failed to substantiate its claim regarding improper determination of 'period of investigation'

19. In response to question 94 by the Panel, Japan asserts that the Indian authority failed to make a qualitative analysis of the increase in imports such as to ensure that the alleged increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both quantitatively and qualitatively. Further, while Japan does not point out any specific shortcoming in the Competent Authority's selection and analysis of the POI, it suggests that the Competent Authority should have

³¹ Final Findings, (Exhibit IND-11), paras. 34-42. See India's opening statement at the second substantive meeting of the Panel, para. 10(i).

³² Japan's second written submission, para. 29.

³³ Japan's second written submission, para. 29.

³⁴ Japan's response to Panel questions, paras. 23-24.

³⁵ Japan's response to Panel questions, para. 23.

³⁶ Japan's response to Panel questions, para. 24.

³⁷ India's opening statement at the second substantive meeting of the Panel, paras. 12-14.

³⁸ Japan's response to Panel questions, para. 25.

³⁹ India's opening statement at the second substantive meeting of the Panel, para. 15.

⁴⁰ Japan's second written submission, para. 38.

conducted its examination as per the methods suggested by it.⁴¹ Further, Japan takes retreat from its previous claim⁴² and clarifies that its claim focuses on the fact that the Indian authority failed to make a qualitative analysis, noting that while examining data outside the POI or determining a longer POI would be one possible method to ensure a qualitative analysis, there may be other methods to do so.⁴³

20. In this regard, India reiterates that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.⁴⁴ While Japan expressly admits that there could be various methods of doing qualitative analysis⁴⁵, it fails to specifically point out how the POI selected by the Competent Authority does not qualify the test of 'qualitative analysis'. Japan further contends that determining a longer POI would be one possible method to ensure a qualitative analysis. However, it does not indicate how much longer a POI (3 years, 4 years or 10 years) would have qualified its understanding of the test of 'qualitative analysis'. Further, when specifically asked by the Panel in question 96(a) that whether a period of investigation of two years and three months would be sufficient in order to make an objective analysis of import trends, Japan refrains from providing any answer to the said question. Therefore, while Japan's claims regarding POI lack factual or legal basis, Japan also failed to discharge the burden of proof to establish that the period selected by the Competent Authority was not in accordance with the Agreement on Safeguards or the legal framework as interpreted by panels and the Appellate Body.⁴⁶

21. Japan notes that there is no provision in the Agreement on Safeguards which prohibits the examination of data outside the POI.⁴⁷ India agrees with Japan that there is no bar on the Competent Authority to examine the data outside the POI. However, India notes that the discretion, in this regard, lies with the Competent Authority.⁴⁸

22. As regards the basis of the selection of the POI, in paragraphs 30 and 31 of the Final Findings, the Competent Authority has clearly provided the basis of selection of the POI. As discussed in paragraph 30 of the Final Findings, the selection of the POI was based on (i) principles set out in the panel findings in US – Line Pipe; (ii) facts of the present case; and (iii) the information and sources of information analyzed by the Competent Authority. Further, in paragraph 31 of the Final Findings the Competent Authority clearly considered it appropriate to take the present POI in view of the decision of panel mentioned in paragraph 30.⁴⁹

Japan failed to substantiate its claim regarding improper determination of 'Increase in imports'

23. In its Second Written Submission, Japan seeks to dispute India's claim that the Panel cannot be called upon by Japan to rule with regard to the alleged violation of Article 2.1 of the Agreement on Safeguards.⁵⁰ Japan contends that it has, at various junctures, claimed violation of Article 2.1. However, India submits that Japan did not make any claim with respect to the violation of Article 2.1 *per se* and all its claims are merely consequential. India further submits that a mere reference by Japan to an Appellate Body report cannot be construed as an independent claim of violation of Article 2.1. India submits that the facts of the present case are *similis* to the panel's finding in *Korea – Dairy* to the extent that Japan has merely stated (without specifically claiming) that India violated Article 2.1 of the Agreement on Safeguards and all the claims regarding such violation are merely consequential. However, in its submissions, Japan did not specifically claim nor did it submit any evidence in respect of violation

⁴¹ Japan's response to Panel question No. 94, para. 39.

⁴² Japan's first written submission, para. 179.

⁴³ Japan's response to Panel question No. 94, para. 40.

⁴⁴ India's first written submission, paras. 118-140.

⁴⁵ Japan's response to Panel question No. 94, para. 40.

⁴⁶ India's comments on Japan's response to Panel question No. 94, para. 35.

⁴⁷ Japan's response to Panel question No. 96.

⁴⁸ India's comments on Japan's response to Panel question No. 96, para. 39.

⁴⁹ India's response to Panel question No. 99.

⁵⁰ India's first written submission, para. 120.

of Article 2.1. India submits that in such circumstances, the Panel may refrain from ruling upon the alleged violation of Article 2.1 of the Agreement on Safeguards.⁵¹

24. Japan contends that the Indian authority failed to make a qualitative analysis of the "increase in imports".⁵² In this regard, India observes that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.⁵³

Japan failed to substantiate its claim regarding improper determination of Domestic Industry

25. Japan seems to disagree with India's contention that there is no violation of Article 4.1(c) because the producers included in the domestic industry accounted for more than 67% and therefore constituted a "major proportion" of the total domestic production. As already explained in India's First Opening Statement, the term "domestic industry" under Article 4.1(c) of the Agreement on Safeguards is defined as "the producers as a whole of the like or directly competitive products" or "those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". It is undisputed that Article 4.1(c) of the Agreement on Safeguards provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry". Under the second option, the term "domestic industry" shall be understood as producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".⁵⁴

26. Under the second option, the Agreement on Safeguards consciously does not specify any precise definition in terms of a percentage of total production to qualify the test of "a major proportion" presumably for the reason that such a prescription would have created practical and conceptual difficulties. For example, any prescription of a particular percentage, say more than 50% for applying the test of "major proportion" in Article 4.1(c) of Agreement on Safeguards in the context of fragmented industry, may result in practical difficulties not only for data collection but also for injury and causation analysis. India considers that it is in this backdrop that Article 4.1(c) of the Agreement on Safeguards is silent on what proportion of total production of domestic producers must be taken into consideration for evaluating whether a certain percentage constitutes "a major proportion".⁵⁵

27. Japan places reliance on *Russia – Commercial Vehicles* to assert that the determination of the Domestic Industry by the Competent Authority was flawed. In this regard, India submits that Japan's reliance on *Russia – Commercial Vehicles* is completely misplaced in the facts and circumstances of the present case. The panel in *Russia – Commercial Vehicles* had found that the investigating authority: (a) had decided not to include a domestic producer of the like product after having reviewed that producer's data; and (b) had not provided the reasons for the exclusion of that producer in the investigation report. On the contrary, the present case is not about the exclusion of certain domestic producer. In the present case, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, nevertheless questionnaires were sent to all other known producers of the PUC, as reflected in the Final Findings.⁵⁶ Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meet

⁵¹ India's opening statement at the second substantive meeting of the Panel, para. 18.

⁵² Japan's second written submission, para. 103.

⁵³ India's first written submission, paras. 118-140. See, India's opening statement at the second substantive meeting of the Panel, para. 21.

⁵⁴ India's opening statement at the first substantive meeting of the Panel, paras. 16-17.

⁵⁵ India's opening statement at the second substantive meeting of the Panel, para. 25.

⁵⁶ Final Findings, (Exhibit IND-11), para. 2.

the requirements set out under the Agreement on Safeguards.⁵⁷

28. Further, in response to question 104 by the Panel, Japan agrees that the facts in *Russia – Commercial Vehicles* and in the investigation at issue are different. However, Japan claims that the way the Indian authority determined the domestic industry introduced a material risk of distortion. Japan also makes an assumption that, in the present case, the Indian authority received information concerning all six domestic producers but only three were included as a part of the domestic industry. Japan states that although the three producers (not included in the domestic industry), did not expressly indicate their willingness to be included in the domestic industry, they had provided information in the application and expressly supported the application.⁵⁸

29. India vehemently denies the claims made by Japan as they are neither supported by facts of the case or the information available on record nor are they supported by any evidence. Indeed, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.⁵⁹ In fact, since the other domestic producers did not respond to the questionnaire sent to them by the Competent Authority or sent any request for being considered as an interested party, the said other domestic producers were not even considered as interested parties in the present investigation.⁶⁰ Japan's claim that the Competent Authority had the data and information pertaining to the domestic producers not constituting domestic industry is also not supported by any evidence on record. Japan fails to appreciate that in the absence of cooperation from domestic producers not constituting domestic industry, the Competent Authority is required only to ensure that the information relied upon to reach its conclusions, meets the requirements under the Agreement on Safeguards.⁶¹

30. While Japan considers the method of determination of domestic Industry by India as a "mere quantitative approach", it fails to present any alternative method of such determination or point out any legal inconsistency in the method adopted by the Competent Authority. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehensions. India respectfully submits that injury determination of Competent Authority is based on wide-ranging information regarding domestic producers and is not distorted or skewed as is evident from the details in the Final Findings.⁶²

31. In question 106 when Panel asked Japan to substantiate its claim that only the alleged low performing producers were *on purpose* included into the definition of the domestic industry, Japan states that such evidence is not necessary.

32. Japan further alleges that in the present case there was a 'self selection' of the Domestic Industry by the domestic producers.⁶³ India submits that the Japan's contention is presumptuous as there was neither any 'self-selection' by the Domestic Industry nor any 'automatic acceptance' by Competent Authority. Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meets the requirements set out under the Agreement on Safeguards. In any case, Japan failed to indicate any alternate method by which the Competent Authority could have examined the other producers whose data was also not available with the Competent Authority.⁶⁴

33. India submits that Japan's claim with respect to violation of Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) is based on the presumption that the determination of the "domestic industry" by the Competent Authority is inconsistent with its obligations under Article 4.1(c) which India vehemently denies. As explained earlier, India has sufficiently established that its determination of the "domestic industry" was wholly consistent with the provisions of Article 4.1(c).⁶⁵

⁵⁷ India's response to Panel question No. 105.

⁵⁸ Japan's response to Panel question No. 104.

⁵⁹ Final Findings, (Exhibit IND-11), para. 4.

⁶⁰ Final Findings, (Exhibit IND-11), para. 5.

⁶¹ India's comments on Japan's response to Panel question No. 104, para. 45.

⁶² Final Findings, (Exhibit IND-11), paras. 24-26. See *also*, India's opening statement at the second substantive meeting of the Panel, para. 29.

⁶³ Japan's response to Panel question No. 106.

⁶⁴ India's comments on Japan's response to Panel question No. 106, para. 48.

⁶⁵ India's opening statement at the second substantive meeting of the Panel, para. 30.

Japan's claims regarding improper determination of serious injury and threat thereof are without merit

34. Japan stated in its Second Written Submission that the standard of serious injury is, on its face, "very high" and "exacting".⁶⁶ It further contends that India misread the Appellate Body's findings in *US – Wheat Gluten* when it argues that "the term 'exacting' was used in the context of the 'legal standard in the Agreement on Safeguards' and not for 'serious injury' itself".⁶⁷ In this regard, India reiterates that "serious injury" is defined under Article 4.1(a) of the Agreement on Safeguards as "a significant overall impairment in the position of a domestic industry" and there is no obligation, explicit or implicit, that the standard of "serious injury" set forth in Article 4.1(a) is, on its face, "very high" and "exacting", as proposed by Japan.⁶⁸ India also reiterates that the observation of the Appellate Body was unambiguously in the context of making a contradistinction between the term "material injury" in the Anti-dumping Agreement and "serious injury" as defined under Agreement on Safeguards. India further submits that while the term "serious injury" may be of a higher standard as compared to "material injury" under the Anti-dumping Agreement, the observations of the Appellate Body cannot be construed to give the term "serious injury" the status of an absolute standard, as proposed by Japan. The obligations of the Members in terms of Article 4.1(a) have to be understood and given its meaning within the framework of the Agreement on Safeguards and there is no room for casting any additional burden or obligation on a Member than what is specifically provided in the Agreement on Safeguards.⁶⁹ In other words, the Appellate Body merely stressed the point that the legal standards have to be exacting which cannot be construed to mean that the assessment of "serious injury" itself ought to be "exacting".⁷⁰

35. With regard to Japan's contentions relating to obligations imposed on the competent authorities in the context of the serious injury analysis⁷¹, India reiterates that the Competent Authority in its findings has not only evaluated the listed factors in Article 4.2(a) to justify a determination of 'serious injury' under the Agreement on Safeguards⁷² but has also thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".⁷³ The Competent Authority has indeed conducted a substantive evaluation of the 'bearing', or the 'influence' or 'effect' or 'impact' that the relevant factors have on the 'situation of the domestic industry' as suggested in the Appellate Body Report, *US – Lamb*.⁷⁴

36. Japan disagrees with India's argument that the "other factors" that must be examined in the framework of the non-attribution analysis pursuant to Article 4.2(b) are factors that are found by the competent authorities to be "relevant".⁷⁵ In India's view, whether a factor is "relevant" depends on whether it is "of an objective and quantifiable nature" and "having a bearing on the situation" of the domestic industry pursuant to Article 4.2(a). India claims that "it is only after the Competent Authority decides about the 'relevance' of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise".⁷⁶

37. Further, Japan contends that there is no textual basis to support India's understanding that the "other factors" examined under Article 4.2(a) and Article 4.2(b) of the Agreement on Safeguards should be identical. According to Japan, the "other factors" examined pursuant to Article 4.2(b) in the context of the non-attribution analysis are factors which have an effect on the state of the domestic industry.⁷⁷ India submits that Japan is attempting to read words and phrases which are not a part of the Agreement. There is nothing in the text of the Article to suggest that the non-attribution obligation requires a distinct examination in the context of "factors which have an effect on the state of the domestic industry". It is submitted that the two paragraphs of Article 4.2 cannot

⁶⁶ Japan's second written submission, para. 135.

⁶⁷ Japan's second written submission, para. 136.

⁶⁸ India's opening statement at the second substantive meeting of the Panel, para. 33.

⁶⁹ India's opening statement at the second substantive meeting of the Panel, para. 34.

⁷⁰ India's first written submission, para. 180.

⁷¹ Japan's second written submission, section E. 2 (ii), paras. 138-142.

⁷² Appellate Body Report, *Argentina – Footwear (EC)*, para. 138.

⁷³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

⁷⁴ Appellate Body Report, *US – Lamb*, para. 104. See also, India's opening statement at the second substantive meeting of the Panel, para. 36.

⁷⁵ India's first written submission, paras. 276, 278 and 279.

⁷⁶ India's first written submission, para. 279. See, India's second written submission, para. 16.

⁷⁷ India's second written submission, para. 17.

be read disjunctively as is being suggested by Japan. It is very clear from a plain reading of Article 4.2(a) that in the investigation to determine whether increased imports have caused serious injury or are threatening to cause serious injury, the competent authorities shall evaluate "all relevant factors". Thus, the examination is not restricted to some factors but extends to all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry. It is important to note that Article 4.2(b) is intricately linked to Article 4.2(a) inasmuch as the opening sentence itself states that "The determination referred to in sub-paragraph (a) shall not be made ...". Thus, it is clear that Article 4.2(b) only imposes an additional burden on the competent authorities to demonstrate the causal link between increased imports and serious injury based on the examination of the factors referred to in Article 4.2(a).⁷⁸

38. Further, the last sentence of Article 4.2(b) merely prohibits the competent authorities from attributing injury caused by "factors other than increased imports" to increased imports. In India's view, there is no independent or separate identification envisaged under Article 4.2(b). Therefore, the phrase "factors other than increased imports" has to be necessarily understood to refer to only those factors that have been found to be relevant in terms of Article 4.2(a). It also needs to be appreciated that the last sentence of Article 4.2(b) does not envisage any independent evaluation but only presupposes an analysis elsewhere which obviously is under Article 4.2(a). It may also be noted that unlike Article 3.5 of the Anti-dumping Agreement, no separate identification of "other factors" is envisaged under Article 4.2(b) of the Agreement on Safeguards. Accordingly, Japan's reference to the panel's findings in *EC – Tube or Pipe Fittings* is also misplaced.⁷⁹

39. Further, as confirmed by India in response to question 119⁸⁰ by the Panel, there is no conflict in the decision of the Appellate Body in *US – Line Pipe* and India's argument that there is no independent or separate identification envisaged under Article 4.2(b). In India's view, the factors required to be analyzed in terms of Article 4.2(b) are the ones identified in terms of Article 4.2(a). India's view is also fully supported by the report of the panel in *US – Steel*.

40. Regarding Japan's claim of mismatch in the figures of inventories, production and sales, India has already clarified in its First Written Submissions that the production, sales and inventories have been duly verified from the excise records of the domestic industry and that they were correct.⁸¹ Further, regarding the issue of annualization of data, India reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis.⁸² Annualization does not result in a change in the POI but is only a statistical tool used for comparing periods which are dissimilar. In India's views, whenever the periods are different over the length of the investigation period, the only methodology that can be adopted for a proper comparison is to bring the periods to a common denominator. For instance, if the period of investigation is nine months, it cannot be directly compared to a preceding period of 12 months.⁸³

41. Japan also asserts that the analysis of "further threat of greater serious injury" as examined under the Final Findings of the Competent Authority, does not have any legal basis and the same is different from "threat of serious injury" as prescribed in the Agreement on Safeguards. In this regard, India reiterates that the expression "further" has been used in the context of the findings of the Competent Authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.⁸⁴ Therefore, Japan's contention in this regard is without any merit.⁸⁵

⁷⁸ India's second written submission, para. 18.

⁷⁹ India's second written submission, para. 19.

⁸⁰ India's response to Panel question No. 119.

⁸¹ India's first written submission, para. 228.

⁸² India's response to Panel question No. 31.

⁸³ India's response to Panel question No. 95.

⁸⁴ India's response to Panel question No. 47. See also, India's opening statement at the second substantive meeting of the Panel, para. 42.

⁸⁵ India's opening statement at the second substantive meeting of the Panel, para. 39.

42. Japan, while relying on its First Written Submission, also reiterated that India's determination does not meet the standard of "threat of serious injury".⁸⁶ India submits that it has clearly demonstrated in its First Written Submissions⁸⁷ that apart from the existence of serious injury, there was also a further threat of serious injury to the domestic industry.⁸⁸

Japan's claims regarding determination of the causal link are without merit

43. India submits that it has clearly established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b). Further, the determination of the Competent Authority has also demonstrated that the increased imports had caused or were threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.⁸⁹

44. Japan contends that in the present case there was no overall coincidence in time between the movements in imports and the movements in injury. India submits that Japan's contention is bereft of factual support. The Competent Authority in its findings has discussed and come to a conclusion that while the imports have gone up, the domestic industry has lost its share in the same period. At the same time, decline in profitability of the domestic industry is also of exactly the same period when the increased imports have taken place. As a matter of fact, the entire injury analysis is for the period when the increased imports have taken place.⁹⁰ Further, the Competent Authority has clearly held that there is a direct correlation (emphasis added) between the increase in imports and serious injury suffered by the domestic industry as imports in absolute terms increased approximately three times during the year 2015-16 (Annualized on the basis of the figures of Q1) as compared to base year 2013-14. The domestic industry's market share declined so did the landed price of imports per ton. Consequently, the domestic industry has suffered losses. It is, thus, evident that injury to the domestic industry has been caused by the increased imports.⁹¹ Clearly, in the facts of the present case, the Competent Authority has not only established a mere "coincidence" but has, as a matter of fact, established a "direct correlation" between the increase in imports and serious injury suffered by the domestic industry.⁹²

45. Further, India reiterates that the Competent Authority is required to establish a relationship between the movements in import volume and the movements in only those factors which are held to be a cause of injury. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan.⁹³

Japan's Claims regarding violation of the Article 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 are without merit

46. Japan has clarified that its claims under Articles 5.1 and 7.1 of the Agreement on Safeguards are consequential to a finding of violation of Article 4.2(b) of the Agreement on Safeguards. Japan seems to indicate that its entire claim of violation of Article 5.1 and 7.1 is based on the presumption of improper non-attribution and therefore, a violation of Article 4.2(b).⁹⁴ Further, in response to question 127 by the Panel, Japan seems to change its stance and accept that a violation of Article 4.2(b) of the Agreement on Safeguards does not necessarily mean a violation of Article 5.1. Contrary to the position taken earlier where Japan disagreed with India's understanding that the violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1, Japan seems to concede the point.⁹⁵

⁸⁶ Japan's second written submission, para. 182.

⁸⁷ India's first written submission, paras. 237-243.

⁸⁸ India's opening statement at the second substantive meeting of the Panel, para. 40.

⁸⁹ India's first written submission, paras. 244-291. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 42.

⁹⁰ India's opening statement at the second substantive meeting of the Panel, para. 43.

⁹¹ Final Findings, (Exhibit IND-11), para. 66. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 44.

⁹² India's opening statement at the second substantive meeting of the Panel, para. 45.

⁹³ India's first written submission, para. 261. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 46.

⁹⁴ Japan's response to Panel question No. 62.

⁹⁵ Japan's response to Panel question No. 63.

47. In response to the questions posed by the Panel subsequent to the first substantive meeting⁹⁶ and in its opening oral statement at second substantive meeting⁹⁷, India clarified that in its understanding a violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1 and Article 7.1. It may be recalled that India has relied upon the text of Article 5.1 and 7.1 which does not contain any indication or even a suggestion that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Agreement on Safeguards.⁹⁸ India has clearly demonstrated that in the present case, India has fully complied with each and every requirement of Article 4.2(b) of the Agreement on Safeguards. Further, India has also demonstrated through its First Written Submissions and subsequent submissions⁹⁹ that the duties levied were only to the extent necessary in terms of Article 5.1 of Agreement on Safeguards. India further submits that Japan has clearly failed to even indicate *how* the duties levied by India are not only to the extent necessary and *what* should have been the extent of duties which would have been proper in its understanding. Therefore, Japan has completely failed to establish even a *prima facie* case that the duties levied by India were not only to the extent necessary to counter the injurious effects of increased imports.¹⁰⁰

Japan's Claims regarding violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are without merit

48. Japan's claim regarding the violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are wholly consequential to its presumption that by way of measures at issue, India has violated other provisions and requirements under GATT 1994 and Agreement on Safeguards.¹⁰¹ India submits that since it has fully complied with the obligations under the GATT 1994 and the Agreement on Safeguards, there can be no question as to the violation of Article 3.1, Article 4.2(c) and Article 11.1(a). Therefore, the Panel should reject the contention of Japan in this regard.¹⁰²

⁹⁶ India's response to Panel question No. 63.

⁹⁷ India's opening statement at the second substantive meeting of the Panel, para. 49.

⁹⁸ India's response to Panel question No. 127.

⁹⁹ India's opening statement at the first substantive meeting of the Panel.

¹⁰⁰ India's comments on Japan's response to Panel question No. 127, para. 62.

¹⁰¹ Japan's second written submission, paras. 244-245.

¹⁰² India's opening statement at the second substantive meeting of the Panel, para. 50.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF AUSTRALIA

I. Introduction

1. Australia's written submission and response to questions in this dispute have addressed the proper interpretation of Article XIX:1(a) of GATT 1994 and the Agreement on Safeguards (Safeguards Agreement) with respect to the constituent elements of a safeguard measure. Drawing on this analysis, Australia has examined the parties' arguments with respect to:

- i. the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry;
- ii. the application of obligations under Article I:1 of the GATT with respect to the disputed safeguard measure; and
- iii. the application of obligations under Article II:1(b) of the GATT with respect the disputed safeguard measure.

II. The proper interpretation of Article XIX:1(a) of the GATT 1994

2. In Australia's view, Article XIX:1(a) of GATT 1994 provides clear direction for determining whether a measure contains the constituent elements of a safeguard measure. It enables a Member to temporarily suspend an obligation incurred under the GATT 1994 where as a result of that obligation, a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the Member's domestic industry producing like products. The Appellate Body has confirmed this view:

... 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*. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend *the obligation* in whole or in part["]...¹ (emphasis added)

3. In Australia's view, Article XIX:1(a) therefore establishes that a "safeguard measure" is a measure that:

- i. suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff concession; and
- ii. suspends that GATT obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue.

4. In Australia's view, these two elements can be seen as: (i) the *content* of a safeguard; and (ii) the *objective* of a safeguard. Both must be present for a measure to constitute a safeguard measure.

III. The Parties' arguments with respect to the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry.

5. Japan claims India has violated Article XIX:1(a) of the GATT 1994 because it failed to demonstrate a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to its like

¹ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

domestic industry.² In response, India claims the logical connection exists through the existence of tariff concessions for the relevant product.³

6. As set out above, Australia holds the view that the suspension, withdrawal or modification of a GATT obligation through a safeguard measure must be undertaken with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue. The mere existence of an obligation or concession would not be satisfactory to demonstrate the logical connection between the effect of the obligations incurred and the surge in imports. The Appellate Body has noted there must be:

... **[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 [regarding increased imports] in the second clause of Art XIX:1(a) for the imposition of a safeguard.**⁴

7. In the current dispute, Australia considers that if India's measure did not in fact suspend, withdraw or modify its bound tariff concession of 40 per cent under GATT 1994, the Panel should find that the measure lacked the requisite content of a safeguard. It therefore would not constitute a safeguard measure under Article XIX:1(a) of the GATT 1994.

IV. The application of obligations under Article I:1 of the GATT 1994 with respect to the disputed safeguard measure

8. Japan submits India has violated Article I:1 of GATT 1994 because its purported safeguard measure does not apply equal tariffs to all WTO Members.⁵ India submits it is permitted to suspend the obligations in Article I:1 of GATT 1994 through a safeguard measure.⁶ India further submits that Article 9 of the Safeguards Agreement permits the application of safeguard measures in a manner which favors developing country WTO Members.⁷

9. In light of the requisite link between the content and objective of a safeguard, outlined above, Australia submits that a "suspension" of MFN obligations under Article I:1 in the application of a safeguard measure is permitted only to the extent that this derogation addresses the cause or threat of serious injury to the like domestic industry.

10. Australia's view is supported by the Panel in *Indonesia – Iron or Steel Products*, which said it failed to see:

... **how a course of action that dilutes the protective impact of a safeguard measure ...** could result in the suspension of a Member's MFN obligations under Article I:1 *for the purpose of* Article XIX:1(a), given that the fundamental objective of Article XIX:1(a) is to allow Members to "escape" their GATT obligations to the extent necessary to prevent or remedy serious injury to a domestic industry.⁸ (original emphasis modified)

11. The panel further noted:

... **the discriminatory application of a safeguard measure for the purpose of affording** [special and differential treatment] pursuant to Article 9.1 [of the Safeguards Agreement] does not result in a suspension of a Members obligations under Article I:1, within the meaning of Article XIX:1(a) of the GATT 1994.⁹ (original emphasis)

12. Therefore, where the obligation or concession being suspended, withdrawn or modified did not *contribute* to the surge in imports which injured or threatened to injure domestic industry

² Japan's first written submission, paras. 152, 162-3.

³ India's first written submission, paras. 117-118.

⁴ Appellate Body Report, *US – Steel Safeguards*, para. 317, referring to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

⁵ Japan's first written submission, para. 521.

⁶ India's first written submission, paras. 337, 342.

⁷ India's first written submission, paras. 337, 342.

⁸ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.28.

⁹ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.30.

producing like goods, the requisite *objective* of the safeguard measure is not present. Where the *objective* of the purported safeguard measure is not present, then no safeguard has been imposed. In such circumstances, obligations under Article I:1 of GATT 1994 have not been suspended, and the exception under Article 9.1 of the Safeguards Agreement cannot apply.

V. The application of obligations under Article II:1(b) of the GATT 1994 with respect to the disputed safeguard measure

13. Japan submits that India violates Article II:1(b) of GATT 1994 because through the measures at issue, India imposes "other duties or charges" in violation of the second sentence of that provision; and that while the disputed measures are duties levied in customs, as safeguard measures they are by nature "extraordinary" or "exceptional" and not "ordinary" measures.¹⁰ India submits that since the measures at issue were imposed in pursuance of Article XIX of the GATT 1994, the obligation of India under Article II:1(b) ipso facto is suspended, and therefore the question of any violation under Article II:1(b) does not arise.¹¹

14. In the present dispute, India's Schedule permitted it to impose a tariff rate of 40 per cent on the particular products at issue.¹² Prior to imposing the purported safeguard measure, India applied a tariff rate in the order of 7.5 per cent – well below its scheduled tariff concession.¹³ To address "the effect of such low applied tariffs",¹⁴ India imposed a purported safeguard measure comprising an additional tariff of around 10 - 20 per cent.¹⁵

15. In these circumstances, neither the *content* or *objective* of a safeguard measure are present:

i. India's imposition of the purported safeguard measure did not in fact withdraw or modify its scheduled tariff concession of 40 per cent; and

ii. India's imposition of the purported safeguard measure did not in fact address serious injury to its like domestic industry caused or threatened by a surge of imports resulting from its scheduled tariff concession of 40 per cent.

16. As such, Australia does not consider that India's measure constitutes a safeguard measure within the meaning of Article XIX of the GATT 1994 and the Safeguards Agreement.

VI. Conclusion

17. In summary, Australia submits that this dispute provides an opportunity for the Panel to clarify a number of questions of legal interpretation regarding the scope and application of provisions in the GATT 1994, and Safeguards Agreement. In Australia's view, the constituent *content* and *objective* of a safeguard measure are not present in this instance. In light of that, India has failed to implement a safeguard measure, and the measure it has implemented contravenes a number of GATT obligations.

¹⁰ Japan's first written submission, paras. 503, 513.

¹¹ India's first written submission, paras. 344, 346.

¹² India's first written submission, para. 48.

¹³ Japan's first written submission, paras. 160 - 163; also India's first written submission, para. 49.

¹⁴ Japan's first written submission, para. 160.

¹⁵ Japan's first written submission, paras. 27 - 30.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. A measure should be deemed a safeguard within the meaning of Article XIX of GATT 1994, when it: (i) suspends an obligation under the GATT 1994 or withdraws or modifies a scheduled tariff concession; (ii) with purpose of remedying or preventing injury caused by an increase in imports. The obligation that may be suspended in accordance with the last part of Article XIX: 1(a) of the GATT 1994 refers to the obligation which, according to the first part of the Article, has given rise to the increase in imports which has caused or threatens to cause serious injury.

2. In the view of the EU, the nature of a safeguard measure under Article XIX of GATT 1994 is that of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it is not a safeguard measure within the meaning of Article XIX of GATT 1994 and, consequently, does not fall under the Agreement on Safeguards. The EU notes in this respect that the Agreement on Safeguards provides for the possibility of compensation and that several provisions make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted, precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

3. Unlike the anti-dumping rules that apply to any "specific action against dumping" of exports, Article XIX of GATT 1994, read together with the Agreement on Safeguards, makes clear that certain measures can only be considered as safeguards if they suspend an obligation under the GATT 1994 in whole or in part or withdraw or modify a concession.

4. Therefore, an increase of the applied tariff rate, while still remaining at or below the level of the bound tariff rate, would thus not require (or indeed allow) the adoption of safeguard measures.

5. The application of Article 9.1 of the Agreement on Safeguards does not qualify a specific measure as a safeguard measure for the purposes of Article XIX GATT 1994 and the Agreement on Safeguards, but rather presupposes the existence of a safeguard. The application of Article 9.1 of the Agreement on Safeguards does not violate the MFN obligation in Article I: 1 of GATT 1994 as the former prevails if and to the extent there is a conflict with the latter. Moreover, if compliance with the obligation under Article 9.1 were to be tantamount to a suspension of an obligation within the meaning of Article XIX of the GATT 1994, that would mean that compliance with an obligation under the Agreement on Safeguards would give rise to compensation rights for other Members under Article 8 of the Agreement on Safeguards without suspension, withdrawal, or modification of obligations or concessions that caused the alleged serious injury. Clearly such a result would be absurd.

6. Article 9 in practice operates as a limited exception to the non-discrimination obligation as reflected in Article 2.2 of the Agreement on Safeguards for safeguards measures and the MFN principle, as reflected in Article I: 1 of the GATT 1994 for trade in goods generally. However, in the absence of language clearly designating it as an exception to these provisions, this should be dealt with as a case of legal conflict between obligations which are simultaneously applicable but mutually exclusive. According to the General Interpretative Note to Annex 1A to the WTO Agreement, which deals with conflicts between the GATT 1994 and any of the other agreements in Annex 1A, including the Agreement on Safeguards, priority should be given to the Agreement on Safeguards, which prevails if and to the extent there is a conflict. As for the conflict between Article 2.2 and 9.1 of the Agreement on Safeguards, the principle of *lex specialis* directs to set aside the general obligation under Article 2.2 in favour of the more specific obligation under Article 9.1 to the extent there is a conflict between them.

7. The nature of duties imposed following a safeguard investigation ordinary is contingent upon their design and structure. If they have the essential attributes of customs duties they could be qualified as "ordinary customs duties" within the meaning of Article II: 1 of the GATT 1994; otherwise they fall in the residual category of "other duties or charges of any kind". In the present case, the EU considers that the duties imposed are "ordinary customs duties" within the meaning of Article II: 1 of the GATT 1994.

8. The EU also notes that while a Member could carry out a safeguards investigation in accordance with the procedures of the Agreement on Safeguards, the ensuing measures in the form of an increase in the tariff may not need to go above the bound rate in order to "prevent or remedy serious injury and to facilitate adjustment". In such circumstances, it is plausible to argue that the Agreement on Safeguards would nonetheless apply to all acts that have already taken place.

9. Finally the European Union submits that the wording "obligations" in the first clause in Article XIX: 1(a) of the GATT 1994 includes all obligations incurred under the GATT 1994. However, some obligations are not capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers. For example, Article XXIV of the GATT does not appear to impose obligations under the GATT 1994 that are capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers.

II. CLAIMS UNDER ARTICLE II: 1 (B) AND ARTICLE I: 1 OF THE GATT 1994

10. The EU submits that safeguard measures, within the meaning of Article 1 of the Agreement on Safeguards, which comply with the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards, do not breach Article II: 1(b) and Article I: 1 of the GATT 1994.

11. Assuming, *quod non*, the measures at issue in this dispute are safeguard measures within the meaning of Article 1 of the Agreement on Safeguards, any breach of Article II: 1(b) and Article I: 1 of the GATT 1994 would have to be consequential to a breach of the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards.

12. To put it differently, if a measure is a safeguard measure, it is clear for everybody that the Member imposing it would have to comply with Article 9.1 of the Agreement on Safeguards, and thus would have to exclude developing countries meeting the conditions set out in Article 9.1 from the scope of the measure. The simple exclusion of developing countries meeting those criteria could thus not reasonably be considered as a breach of Article I: 1 of the GATT 1994. Unless the challenge is really directed against e.g. the wrongful application of Article 9.1 (or some other provision) of the Agreement on Safeguards, with a consequential breach of Article I: 1 of the GATT 1994.

13. The EU notes that Japan does not frame its claims under Article II: 1(b) and Article I: 1 of the GATT 1994 as purely consequential to a breach of the Agreement on Safeguards. At the same time it is not entirely clear to the EU whether Japan wishes to challenge the specific duty at issue as a stand-alone measure (i.e. regardless of whether or not it can be considered as a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards).

14. The EU would limit itself to recalling the standing case-law of the Appellate Body that "a party's submissions during panel proceedings cannot cure a defect in a panel request"¹, a principle which is "paramount in the assessment of a panel's jurisdiction". The Appellate Body has stressed that "although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request" and that "in every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing".²

¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642, quoting Appellate Body Reports, *EC – Bananas III*, para. 143 and *US – Carbon Steel*, para. 127.

² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE
SEPARATE CUSTOMS TERRITORY OF TAIWAN,
PENGHU, KINMEN AND MATSU

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu offers comments on the following issues:

- (a) characterization of the measure at issue;
- (b) whether country-specific analysis was required to demonstrate a logical connection between unforeseen developments and increased imports; and
- (c) the logical connection between obligations incurred and increased imports.

II. CHARACTERIZATION OF THE MEASURE AT ISSUE

2. Australia and the European Union consider that a measure does not constitute a safeguard measure within the meaning of Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards if it does not suspend a GATT obligation or withdraw or modify a concession. We consider this approach to be flawed, as it undermines the procedural and substantive obligations of the Agreement on Safeguards, and has no basis in the text of Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards.

3. We believe that the ordinary meaning of the term "safeguard measure" encompasses all measures taken to safeguard the domestic industry against serious injury arising from increased imports, without any limitation to particular types of measures. In this dispute, because India's safeguard measure was taken to safeguard its domestic industry against serious injury arising from increased imports, it constitutes a safeguard measure within the meaning of Article XIX: 1(a) and the Agreement on Safeguards.

4. However, even if one were to accept the argument that a measure must "suspend" a concession or obligation in order to constitute a safeguard measure, that condition would be satisfied in this case. The measure at issue was imposed on a product for which a tariff binding exists (40%). Therefore, the measure at issue could result in a violation of the prohibition on "other duties and charges" (ODC) under Article II: 1(b), second sentence of the GATT 1994. Here, because Indian law appears to treat safeguard duties as an exceptional measure distinct from ordinary import duties, we believe that the measure at issue constitutes an ODC. Since India has not inscribed this type of ODC in its WTO Schedule of Concessions¹, the safeguard measure gives rise to a suspension of India's obligation under Article II: 1(b), second sentence.

III. WHETHER COUNTRY-SPECIFIC ANALYSIS WAS REQUIRED TO DEMONSTRATE A
LOGICAL CONNECTION BETWEEN UNFORESEEN DEVELOPMENTS AND INCREASED
IMPORTS

5. Regarding demonstrating a logical connection between unforeseen developments and increased imports, Japan argues that, "for those developments which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis".² India argues that such analysis is impossible as it is a confluence of circumstances and not a single event which constitutes unforeseen developments.

6. We consider that India's reliance on a confluence of circumstances does not detract from its ability to analyze trade flows and price and demand developments occurring in any specific country.

¹ Schedule of Concessions XII – India, annexed to the Marrakesh Protocol.

² Japan's first written submission, para. 124. (emphasis original)

Moreover, we consider it incumbent on the Indian authority to conduct its analysis on a per country basis because the Indian authority relied on shifts of imports from individual import markets to India. Because the Indian authority did not perform analysis on a per country basis, we consider that the Indian authority failed to sufficiently demonstrate a logical connection between the alleged unforeseen developments and increased imports.

IV. LOGICAL CONNECTION BETWEEN OBLIGATIONS INCURRED AND INCREASED IMPORTS

7. India argues that Article XIX:1(a) of the GATT 1994 requires only that an investigating authority show that the importing Member has incurred tariff concessions for the relevant product.³

8. We consider that the phrase "**as a result of ... the effect of the obligations incurred by a contracting party under this Agreement**" in Article XIX:1(a) of the GATT 1994 requires a showing of three elements: (1) an obligation incurred under the GATT 1994; (2) the effect of that obligation; and (3) how such effect resulted in increased imports causing or threatening to cause serious injury.

9. In this dispute, the Indian authority only explains how India's applied rates might have the effect of increased imports. This is not an explanation of how India's *bound rates*—the relevant GATT obligation here—have the effect of increased imports. Thus, the Indian authority failed to make the relevant inquiry, and has not met the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

³ India's first written submission, paras. 114-118.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF UKRAINE

I. Introduction

1. Ukraine's submissions in this dispute have focused on several points with respect to some of the India's methodologies used in the investigation that led to the imposition of safeguard measures on imports of certain steel products.

II. Methodology used for imports trend examinations

2. First of all, Ukraine would like to address the issue of Indian authority's approach of showing the increase in imports based on an annualized forecast because proper analysis of the import development is the key issue to justify imposition of safeguard measures. Indeed, Article 2.1 of the Agreement on Safeguards does not stipulate any kind of annualization methodology or usage of forecasted data for the import development. In fact, the language of Article 2.1 of the Agreement on Safeguards "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'".¹ Usage of such wording as "product is being imported" and "increase in imports must have been" indicates that the investigation requires examination of factual imports and not forecasted trends.

3. Therefore, Ukraine considers that the conclusions made on distorted evidence and imposition of safeguard duties basing on forecasted data on imports would be inconsistent with Article 2.1 of the Agreement on Safeguards.

4. Ukraine agrees with Japan's point that quadrupling figures relating to first quarter of 2015-2016 in order to obtain data for 2015-2016 (Annualized) would be inconsistent with requirements that the investigating authority must rely on "objective data" pursuant to Article 4.2(a) of the Agreement on Safeguards. Indeed, such a simple assumption that indicators of imports and industry operation in each of three other quarters of 2015-2016 would be the same as in the first quarter of this period is rather groundless. The investigating authority did not provide any explanation of why such an assumption was reasonable.

5. Ukraine submits that usage of annualization methodology for analysis of import development and domestic industry position would result in lack of objectivity in the safeguard investigation and therefore would be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.

III. Evidence of serious injury

6. Ukraine notes that the existence of serious injury in the safeguard investigation should be demonstrated properly within the meaning of Article 4 of the Agreement on Safeguards. According to Article 4.1 (a) of the Agreement on Safeguards, under 'serious injury' shall be understood to mean a significant overall impairment in the position of the domestic industry. In addition, the term 'serious injury' means a high standard of injury. However, as long as certain key industry indicators – including domestic sales, production of domestic industry, capacity utilization, employment and productivity – showed positive trends or as mentioned in the Indian Notification 'remained same over the injury period'² the position of the domestic industry should not be qualified as being seriously injured.

7. Therefore, in Ukraine's view, conclusions based on forecasted data with lack of objectivity that imports have caused serious injury to the domestic industry do not constitute a sufficient justification for the application of safeguard measures pursuant to the Agreement on Safeguards and Article XIX of the GATT 1994.

¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

² G/SG/N/8/IND/28-G/SG/N/10/IND/19-G/SG/N/11/IND/14/Suppl.2.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE UNITED STATESEXECUTIVE SUMMARY OF U.S. ANSWERS TO THE PANEL'S QUESTIONS TO THIRD PARTIES

I. QUESTION REGARDING ARTICLE XIX:1 OF THE GATT 1994

1. The expression "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1 of the GATT 1994 refers not only to a tariff concession, but also to any obligation a Member assumed at the time the WTO was established or at the Member's accession. The text of Article XIX:1 refers to "obligations incurred by a contracting party" and, as an example of this, "include[es] tariff concessions" expressly. It would be contrary to the text of the provision to limit the type of obligations that may result in the increase of imports to those that are only a result of tariff concessions.

2. Besides tariff obligations, any WTO obligation affecting importation may potentially be a relevant obligation if it results in an unforeseen increase of imports that causes serious injury to a Member's domestic producers. Accordingly, each safeguard measure should be evaluated on a case-by-case basis while taking into consideration the relevant facts and context in which a Member has decided to take action to prevent or remedy an injury.

II. QUESTION REGARDING THE NATURE OF DUTIES RESULTING FROM APPLICATION OF A SAFEGUARD MEASURE

3. GATT 1994 Article II:1 provides that an imported product shall be accorded treatment no less favourable than that set out in a Member's Schedule and further contemplates that an imported product shall be subject to scheduled ordinary customs duties and (as set out in the Understanding on Article II) designated other duties or charges. A duty pursuant to a safeguard measure (or "emergency action") would not, in principle, be an ordinary customs duty – for example, set out in the customs tariff of a Member normally corresponding to the Harmonized System.

4. Duties imposed pursuant to a safeguard measure could, in principle, be considered an "other duty or charge" under the second sentence of Article II:1(b). Should those duties be applied consistent with the requirements of Article XIX (and the Agreement on Safeguards), a Member would be in conformity with its WTO obligations (including those under GATT 1994 Article II). This is explicit in the text of Article XIX: (1)(a) of the GATT 1994, which provides that a Member "shall be free" to suspend an obligation, in whole or in part, or modify a concession – "including tariff concessions". That is, Article II would not prevent the application of a WTO-consistent safeguard measure because the Member "shall be free" to apply that measure.

III. QUESTION REGARDING THE DEFINITION OF SAFEGUARD MEASURE

5. The United States agrees, in part, with the argument Chinese Taipei raises with respect to the relevance of the Appellate Body's reasoning in *US – 1916 Act*. The United States acknowledges that the Appellate Body found, for purposes of the Antidumping Agreement, that the phrase "anti-dumping measure" is not immediately clear and that, without an express definition, the phrase could apply to all measures taken to address imported products sold for less than their fair market value. From this, Chinese Taipei extrapolates that a safeguard measure, which also does not have an express definition in the Agreement on Safeguards, is any measure taken to safeguard a domestic industry from increased imports.

6. However, Chinese Taipei does not recognize that, to qualify as a safeguard measure, the measure at issue must be to remedy or protect domestic producers from serious injury or a threat of serious injury and that the action a Member takes must be related to the suspension, withdrawal, or modification of a GATT obligation or concession.

IV. QUESTION WHETHER APPLICATION OF A MEASURE BELOW A BOUND RATE CAN BE CONSIDERED A SAFEGUARD MEASURE

7. A Member has, in effect, two bound rates in relation to the charge it may impose on an imported product. The first, under the first sentence of GATT 1994 Article II:1(b), is in relation to the rate it may impose as an "ordinary customs duty". The second, under the second sentence of that provision, is in relation to the rate it may impose as an "other duty or charge". The bound rate for an ordinary customs duty is as set out in a Member's Schedule. Under the Understanding on Article II, a Member was required to specify in its schedule the nature and level of any "other duty or charge" it could apply on an imported product. In the absence of any such scheduled "other duty or charge", a Member would not be able to apply a duty or charge on importation other than an ordinary customs duty.

8. If there is a duty or charge resulting from application of a safeguard measure, the issue is whether this duty or charge falls under the first or second sentence of GATT 1994 Article II:1(b). In principle, it would not seem that "emergency action" and application of a duty or charge while suspending, withdrawing, or modifying a concession (Article XIX:1) would normally result in an "ordinary customs duty". Therefore, that a duty or charge resulting from a safeguard measure falls within a Member's bound rate for an ordinary customs duty would not seem relevant. Instead, the proper analysis would seem to be whether the duty or charge resulting from a safeguard measure falls within a Member's bound rate for an "other duty or charge".

V. QUESTION REGARDING A PERIOD OF INVESTIGATION UNDER THREE YEARS

9. Most Members use at least three years as a baseline period of investigation. The most important aspect, however, is that the time period is unbiased and fair, and especially that it is not manipulated or otherwise selected to achieve a particular outcome during the investigation. Accordingly, the United States believes that a period of investigation under three years should not always be considered per se inadequate, although a reasonable explanation of that choice may be warranted.

VI. QUESTION REGARDING THE POSSIBILITY OF FINDING BOTH SERIOUS INJURY AND THREAT OF SERIOUS INJURY FOR THE SAME SAFEGUARD INVESTIGATION

10. Under the Agreement on Safeguards, it is possible to have findings of both serious injury and threat of serious injury for the same safeguard investigation. Under Article 2.1, a Member may impose a measure if imports cause or threaten to cause serious injury, and the text does not exclude that both situations may arise.

11. The Appellate Body addressed this issue in the context of whether discrete findings were necessary under the Agreement on Safeguards. In *US – Line Pipe*, the Panel found that the Member imposing the measure had breached the Agreement on Safeguards because the Member had determined that increased imports were the substantial cause of serious injury or the threat of serious injury and, in the Panel's view, the Agreement on Safeguards required a discrete determination as to one or the other.

12. On appeal, the Appellate Body reviewed the Panel's analysis. As an initial matter, the Appellate Body agreed with the Panel that Article 2.1 of the Agreement on Safeguards necessitates the inclusion of "findings" or "reasoned conclusions" in a published report from the competent authorities. The Appellate Body, however, questioned the kind of findings that must appear in the published report.

13. In particular, the Appellate Body examined the meaning of the term "or" in the phrase "cause or threaten to cause" serious injury. That is, it examined whether the use of this term required discrete findings or allowed the possibility of finding one (serious injury), the other (threat of serious injury), or both. The Appellate Body focused on the context in which the term "or" is used. The Appellate Body determined that the phrase "or" did not necessarily mean "one or the other, but not both" and that the clause could mean "either one or the other, or both in combination" and, as such, it did not see that it matters, for purposes of imposing a safeguard measure, whether the competent authority finds the one (serious injury), the other (threat of serious injury), or the one or the other (serious injury or the threat of serious injury). On this basis, it found that the Member's determination had established the right to apply a safeguard.

VII. QUESTION REGARDING IMMEDIATE NOTIFICATION UNDER THE AGREEMENT ON SAFEGUARDS

14. The term "immediately" as used in Article 12.1 suggests a certain level of urgency. At the same time, the use of this term would not support a bright line test. Indeed, if the negotiators had intended to adopt a bright line test, they would have included that test in the text of the Agreement. Accordingly, each circumstance must be evaluated on a case-by-case basis. Appropriate considerations would include whether a Member subject to a safeguard received sufficient time to adequately defend its rights and support its position during and after the safeguard investigation.



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INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS518/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 10 October 2017

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 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.

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, India shall submit its response to the request in its first written submission. If India 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 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 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 of such exhibits 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. The Panel may grant

exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation within a deadline to be determined by the Panel.

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 (electronic copy provided), to the extent 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, indicating the submitting Member and the number of each exhibit on its cover page. 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 12h00 (noon) 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 India 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 17h00 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 India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by Japan. If India 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 17h00 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 12h00 (noon) 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 17h00 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.
- 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 section

18. The description of the arguments of the parties and third parties in the descriptive section 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 first written submissions, first opening and closing oral statements in accordance with the timetable adopted by the Panel. This summary may also cover the responses to questions following the first substantive meeting. Each party shall also submit a separate integrated executive summary of its written rebuttal, second opening and closing oral statements in accordance with timetable adopted by the Panel. This summary may also cover the responses to questions following the second substantive meeting and comments on such responses. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. 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.

23. 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.

24. 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

25. 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 two paper copies of all documents it submits to the Panel, including of any exhibits submitted to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.
- 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, including of any exhibits, preferably in Microsoft Word format, either on a CD-ROM, DVD, USB Key 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 XXX@wto.org and XXX@wto.org. If a CD-ROM, DVD or USB Key is provided, it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

- 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 17h00 (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 section, 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.
26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made a number of editorial changes, some of which were suggested by the parties, to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.¹

1.2. As a result of the changes that we have made, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Japan's specific requests for review

2.1.1 Paragraph 7.15

2.1. Japan requests that the Panel modify paragraph 7.15 in order to more completely reflect its arguments that the Panel should make findings and recommendations in the present dispute, despite the expiry of the measure at issue. India does not comment on this request.

2.2. We have modified paragraph 7.15 to better reflect Japan's arguments.

2.1.2 Paragraph 7.24

2.3. Japan requests that the Panel add a footnote after the phrase "[a]s indicated above" in the fourth sentence of paragraph 7.24 in order to clarify the relevant paragraph of the Report in which the same issue has been addressed. India does not comment on this request.

2.4. We have modified the fourth sentence of paragraph 7.24 to clarify the Panel's reasoning.

2.1.3 Section 7.4

2.5. Japan refers to the Panel's statement in paragraph 7.30 that both parties agree that the challenged measure is a safeguard within the meaning of Article XIX: 1(a) of the GATT 1994 and of the Agreement on Safeguards. Japan requests that the Panel summarize the parties' arguments in this regard and add a reference to the parties' relevant submissions.² India does not comment on this request.

2.6. In light of Japan's request, we have added footnote 74 to paragraph 7.30 to refer to the parties' submissions. We note that paragraph 7.30 introduces the question that the Panel addresses in section 7.4, i.e. whether the measure at issue falls within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. We summarize the parties' arguments in the subsequent paragraphs, including paragraphs 7.44, 7.54, and 7.64, in the manner and to the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning. We note that parties are free to reflect their arguments in their executive summaries,

¹ We have corrected typographical and non-substantive errors in paragraphs 7.106, 7.196, 7.227, and 7.246.

² In particular, Japan refers to its responses to Panel question Nos. 11 and 14, and its second written submission, paras. 276-279.

annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraphs 40-42, Annex B-2.

2.1.4 Paragraph 7.43

2.7. Japan requests that the Panel modify the penultimate sentence of paragraph 7.43, by adding the word "ordinary" before the phrase "customs duties". India does not comment on this request.

2.8. We have made the requested change to clarify the Panel's reasoning.

2.1.5 Paragraph 7.49

2.9. Japan requests that the Panel delete the phrase "as a matter of fact" in the last sentence of paragraph 7.49. India does not comment on this request.

2.10. We have made the requested change to clarify the Panel's reasoning.

2.1.6 Paragraph 7.62

2.11. Japan requests that the Panel modify paragraph 7.62 to reflect Japan's argument that the fact that imports from Ukraine and China were subject to the measure at issue due to their significant market shares indicated that India selected the sources of imports to be subject to the measure with a view to preventing or remedying serious injury.³ Japan also requests that the Panel address this argument of Japan. India does not comment on this request.

2.12. In light of Japan's request, we have added a new paragraph 7.60 to reflect Japan's argument on this issue and added footnote 118 to refer to Japan's submissions. The Panel's reasoning in paragraph 7.62 reflects its considerations of the arguments made by both parties in light of the evidence on the record. Therefore, there is no need to make any further changes in paragraph 7.62.

2.1.7 Paragraph 7.74

2.13. Japan suggests that the Panel use the term "measures at issue" in the first sentence of paragraph 7.74 in singular form in order to ensure consistency with the rest of the Report. India does not comment on this request.

2.14. We have made the requested correction.

2.1.8 Paragraph 7.95

2.15. Japan requests that the Panel modify paragraph 7.95 in order to more completely reflect its arguments. India made no comment on this request.

2.16. We have modified paragraph 7.95 to better reflect Japan's arguments.

2.1.9 Paragraphs 7.101 and 7.102

2.17. Japan requests that the Panel modify paragraphs 7.101 and 7.102 in order to more accurately reflect its arguments. India made no comment on this request.

2.18. We have modified paragraphs 7.101 and 7.102 to better reflect Japan's arguments.

2.1.10 Paragraph 7.117

2.19. Japan requests that the Panel modify the last sentence of paragraph 7.117 in order to more accurately reflect Japan's arguments. India does not comment on this request.

³ In particular, Japan refers to its second written submission, para. 285; and response to Panel question No. 11, para. 5.

2.20. We have modified the last sentence of paragraph 7.117 to better reflect Japan's arguments.

2.1.11 Section 7.6

2.21. Japan suggests that the Panel refer to paragraph (a) of Article 4.2 of the Agreement on Safeguards in the title of section 7.6. India does not comment on this request.

2.22. We have made the requested correction.

2.1.12 Paragraph 7.147

2.23. Japan requests that the Panel modify paragraph 7.147 in order to more completely reflect its arguments. India does not comment on this request.

2.24. We have modified paragraph 7.147 to better reflect Japan's arguments.

2.1.13 Paragraph 7.153

2.25. Japan suggests that the Panel use the word "determine" instead of the word "define", when summarizing Japan's arguments in the first sentence of paragraph 7.153, and add a footnote after this sentence to refer to Japan's submissions. India does not comment on this request.

2.26. We have made the requested correction.

2.1.14 Paragraphs 7.159 and 7.163

2.27. Japan requests that the Panel modify paragraphs 7.159 and 7.163 in order to more completely reflect its arguments with respect to the determination of the domestic industry. Japan also requests that the Panel include data on sales, market share, and production of the domestic industry as compared to the producers outside the domestic industry. India does not comment on this request.

2.28. We have modified paragraphs 7.159 and 7.163, and added footnote 273 to better reflect Japan's arguments. We have also added footnotes 274 and 275, and modified footnote 276 to reflect the data on sales, market share, and production of the domestic industry and the producers outside the domestic industry.

2.1.15 Paragraph 7.164

2.29. Japan refers to the Panel's statement in paragraph 7.164 that Article 4.1(c) does not require a competent authority to examine the domestic producers' market share and sales in order to define the domestic industry. Japan submits that the Panel has not addressed Japan's argument relating to differences in production trends of the domestic industry and producers outside the domestic industry. Japan requests that the Panel address this argument in the Report. India does not comment on this request.

2.30. In light of Japan's request, we have modified paragraph 7.165 to clarify the Panel's findings.

2.1.16 Paragraph 7.180

2.31. Japan requests that the Panel modify paragraph 7.180 to more completely reflect Japan's arguments regarding the Indian competent authority's evaluation of the share of the domestic market taken by increased imports. India does not comment on this request.

2.32. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.1.17 Paragraphs 7.187 and 7.191

2.33. Japan requests that the Panel elaborate further on its analysis of Japan's argument that the Indian competent authority focused its analysis on the non-captive segment of the domestic

industry. Japan repeats its argument that the market share of the domestic industry presented in the Final Findings (45% in 2013-2014 and 37% in 2015-2016 (annualized)) refers only to the market share of the non-captive segment.

2.34. India opposes Japan's request. India submits that the Panel's conclusion in paragraphs 7.187 and 7.191 is not based solely on the excerpts from the Final Findings quoted by the Panel in paragraph 7.186, but also on its analysis in the preceding paragraphs. In particular, India notes that Table 3 in paragraph 7.183 of the Report shows that the Indian competent authority's analysis of the changes in the market share was based upon the examination of both captive and non-captive segments of the market.

2.35. We have decided not to grant Japan's request. As explained in paragraph 7.181 of the Report, Article 4.2(a) of the Agreement on Safeguards requires a competent authority to evaluate "the share of the domestic market taken by increased imports", which is distinct from the language in the Anti-Dumping Agreement that refers to a "decline" in the domestic industry's market share. The Panel observes in paragraph 7.188 that the domestic industry lost sales and market share in the non-captive segment, while it was able to maintain its market share represented by the captive market. Paragraph 49(b) of the Final Findings (represented in Table 3, paragraph 7.183, of the Report) shows that the Indian competent authority considered both captive and non-captive segments of the market when examining sales of different market participants and share of the domestic market taken by imports.

2.1.18 Paragraph 7.188, footnote 306

2.36. Japan requests that the Panel add a reference to paragraph 288 of Japan's first written submission in footnote 306. India does not comment on this request.

2.37. We have decided not to grant Japan's request. Footnote 306 refers to the table presented on page 82 of Japan's first written submission (which corresponds to Table 4 of the Panel Report). In any event, in light of Japan's request, we have modified footnote 306 to refer to Table 4 of the Report.

2.1.19 Paragraph 7.189

2.38. Japan requests that the Panel reflect and address its argument that in the domestic investigation some interested parties mentioned the possibility that the domestic industry was not able to meet the increasing demand due to reasons other than increased imports, such as the fact that the increase in demand was for products that were not produced by the domestic industry. India does not comment on this request.

2.39. In light of Japan's request, we have added a footnote to paragraph 7.189 to clarify the Panel's reasoning.

2.1.20 Paragraph 7.216

2.40. Japan suggests that the Panel modify paragraph 7.216, by adding a sentence describing Japan's argument that the figures of inventories, production, and sales for a given year of the POI do not match. India does not comment on this request.

2.41. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 349. We see no reason to make the change requested by Japan.

2.1.21 Paragraph 7.221

2.42. Japan requests that the Panel modify paragraph 7.221 in order to fully and accurately reflect Japan's arguments regarding the Indian competent authority's alleged determination of threat of serious injury. Japan also requests that the Panel modify footnote 351 to provide more complete references to Japan's submissions. India does not comment on Japan's request.

2.43. We have modified paragraph 7.221 and added footnote 352 to better reflect Japan's arguments. We have also modified footnote 351.

2.1.22 Paragraph 7.228

2.44. Japan requests that the Panel modify footnote 367 in order to note that the domestic industry submitted the post POI data after the public hearings. India does not comment on this request.

2.45. We have decided not to grant Japan's request. The proposed change is unnecessary and Japan has not explained why the additional language is relevant to the analysis in paragraph 7.228.

2.1.23 Paragraph 7.232, footnote 369

2.46. Japan requests that the Panel modify the reference to its second written submission in footnote 369. India does not comment on Japan's request.

2.47. We have made the requested change.

2.1.24 Paragraph 7.240, footnote 384

2.48. Japan requests that the Panel add a reference to its second written submission in footnote 384. India does not comment on Japan's request.

2.49. We have made the requested change.

2.1.25 Paragraph 7.241

2.50. Japan requests that the Panel modify paragraph 7.241 to more completely reflect Japan's arguments regarding the causal link analysis. Japan also requests that the Panel add a reference to its second written submission in footnote 385. India does not comment on Japan's request.

2.51. We have modified paragraph 7.241 and added footnotes 388-390 and 410 to better reflect Japan's arguments and to clarify the Panel's reasoning. We have also added a reference to Japan's second written submission in footnote 385.

2.1.26 Paragraph 7.258, footnote 411

2.52. Japan requests that the Panel modify the reference to its second written submission in footnote 411. India does not comment on Japan's request.

2.53. We have made the requested change.

2.1.27 Paragraph 7.259

2.54. Japan requests that the Panel modify paragraph 7.259 to add a reference to its argument that the Indian competent authority failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the GATT obligations from the impact caused by other reasons. India does not comment on Japan's request.

2.55. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 440. We see no reason to make the change requested by Japan.

2.1.28 Paragraph 7.260

2.56. Japan requests that the Panel add a new paragraph between paragraphs 7.260 and 7.261 in order to reflect its arguments made in response to India's argument that the obligation to conduct a non-attribution analysis pursuant to the second sentence of Article 4.2(b) of the Agreement on Safeguards only arises when a competent authority has determined that a specific factor is "relevant" under Article 4.2(a). India does not comment on Japan's request.

2.57. We have decided not to grant Japan's request. We summarize the parties' arguments in paragraphs 7.259 and 7.260 in the manner and to the extent necessary and appropriate to capture

our understanding for the purposes of our own assessment and reasoning. We note that the parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraph 27, Annex B-2.

2.1.29 Paragraph 7.272

2.58. Japan requests that the Panel reflect in paragraph 7.272 that more detailed explanations of the interested parties' arguments summarized in the Final Findings were provided in the submissions of the interested parties to the Indian competent authority. India does not comment on Japan's request.

2.59. We have decided not to grant Japan's request. We see no reason to make the requested change, since Japan does not refer to any specific submission by interested parties on the record of the Panel that the Indian competent authority failed to consider.

2.1.30 Paragraph 7.280, footnote 443

2.60. Japan requests that the Panel add a reference to its second written submission in footnote 443. India does not comment on Japan's request.

2.61. We have made the requested change.

2.1.31 Paragraph 7.308

2.62. Japan requests that the Panel modify paragraph 7.308 in order to more completely reflect Japan's arguments in relation to its claim under Article 12.1 (a) of the Agreement on Safeguards. India does not comment on this request.

2.63. We have modified paragraph 7.308 and added footnote 467 to better reflect Japan's arguments.

2.1.32 Paragraph 7.379

2.64. Japan suggests that the Panel delete the words "the month" in paragraph 7.379, because they are used twice. India does not comment on this request.

2.65. The third sentence of paragraph 7.379 refers to "the precise day of the month" and "the month, and the year", which is consistent with the definition of the word "date" provided in the first sentence of paragraph 7.378. Therefore, we reject Japan's request.

2.2 India's specific requests for review

2.2.1 Section 7.3 (paragraphs 7.11-7.28)

2.66. India requests that the Panel review paragraphs 7.11-7.28 of the Report with respect to the continued effects of the measure at issue, and refrain from making any recommendations for the following reasons. India submits that the Panel has not fully evaluated India's arguments that the Panel's recommendation would be outside its mandate, retrospective in nature and in effect. India notes that it has clarified that the measure at issue does not have lingering effects. India argues that Japan failed to submit any evidence or documents to prove its contention that the measure at issue would have an effect after its expiry. India submits that Section 28 of the Indian Customs Act, 1962 is not designed for the imposition of duties, but only for the collection of duties, which were not levied, *inter alia*, due to the reason of collusion, wilful misstatement, or suppression of facts. India contends that Japan cannot refer to the collection mechanism to argue that the measure at issue still has an effect. India also notes that the Panel's recommendations discriminate against the product concerned that had been imported before the measure at issue expired and on which duties had been collected. In addition, India considers that the Panel's approaches in paragraphs 7.11-7.28 and paragraph 7.72 of the Report are contradictory, because in the latter the Panel considered that there must be a real demonstration of the conduct by the regional or local

authorities, while in the former the Panel did not mention any evidence or documents which would compel the Panel to make recommendations.

2.67. Japan opposes India's request. Japan recalls that pursuant to Article 15.2 of the DSU, a party may submit a written request to review "precise aspects" of the report. Japan submits that India refers to section 7.3, i.e. paragraphs 7.11-7.28 of the Report, without referring to specific paragraphs of that section. Japan contends that India resubmits its arguments or submits new arguments as to why the Panel findings in section 7.3 should be modified. Japan submits that the interim review stage of a panel proceeding is not the appropriate time for India to relitigate issues discussed during the panel proceedings. Japan notes that it submitted evidence that, even if the measure at issue expired, it continues to have legal effects and therefore the Panel has no basis to refrain from making a recommendation. Japan also submits that the Panel has examined in detail Section 28 of the Customs Act, 1962 in paragraphs 7.13-7.23 of the Report.

2.68. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel.⁴ Section 28 of the Customs Act, 1962 has been addressed by the Panel in paragraphs 7.13-7.27. India's comments would require us to engage in a new analysis of arguments and evidence on the record.

2.2.2 Section 7.4.3.2 (paragraphs 7.54-7.63)

2.69. India requests that the Panel review paragraphs 7.54-7.63 of the Report regarding India's obligations under Article I:1 of the GATT 1994. India disagrees with the Panel's observation that the suspension of India's obligation under Article I:1 was not designed to prevent or remedy serious injury to the domestic industry. India considers that this observation is based on an erroneous premise that Article 9.1 of the Agreement on Safeguards is relevant for determining whether a measure falls within the scope of Article XIX of the GATT 1994. India submits that, because the measure at issue was applied on a selective basis by excluding imports from certain developing countries, India had suspended its MFN obligations under Article I:1 of the GATT 1994.

2.70. Japan replies that India failed to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that although it shares India's view that the challenged measure suspended India's MFN obligation under Article I:1 of the GATT 1994, Japan notes that India failed to indicate any of its submissions to the Panel where the above arguments can be found.

2.71. We have decided not to grant India's request. The Panel addressed India's arguments as to whether India suspended its MFN obligation with the objective of preventing and remedying serious injury in paragraph 7.62 of the Report.

2.2.3 Section 7.4.3.3 and section 7.4.4 (paragraphs 7.64-7.75)

2.72. India requests that the Panel reconsider its decision with respect to the suspension of obligations under Article XXIV of the GATT 1994 in paragraphs 7.64-7.75 of the Report. India submits that the Panel failed to consider the specific arguments raised by India as to why the measure at issue resulted in a suspension of India's obligations under Article XXIV of the GATT 1994. In particular, India submits that, as long as there is an obligation which is incurred by a Member under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX of the GATT 1994 on the ground that it is not a positive obligation. India argues that Article XXIV is permissive only when a Member has the option to enter into an FTA. According to India, Article XXIV becomes a mandatory obligation once the FTA is entered into and a Member has to comply with provisions of Article XXIV. India further argues that since Article XIX does not differentiate between different GATT obligations, the Panel cannot make such differentiation.

2.73. India further notes the Panel's finding that there is no indication that the measure at issue resulted in regional or local authorities engaging in any conduct that was inconsistent with

⁴ Panel Report, *EU – Energy Package*, para. 6.18 (referring to Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; *India – Agricultural Products*, para. 6.5; and *Russia – Pigs (EU)*, para. 6.7).

India's obligations under the GATT 1994. India submits that this finding is based on incorrect premise. India argues that the Panel does not need to examine whether the measure has resulted in a *de facto* violation of obligations, rather the nature of the obligation should be a determinative factor while examining the scope of the provision in question. India reiterates that the Panel did not follow a consistent approach when interpreting the scope of Article XXIV:12 of the GATT 1994 and considering Japan's contention that the measure at issue has a continued effect. India submits that the regional or local authorities did not engage in any conduct that was inconsistent with India's obligation under the GATT 1994 in compliance with the obligation under Article XXIV:12.

2.74. Japan opposes India's request. Japan notes that India refers generally to the entire section 7.4.3.3 and section 7.4.4 and fails to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that India reargues the case and resubmits its arguments as to why the Panel should consider that the measure at issue resulted in the suspension of India's obligations under Article XXIV of the GATT 1994. Japan notes that the Panel addressed those arguments in paragraphs 7.70-7.72. Japan reiterates that the purpose of the interim review is not to relitigate the issues that have been discussed during the panel proceedings or to challenge the legal interpretations developed by the Panel.

2.75. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel. India's arguments regarding Article XXIV of the GATT 1994 have been addressed by the Panel in paragraphs 7.64-7.73 of the Report.

2.2.4 Section 7.5.5 (paragraphs 7.100-7.115)

2.76. India takes issue with the Panel's observations in paragraphs 7.108-7.110 of the Report, which address the question of logical connection between unforeseen developments and the increased imports. India submits that the Panel has not indicated the specific obligations which require competent authorities to conduct a country-specific analysis with regard to imports and unforeseen developments. India submits that Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards do not require country-specific analyses. India reiterates that considering the global nature of safeguard measures, there is no need to conduct a country-specific analysis.

2.77. India requests that the Panel modify paragraph 7.112 in order to reflect India's arguments regarding the analysis of unforeseen developments in relation to the product concerned submitted in India's responses to Panel question Nos. 16 and 90.

2.78. India also takes issue with the Panel's statement that the timing of unforeseen developments is a relevant consideration for showing that the unforeseen developments resulted in an increase in imports. India submits that neither Article XIX of the GATT 1994 nor the Agreement on Safeguards require that the unforeseen developments should necessarily coincide in time with the increase in imports. India further submits that the Panel did not reconcile this finding with the statement of the panel in *US – Steel Safeguards* that confluence of events can constitute unforeseen developments. India argues that if the Indian competent authority should elaborate on timing of unforeseen developments, it would mean that there is an obligation to explain each unforeseen development causing the increase in imports. India requests the Panel to review and modify the relevant part of the Report.

2.79. Japan opposes India's request. Japan submits that India repeats its arguments presented during the panel proceedings and challenges the Panel's findings. Japan reiterates that the purpose of the interim review is not to reargue the issues discussed during the panel proceeding or to challenge the legal interpretations developed by a panel. With respect to paragraphs 7.108-7.110, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report. Japan also notes that India fails to make any specific request with regard to changes that the Panel should make to paragraphs 7.108-7.110. With respect to paragraph 7.112, Japan notes that India's arguments in response to Panel question Nos. 16 and 90, namely that "[s]teel production worldwide is measured in terms of the crude capacity" and that "the proportion of the [product under consideration] remains the same *qua* the crude production for which data is available in public domain" have been addressed and rejected by the Panel in paragraphs 7.111 and 7.112 of the Report. With respect to paragraph 7.114, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report.

2.80. We have decided not to grant India's request. In its comments, India repeats arguments submitted during the panel proceeding that the Panel addressed in its Report. In particular, India's arguments regarding the country-specific analysis of unforeseen developments and the global nature of safeguard measures have been summarized in paragraph 7.104 and addressed in paragraphs 7.107-7.110 of the Report. India's arguments presented in its responses to Panel question Nos. 16 and 90 regarding the product concerned were addressed in paragraphs 7.111-7.112. In light of this request, however, we have modified footnote 188 in order to note India's response to Panel's question No. 90. India's arguments regarding the timing of unforeseen developments (including the fact that the confluence of events was identified as "unforeseen developments") were considered in paragraph 7.114 of the Report.

2.2.5 Section 7.5.6 and section 7.5.7 (paragraphs 7.116-7.122)

2.81. India requests that the Panel review paragraphs 7.116-7.122 of the Report. India notes that, even though the Panel has acknowledged the finding in *US – Steel Safeguards* that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product"⁵, it has found the specific reference to India's tariff concession in the Final Findings as being insufficient. India disagrees with the Panel's observation that the Indian competent authority cited, not the tariff concession, but the "low applied tariffs" as a reason for the increase in imports into India. India argues that "low applied tariffs" are clearly a result of India's tariff concessions.

2.82. **Japan opposes India's request. Japan submits that** India repeats its argument that evidence of the importing Member having a tariff concession for the relevant product itself proves the logical connection between tariff concessions and increased imports causing serious injury. Japan notes that the Panel has already considered India's arguments, as shown in paragraph 7.118 of Report.

2.83. We have decided not to grant India's request. In its comments, India repeats its arguments presented during the panel proceedings, which were summarised in paragraphs 7.118-7.119 and addressed in paragraphs 7.120-7.122 of the Report.

2.2.6 Section 7.6 (paragraphs 7.123-7.152)

2.84. India requests that the Panel revise paragraphs 7.123-7.152 of the Report. India reiterates that the first quarter of 2015-2016 has been annualized for an accurate comparison. India repeats that the annualization does not result in a change in the POI, but it is only a statistical tool used for comparing dissimilar periods. India submits that it is a uniform practice worldwide to annualize or extrapolate the data of a part of financial or calendar year to reflect the data of the complete financial or calendar year. India notes that the panel in *US – Lamb* considered that a focus on the interim data available pertaining to the end of an investigation period was logical and justified the extrapolation (annualization) of data.⁶ India refers to the panel report in *US – Line Pipe* to reiterate that in the absence of any provision in Article XIX of GATT 1994 or the Agreement on Safeguards with regard to the breaking down or manner of analysis of available data, the methodology adopted by India cannot be questioned unless it is apparent that such adopted methodology is unreasonable or biased.⁷

2.85. **Japan opposes India's request. Japan reiterates that the purpose of the interim review is to comment on "precise aspects" of the interim report** meaning that the parties' comments must be sufficiently specific and detailed. Japan notes that India has only specifically addressed paragraph 7.141. Japan submits that by referring to an entire section of the Interim Report covering almost 30 paragraphs without indicating which specific paragraphs should be amended, India's request cannot be considered as sufficiently specific and detailed. Japan further submits that the Panel has already addressed India's arguments in paragraphs 7.138 and 7.139 of the Report.

2.86. We have decided not to grant India's request. In its comments, India repeats its arguments submitted during the panel proceeding regarding the use of annualized data, which were summarised in paragraph 7.136 and addressed in paragraphs 7.137-7.145 of the Report. In light of

⁵ India's request for review of price aspects of the interim report (referring to India's first written submission, paras. 115-116, in turn quoting Panel Reports, *US – Steel Safeguards*, paras. 10.139-10.140).

⁶ Panel Report, *US – Lamb*, paras. 7.192-7.194.

⁷ Panel Report, *US – Line Pipe*, para. 7.203.

India's request, we have added footnote 219 in paragraph 7.136 of the Report in order to better reflect India's arguments.

2.2.7 Sections 7.8.3.2.2 and 7.8.3.3 (paragraphs 7.194-7.206 and 7.215-7.219)

2.87. India notes that the Panel's observation in paragraphs 7.194-7.206 and 7.215-7.219 of the Report is primarily based upon the premise that India used the annualized data of the first quarter of 2015-2016 for the purpose of its serious injury analysis. Therefore, India reiterates its comments regarding section 7.6 above.

2.88. **Japan opposes India's request.** Japan notes that India fails to explain which specific aspects of the Report it asks the Panel to review. Japan submits that India seeks to relitigate the issue of the use of annualized data by the competent authority without any explanation as to why such methodology was justified in the specific case at hand.

2.89. We have decided not to grant India's request. As noted, the Panel has discussed India's arguments regarding the annualized data in paragraphs 7.136-7.145 of the Report.

2.2.8 Section 7.8.4 (paragraphs 7.220-7.230)

2.90. India requests that the Panel modify section 7.8 of the Report in order to duly consider the arguments raised by India during the course of the panel proceeding. India reiterates that the Indian competent authority examined and made its conclusions with regard to serious injury as well as threat of serious injury in paragraphs 45-59 of the Final Findings. India notes that the expression "further" in paragraph 59 of the Final Findings was used in the context of the findings of the Indian competent authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.

2.91. **Japan opposes India's request.** Japan submits that in its comments regarding section 7.8.4 India challenges the Panel's findings and its legal interpretation of "threat of serious injury" within the meaning of Article 4.1(b). Japan reiterates that the parties cannot use the interim review stage to reargue their case if they disagree with the panel's findings. Japan also notes that the Panel carefully analysed the content of the Final Findings as well as India's arguments in paragraphs 7.224-7.229 of the Report, and reached the conclusion that the existence of a threat of serious injury was not adequately addressed in the Final Findings.

2.92. We have decided not to grant India's request. In its comments, India reiterates its contention that the Indian competent authority made a finding of both serious injury and threat of serious injury. The Panel has discussed this issue in paragraphs 7.220-7.230 of the Report.

2.2.9 Section 7.9 (paragraphs 7.232-7.278)

2.93. India requests that the Panel review and modify section 7.9 of the Report regarding the causal link between the increase in imports and serious injury. India submits that the Panel's observation regarding the absence of overall coincidence in trends between movements in imports and movements in injury factors is factually incorrect. India reiterates that the Indian competent authority discussed and reached a conclusion that, while the imports increased, the domestic industry lost its market share in the same period. India adds that the decline in profitability of the domestic industry occurred over the same period when the increased imports took place, and the entire injury analysis was for the period when the increased imports took place.

2.94. India submits that its competent authority found that there was a direct correlation between the increase in imports and the serious injury suffered by the domestic industry, as imports in absolute terms increased approximately three times during 2015-2016 (annualized) as compared to 2013-2014. India notes that the domestic industry's market share declined from 45% to 37% and the price of imports declined sharply, and consequently the domestic industry suffered losses. It is, thus, evident that the increased imports have caused serious injury to the domestic industry. India argues that its competent authority established a "direct correlation", rather than a mere "coincidence", between the increase in imports and serious injury suffered by the domestic industry.

2.95. India notes that the analysis in paragraphs 7.249-7.252 is based predominantly on the fact that the Indian competent authority used the annualized data of the first quarter of 2015-2016 for the purpose of its analysis. Therefore, India reiterates its comments regarding section 7.6 of the Report. Regarding the price competition between imported and domestic products, India reiterates that once the products are included into the scope of the investigation, then no further division or categorization is required with respect to covered products. India notes that the Agreement on Safeguards does not envisage a comparison of prices as required in Article 2.4 of the Anti-Dumping Agreement. India adds that the Panel did not consider the fact that, in the absence of the price related information from the relevant responding parties, India could not have examined the price competition between imported and domestic products.

2.96. Regarding the non-attribution analysis, India reiterates the arguments presented in its first written submission and requests that the Panel reconsider its findings in view of arguments advanced by India therein. India refers to the Panel's finding that the Indian competent authority failed to provide a reasoned and adequate explanation as to why the captive sales of the domestic industry and the sales of domestic producers outside the domestic industry were not a source of injury to the domestic industry. In this respect, India reiterates that Article 4 of Agreement on Safeguards requires competent authorities to only examine the "share of domestic market taken by the increased imports". India argues that its competent authority demonstrated that the share of imports had gone up, which leads to a conclusion that the share of the domestic market was reduced.

2.97. Japan opposes India's request. Japan submits that India repeats its arguments and attempts to reargue an issue that the Panel has already addressed. Japan reiterates that interim review stage is not the appropriate forum for relitigating arguments already put before the Panel. Japan notes that the Panel has already addressed India's arguments regarding the overall coincidence in trends between movements in imports and movements in injury factors in paragraphs 7.242-7.248 of the Report. Japan also notes that the Panel has addressed India's arguments regarding the price competition between imported and domestic products in paragraph 7.255 of the Report. Finally, Japan submits that India's comment regarding the non-attribution analysis is vague and it is unclear what specific aspects of the Panel's findings with regard to the non-attribution analysis India requests the Panel to modify and how.

2.98. We have decided not to grant India's request. In its comments, India reiterates its arguments regarding the causal link and non-attribution that were addressed by the Panel in its Report. In particular, the Panel addressed the question of whether there was an overall coincidence of trends in paragraphs 7.247-7.248. The Panel addressed India's arguments regarding the price analysis in the safeguard investigation and the products included into the scope of the investigation in paragraph 7.255 of the Report. The Panel addressed India's arguments regarding the non-attribution analysis, specifically regarding the domestic industry's captive sales and sales of producers outside the domestic industry, in paragraphs 7.264-7.269 of the Report.

2.2.10 Paragraphs 7.303-7.305

2.99. India requests that the Panel modify paragraphs 7.303-7.305 regarding the notification of provisional measures. India submits that the Panel should consider the difficulty faced by Members (especially developing countries), when the competent authorities reach a conclusion, upon the preliminary examination, that any delay in the imposition of the duties would cause damage which would be difficult to repair. In those circumstances, it might be difficult for a Member to notify the Committee on Safeguards prior to taking the provisional safeguard measures.

2.100. Japan opposes India's request. Japan submits that India's argument is a matter that should not be addressed through the interim review.

2.101. We have decided not to grant India's request. Article 12.4 of the Agreement on Safeguards does not provide any exception for developing countries with respect to the notification of provisional safeguard measures.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In the present dispute, Japan challenges the provisional and definitive safeguard measures imposed by India on imports of iron and steel products into India. These measures, together with the investigation that led to their imposition, violate several provisions of the Agreement on Safeguards and the GATT 1994. Japan respectfully asks the Panel to conclude that India acted inconsistently with its WTO obligations and to recommend the DSB to request India to bring its measures into compliance with the Agreement on Safeguards and the GATT 1994.

II. THE APPLICABLE STANDARD OF REVIEW

2. The Appellate Body in *Argentina – Footwear (EC)* clarified that the general standard of review set out in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards. Consequently, in a dispute involving the Agreement on Safeguards, the 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. This assessment can only be based on the report published by the competent authorities pursuant to Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards. In this case, the Preliminary Findings and the Final Findings constitute the "published report" within the meaning of Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards.

III. TEXTUAL AND CONTEXTUAL INTERPRETATION OF ARTICLE XIX OF THE GATT 1994
AND OF THE AGREEMENT ON SAFEGUARDS

3. Japan emphasizes the importance of the context in interpreting Article XIX of the GATT 1994 and the Agreement on Safeguards for a proper understanding of the requirements to be met by a WTO Member wishing to impose safeguard measures. In particular, the requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards cannot be interpreted in an isolated manner but must be interpreted together in light of their context.

4. More specifically, Article XIX: 1(a) of the GATT 1994 requires competent authorities to identify and establish the existence of certain circumstances as well as certain conditions in order to impose safeguard measures. Importantly, the competent authorities must establish a "logical connection" between these circumstances and conditions. This "logical connection" implies the following steps. First, the competent authorities must identify the "unforeseen developments" and explain how such unforeseen developments have resulted in increased imports causing serious injury or threat thereof to the domestic industry. Second, the competent authorities must demonstrate that the Member concerned incurred obligations under the GATT 1994 which prevented that Member from addressing the increased imports causing serious injury or threat thereof to the domestic industry. Third, the competent authorities must identify the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligation. Fourth, there must be a finding of serious injury or threat thereof to the domestic industry. In addition, such serious injury must be caused by the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligations.

IV. INDIA VIOLATED THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. *Failure to demonstrate the existence of "unforeseen developments"*

5. In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to *why* the identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. Merely identifying events and describing them as "unforeseen" without explaining why these events were unforeseen at the appropriate time does not satisfy the requirement laid down in Article XIX.

6. The Preliminary Findings and the Final Findings refer to a number of events raised by the applicants in their application. Japan submits that the Indian authority violated Article XIX:1(a) of the GATT 1994 since it failed to demonstrate why those events constituted "unforeseen developments". First, it is unclear whether the Indian authority considered that all or some of these events constituted "unforeseen developments" or whether these events together formed an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994. Contrary to what India argues, the mere fact that the Preliminary Findings and the Final Findings refer to the Panel Report in *US – Steel Safeguards* does not make it "evident that the Competent Authority considered that a confluence of all these events constitute [the] 'unforeseen developments'". Any explanation must be explicit and thus clear and unambiguous.

7. Second, regardless of whether the Indian authority considered these events, taken together or separately, as unforeseen development(s), the Indian authority did not discuss why these events could be considered as "unforeseen". In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide "as a minimum, some discussion by the competent authorities as to why [such developments] were unforeseen at the appropriate time". It also means that "[a] mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact". However, the Indian authority did not provide such explanation.

8. Third, Japan also notes that, while the Final Findings seem to indicate that certain developments were unforeseen by the domestic industry, it does not show that these developments were unforeseen by India for the purpose of Article XIX:1(a) of the GATT 1994.

2. *Failure to demonstrate a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry*

9. First, the Indian authority failed to demonstrate *how* imports increased as a result of the alleged unforeseen developments. Merely asserting that there is a "logical connection" cannot satisfy the requirement to provide a reasoned and adequate explanation as required under Article XIX. Japan submits that, in order to do so in this case, the Indian authority was required to provide a reasoned and adequate explanation regarding how and to what extent the alleged unforeseen developments changed the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry. This was necessary since, due to the nature of the events, there was no clear and automatic link between the allegedly identified events and an increase in imports into India.

10. Merely noting the "huge capacities" developed by certain exporting countries is insufficient since the existence of such capacities does not *per se* lead to the conclusion that it resulted in increased imports causing or threatening to cause serious injury to the Indian domestic industry. The same comment applies to the increase in demand in India and the fact that the US and the EU reduced their dependence on imported steel which is referred to in connection with excess capacities in certain countries as well as with regard to the other developments affecting these countries. Indeed, none of these events *per se* leads to increased exports from those countries to India. As there is no automatic link between the unforeseen developments examined above, taken separately or in conjunction, and the increase in imports into India causing or threatening to cause serious

injury, the Indian authority should have explained how these events changed the competitive relationship between imports and the domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry.

11. Furthermore, for those events which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis. Such explanation is, however, missing in the Preliminary Findings and the Final Findings.

12. Finally, the Indian authority should have demonstrated that the events identified as unforeseen developments occurred before imports started to surge. In the present case, however, the analysis does not indicate whether the alleged unforeseen developments occurred before the alleged surge in imports. Japan notes that the evidence on the record appears to indicate that some of the alleged unforeseen developments did not take place before the increase in imports and suggests that the increase in imports was caused by reasons other than the alleged unforeseen developments.

13. Second, the Indian authority failed to explain the impact of the unforeseen developments on the products concerned as the Preliminary Findings and the Final Findings refer to "steel" in general but fail to consider how the alleged unforeseen developments relate to the specific products at issue. Japan recalls that the Appellate Body in *US – Steel Safeguards* upheld the panel's findings that the factual demonstration of "unforeseen developments" must relate to the specific product covered by the specific measure at issue.

14. Third, the Indian authority's analysis is also deficient since the Preliminary Findings and the Final Findings do not provide any supporting data to substantiate its general assertion that the unforeseen developments resulted in the increase in imports causing or threatening to cause serious injury. As indicated by the panel in *US – Steel Safeguards*, an explanation that is not supported by relevant data cannot be seen as a reasoned and adequate explanation. Accordingly, Japan submits that simple assertions on the part of the Indian authority, without any supporting evidence, are insufficient to establish the existence of the "logical connection" between the alleged unforeseen developments and the increase in imports.

B. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

15. Under Article XIX:1(a) of the GATT 1994, the Member wishing to impose safeguard measures must demonstrate not only that it has incurred obligations under the GATT 1994 but also how the obligations incurred under the GATT 1994 prevented the WTO Member concerned from taking WTO-consistent measures to address the increase in imports causing or threatening to cause serious injury to the domestic industry.

16. In the present case, while the Indian authority noted that India's bound rate on the products concerned is 40%, it failed to explain how the tariff concession of 40% undertaken by India under the GATT 1994 had the effect of preventing India from taking WTO-consistent measures. In fact, the Indian authority acknowledged that there was no relationship between the effect of the 40% bound tariff rate India committed to and the alleged increase in imports since, according to the Indian authority, the alleged increase in imports was due to the effect of the "low applied tariffs" which are much lower than the bound tariff rate of 40%.

C. India violated Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

17. First, India failed to determine an increase in imports based on imports which arose "as a result of" the unforeseen developments and the effect of the obligations incurred under the GATT 1994. Since the Indian authority failed to demonstrate the logical connection between the increase in imports and the unforeseen developments and the effect of the obligations incurred under the GATT 1994, it improperly considered all imports in its analysis without ensuring that these

imports resulted from the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

18. Second, India failed to make a qualitative analysis of the increased imports by focusing solely on the quantitative change in the level of imports between 2013-2014 and the first quarter of 2015-2016.

19. In the present case, in order to determine whether the upward trend in imports – identified over a short-term period during the POI – could qualify as an increase in imports justifying the imposition of a safeguard measure, the Indian authority was required to conduct a qualitative analysis of this upward trend in imports. In order to make such a qualitative analysis, the Indian authority should have evaluated this short-term trend during the POI in light of longer-term trends or any other methods, taking into account that the short-term trend could appear simply as a recovery or return to a previous level of imports. The lack of qualitative analysis is striking in this case because, when the most recent data is examined in light of the data pertaining to 2011-2012 and 2012-2013, the increase in imports between 2013-2014 and 2014-2015 appears simply as a recovery or a return to the previous level of imports. Thus, without making a qualitative analysis of the increase in imports that occurred during the POI, e.g. without looking at this short-term increase in light of longer-term trends, India failed to make a determination of an increase in imports in accordance with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

20. Third, India failed to demonstrate an increase in imports based on "objective data". Indeed, the Indian authority annualized the data of Q1 of 2015-2016 without, however, explaining why this annualization was appropriate in light of the circumstances of the case. Japan does not argue that the annualization of data is not allowed in the context of a safeguard investigation. However, when used, the competent authorities must explain why such annualization is appropriate in light of the circumstances of the case. In the present case, the Indian authority failed to explain why it was reasonable to assume that data concerning Q1 of 2015-2016 was representative for the whole year. In fact, when one looks at quarterly figures for previous years, it is clear that there were fluctuations between different quarters and that it cannot be assumed that the figures for Q1 are representative for the entire year.

21. Fourth, India failed to demonstrate that the increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both in absolute and in relative terms, in light of the facts of the case. While the Final Findings use the words "sudden, sharp and significant" in the concluding paragraph of the section concerning the increased imports, they do not provide any explanation why the increase in imports in absolute or relative terms can be qualified as "sudden", "sharp" or "significant". An assertion that "[i]t is apparent" from the data "that there is a sudden, **sharp and significant surge in imports ... both in absolute terms as well as in relation to total domestic production**" without further explanation is clearly not sufficient.

D. India violated Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry

1. *India violated Article 4.1(c) of the Agreement on Safeguards*

22. When a domestic industry is defined as "a major proportion" under Article 4.1(c), it must encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production. This means that the competent authorities must ensure that the process of defining the domestic industry does not give rise to a material risk of distortion in the injury and causation determination. Japan claims that the determination of the "domestic industry" in this case does not comply with this standard.

23. In the Preliminary Findings and the Final Findings, the Indian authority considered that the applicants necessarily constituted "a major proportion" within the meaning of Article 4.1(c) of the Agreement on Safeguards merely because they represented at least 50% of the total production. However, the "major proportion" test is not a purely mathematical test. Indeed, it has both quantitative and qualitative connotations. In other words, the fact that domestic producers represent more than 50% does not necessarily mean that they constitute a "major proportion". Japan submits that the way in which the Indian authority defined the domestic industry gave rise to a material risk

of distortion. Indeed, while all domestic producers supported the Application, only three of them which were petitioners and replied to the questionnaires were included in the definition of the domestic industry. This self-selection process by the domestic producers introduced a material risk of distortion.

24. This is confirmed by the facts. Indeed, the examination of the information concerning the three domestic producers which were not included in the domestic industry showed positive trends in the injury factors for which information has been provided, namely sales, market share and production. Japan submits that, by concluding that the applicants represented a major proportion merely because they accounted for more than 50% and by disregarding that the information concerning the other domestic producers indicated positive trends with regard to some injury factors found to be critical to the finding of serious injury or threat thereof, the Indian authority introduced a material risk of distorting its analysis of the state of the domestic industry and therefore violated Article 4.1(c).

2. *India violated Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

25. Given that the domestic industry was defined in a manner that is inconsistent with Article 4.1(c), it must be concluded that the injury and causation determinations were consequently also inconsistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards as well as with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. India violated Articles 2.1, 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat thereof

1. *India violated Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards*

26. First, India failed to provide an adequate explanation of the "bearing" or "effect" that the relevant factors had on the situation of the domestic industry. Not any injury can justify the imposition of a safeguard measure. The Appellate Body underlined that the standard of "serious injury" is, on its face, "very high" and "exacting." To establish serious injury, the competent authorities must evaluate "all relevant factors". This evaluation is not simply a matter of form since the competent authorities must conduct a substantive evaluation of the "bearing" or "effect" that the relevant factors have on the situation of the domestic industry such as to be able to make a proper overall determination as to whether the domestic industry suffers serious injury or threat thereof. In carrying out this analysis, the competent authorities' explanation must "fully [address] the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data." In that regard, India errs when arguing that the competent authorities are not required to examine the bearing of the injury factors explicitly listed in Article 4.2(a). Furthermore, while Japan agrees that not all injury factors need to show a negative trend, contrary to what India argues, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend.

27. Turning to the facts of the case, Japan submits that the Indian authority did not conduct a substantive evaluation of all relevant factors such as to make a proper overall determination that the domestic industry is seriously injured by the increased imports. In particular, there is no adequate explanation of the "bearing" or "effect" that the decline in market share, prices and profitability had on the overall situation of the domestic industry.

28. The Indian authority first erred in its analysis of the "market share" of the domestic industry. To start with, the Indian authority failed to consider how the "decline in market share" of the domestic industry ties in with the overall position of the domestic industry in a market where domestic demand is expanding. Indeed, the Indian authority's analysis seems to rely on the assumption that the domestic industry should have maintained or expanded its market share in an expanding market. The Indian authority, however, did not provide any explanation as to why this assumption could be made. Then, the Indian authority failed to evaluate the captive segment in considering the decline in market share of the domestic industry. Finally, the Indian authority overestimated the impact of the decrease in market share of the domestic industry. Indeed, it appears that the decrease in the market share of the domestic industry in the non-captive segment

identified by India was partly due between 2013-2014 and 2014-2015 to an increase in the market share of the captive sales of the domestic industry.

29. The Indian authority also erred in its analysis of the "domestic prices". Indeed, while the Indian authority considered that the effect on domestic prices was an important factor for the determination of serious injury, it merely noted that the domestic prices decreased from 100 to 83 but did not make any analysis of the effect of this factor on the financial condition of the domestic industry, taking into account that cost reduction occurred simultaneously. Moreover, an explanation based exclusively on indexed data is insufficient to show that the decrease in domestic prices led to financial losses. Furthermore, the exclusion of information concerning the captive market left the Indian authority without explanation of the overall state of the domestic industry.

30. The Indian authority further erred in its analysis of the "profitability" of the domestic industry. Indeed, the Indian authority failed to take into account the data pertaining to the entire POI since it focused exclusively on the data from the most recent past. In addition, the Indian authority did not consider the captive segment of the domestic industry in evaluating profitability.

31. Finally, the Indian authority failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the findings of serious injury. Most injury factors in this case (namely production sales, capacity utilization, employment, productivity and inventories) showed a stable or positive trend during the POI. Taking into account that the injury evaluated in the context of the Agreement on Safeguards must be an "overall impairment in the position of the domestic industry" for which the standard is very high, the Indian authority was required to provide a substantive and detailed explanation as to why those factors showing a stable or positive trend did not negate the finding of serious injury. Such analysis is, however, lacking in the Final Findings.

32. Second, the Indian authority failed to make a determination of serious injury based on "objective data" as required by Article 4.2(a) of the Agreement on Safeguards for two reasons.

33. The first reason is that, when examining the figures of inventories, production and sales for a given year of the POI, these figures do not match. In other words, taking the figure of inventories at the beginning of the year, adding the production figure, subtracting the amount of sales and ending inventories, there remains a substantial amount. The export sales figures found in the Investigation File do not permit to explain this amount. This seems to imply that some of the figures concerning the injury analysis (production, inventories or sales) might have been misreported in the analysis of the Indian authority and therefore that the injury analysis was not based on "objective data".

34. The second reason is that, in examining the injury factors, the Indian authority treated data of Q1 of 2015-2016 as being representative for the entire year 2015-2016. In other words, the Indian authority annualized the Q1 data to cover the period until 31 March 2016. The Indian authority, however, failed to explain why annualization was reasonable. It therefore failed to make a determination of serious injury that is based on objective data.

2. *India violated Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards*

35. Japan submits that India acted inconsistently with the Agreement on Safeguards since it made a determination of "threat of *further* serious injury" or "*further* threat of *greater* serious injury" which is not provided under the relevant provisions of that Agreement. Indeed, the Agreement on Safeguards provides that safeguard measures may be applied if there is "serious injury" or "threat of serious injury". In fact, if there is "serious injury", there is no need to make a prospective analysis about how this serious injury may evolve in the future.

36. Even if it were to be concluded that the Indian authority made a determination of "threat of serious injury", it does not meet the standard set out in Articles 4.1(b) and 4.2(a) which involves making fact-based projections concerning future developments of the domestic industry's conditions.

37. First, there is no fact-based assessment of likely development in the near future because there is no analysis of factual data concerning "surplus production capacities". Moreover, the Indian authority failed to explain how and to what extent these surplus production capacities would lead to additional production being exported to the Indian market. Second, while "the competent authorities

must evaluate all relevant injury factors," the Indian authority failed to do so because it did not make any assessment *at all* regarding the other factors, namely production, sales, market share, profitability, etc. Third, even if India argues that the factors examined in determining serious injury to the domestic industry are also relevant in determining threat of serious injury to the domestic industry, such determination is also deficient for the same reasons as those described in the section concerning "serious injury".

3. *India violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

38. As demonstrated above, the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury to the domestic industry. Consequently, India also violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

F. India violated Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof to the domestic industry

1. *India violated Article 4.2(b) of the Agreement on Safeguards*

- a. Failure to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry

39. Japan submits that India violated Article 4.2(b) of the Agreement on Safeguards by failing to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry.

40. First, the Indian authority failed to show the existence of an overall coincidence in time between the movements in imports and the movements in injury factors. Indeed, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized). Furthermore, the Indian authority's analysis includes a comparison of the relationship between the movements in import volume with only two injury factors and thus not of *all* injury factors. In fact, the data reveal that there was no clear "overall coincidence" in time. It follows that there was no basis for a finding of existence of a causal link between the increased imports and the serious injury or threat thereof to the domestic industry.

41. Second, in the absence of an overall coincidence between the movements in imports and the movements in injury factors, it was necessary for the Indian authority to provide a compelling explanation as to why a causal link nevertheless existed. However, the Indian authority, failed to provide such an explanation.

42. Indeed, the Indian authority's conclusion that the decreasing price of the imports prevented the domestic industry from sustaining its prices is baseless. First, a simple comparison between the unit average price of imported products and the unit average price of domestic products is unreliable as it ignores the fact that large differences in categories and prices between the various products included in the "products concerned" may distort the comparability of the average prices. Second, no meaningful conclusion can be derived from an end-to-end comparison of the results in 2013-2014 and 2015-2016 (Q1) since such comparison cannot show the existence or the extent of causation. Third, the explanations are based on indexed data which do not allow the authority to draw any meaningful conclusion. Fourth, a simple comparison of two prices, whether it is based on actual figures or index data, does not explain whether there is any causation between the two prices or which price is the cause and which price is the effect because there may be other factors having an impact on domestic prices.

43. Furthermore, the Indian authority's conclusion that the imports prevented the domestic industry from increasing its production and sales compared in proportion to the increase in demand/consumption is also baseless. Indeed, this conclusion is based on the assumption that the domestic industry should be able to increase its production and sales in proportion to the increase in demand/consumption in the absence of increased imports. The Indian authority, however, failed to provide any explanation for this assumption. In fact, the Indian authority did not examine the

possibility that the domestic industry was not able to increase its production and sales proportionally to increased demand in the absence of increased imports because of factors other than increased imports.

44. Finally, the Indian authority's conclusion that the imports led to a sharp decline in profitability and to losses recorded by the domestic Industry also lacks any adequate explanation. Indeed, while the Indian authority's conclusion is based on its findings that the imports prevented the domestic industry from sustaining its prices and increasing its production and sales in proportion to the increase in demand/consumption, these findings are baseless for the reasons explained above. Moreover, with regard to the relationship between profitability, on the one hand, and import volumes/price and domestic volumes/price, on the other hand, no meaningful conclusion can be derived from an end-to-end point comparison

- b. Failure to demonstrate that the alleged serious injury and threat thereof caused to the domestic industry by factors other than the increased imports was not attributed to increased imports

45. Pursuant to 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 the injury caused by such other factors is not attributed to the increased imports. The competent authorities are required to explain the particular process they have used to separate and distinguish other causal factors and how they have ensured that injury caused by such other factors was not included in the assessment of the injury caused by increased imports. Furthermore, 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, must be stated explicitly in the published report, accompanied with an explicit and adequate explanation.

46. Contrary to what India claims, the text of Article 4.2 does not support the understanding that the obligation to carry out the non-attribution analysis under Article 4.2(b) is limited only to the factors that have been identified as "relevant factors" under Article 4.2(a). The "relevant factors of an objective and quantifiable nature having a bearing on the situation" of the domestic industry referred to in Article 4.2(a) are those that must be examined in the context of the serious injury analysis as they are indicative of the state of the domestic industry. The "other factors" examined under Article 4.2(b) are those which have an effect on the state of the domestic industry.

47. In the present case, India violated Article 4.2(b) by failing to ensure that the alleged serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports for the following reasons.

48. At the outset, it should be noted that the Indian authority did not conduct a specific non-attribution analysis as the sections concerning the causal link between increased imports and the serious injury or threat of serious injury in the Preliminary Findings and Final Findings are silent on the issue of other factors that could be causing injury to the domestic industry.

49. In any event, the analysis of the Indian authority attributing the alleged injury of the domestic industry solely to the increased imports does not meet the standard of a "reasoned and adequate" explanation. First, while in the Final Findings the Indian authority noted that "[i]nterested parties have submitted that injury being suffered by the domestic industry is due to their own internal factors", it failed to properly examine those factors. Indeed, its cursory analysis does not include a clear determination that the identified factors are not causing injury to the domestic industry nor an explanation why this is so. Second, while the Indian authority addressed the argument concerning the sales by other Indian producers, it failed to expressly determine that such factor is not causing injury to the domestic industry and did not provide a reasoned and adequate explanation why it is so. Third, with regard to the argument concerning captive sales, the Indian authority should have examined whether such factor was not causing injury to the domestic industry and should have provided a reasoned and adequate explanation why such factor did not or could not cause injury to the domestic industry. Fourth, while various interested parties pointed out during the investigation that the decline in profitability of the domestic industry might be the result of factors other than the alleged increased imports, the Indian authority failed to examine and determine that those other factors were not the cause. Finally, for the purpose of the non-attribution analysis, India failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

2. *India violated Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

50. The fact that India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury or threat thereof implies that India has violated not only Article 4.2(b) but also Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Furthermore, pursuant to Article 4.2(b), a causal link must be established, through an investigation described in Article 4.2(a), between the increased imports, on the one hand, and the serious injury or threat thereof, on the other hand. It follows that India also acted inconsistently with Article 4.2(a).

G. India violated Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

51. The requirements that a safeguard measure be limited to "the extent necessary" and "only for such period of time as may be necessary" to prevent or remedy serious injury" in Article 5.1, first sentence, and in Article 7.1 must be read as requiring that safeguard measures be applied only to the extent that they address serious injury attributed to increased imports. According to the Appellate Body, the violation of Article 4.2(b) is thus a sufficient basis to make a *prima facie* case that the safeguard measure has not been applied "to the extent necessary to prevent or remedy serious injury" under Article 5.1. This equally applies to the requirement of Article 7.1 and Article XIX:1(a) of the GATT 1994.

52. In the present case, the Indian authority failed to make a proper causation and non-attribution analyses, thereby violating Article 4.2(b) of the Agreement on Safeguards. The Indian authority was thus unable to ensure that the safeguard measures were applied only to the extent and only for such a period of time necessary to address the serious injury attributed to increased imports.

H. India violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

53. It has been demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its determination concerning the unforeseen developments, the effects of the obligations incurred under the GATT 1994, the increase in imports, the domestic industry, the serious injury and threat thereof, the causal link and of the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury. Thereby, Japan has also demonstrated that India violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards as the Preliminary Findings and the Final Findings do not set forth findings and reasoned conclusions for all pertinent issues of fact and law.

I. India violated Article 11.1(a) of the Agreement on Safeguards

54. Japan has demonstrated that the safeguard measures imposed by India violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. As a result, India also violated Article 11.1(a) of the Agreement on Safeguards.

V. INDIA ACTED INCONSISTENTLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

55. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards. That provision imposes an obligation for the Member imposing a provisional safeguard measure to notify such measure before taking it. India does not dispute the fact that the provisional measure was notified after the measure was taken. This constitutes a clear violation of Article 12.4.

56. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards. The notifications were made only after the following number of days passed, pursuant to Article 12.1(a) 8 days; pursuant to Article 12.1(b) 6 days and pursuant to Article 12.1(c) 6 days. Japan submits that as a result of such delays, the notifications were not "immediate", taking into account that the notifications were not complex and did not have to be translated.

57. Third, India violated Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 failed to provide the following information: information on the causal link between

the increased imports and the serious injury or threat thereof; a precise description of the product involved; a precise description of the scope of the proposed measure; and the proposed date of introduction of the proposed measure.

58. Fourth, India failed to comply with Article 12.3 of the Agreement on Safeguards. Indeed, India failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views on the issues identified.

VI. INDIA VIOLATES ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India violates Article II:1(b) of the GATT 1994

59. India violates Article II:1(b) of the GATT 1994 since, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. While the impugned measures are duties levied by customs, considering their design and structure, they are of an "extraordinary" nature and therefore qualify as "other duties or charges" and not as "ordinary customs duties" under Article II:1(b) of the GATT 1994. Since the duty at issue is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.

B. India violates Article I:1 of the GATT 1994

60. India violates Article I:1 of the GATT 1994 since the safeguard duty is not applied to the products concerned originating in certain countries and this constitutes an advantage that is not accorded immediately and unconditionally to the like products originating in other WTO Members including Japan.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF JAPAN

I. INDIA ACTED INCONSISTENTLY WITH THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. *India failed to demonstrate the existence of "unforeseen developments"*

1. First, by failing to clearly indicate in the Preliminary Findings and the Final Findings whether it was the confluence of events rather than the events taken separately that were considered as the "unforeseen developments", the Indian authority failed to properly identify the alleged unforeseen developments. Contrary to what India argues, the mere reference to the Panel Report in *US – Steel Safeguards* does not make it evident that the Indian authority considered that it was the confluence of events that constituted the "unforeseen developments".

2. Second, India failed to provide a reasoned and adequate explanation *why* the relevant events constituted the "unforeseen developments". India's interpretation that Article XIX:1(a) of the GATT 1994 only requires a "discussion" and not an "analysis" of unforeseen developments whereby the competent authorities should merely identify events that they present as being unforeseen is manifestly erroneous. Indeed, as clarified by the Appellate Body, in order to satisfy the requirement to demonstrate the existence of "unforeseen developments" the competent authorities must discuss or offer an explanation "as to why [the identified] changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994."

3. Third, the fact that the Indian authority concluded that the events were unforeseen for the domestic industry does not mean that these events were unforeseen for India, as required by Article XIX of the GATT 1994. India failed to rebut Japan's argument.

2. *India failed to demonstrate the existence of a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry*

4. Although India agrees that there must be a logical connection between the unforeseen developments and the increase in imports causing serious injury or threat thereof, India appears to implicitly consider that merely claiming that there is a "logical connection" is sufficient to comply with Article XIX. According to India the "logical connection" test is of a lesser threshold when compared to the "causal link" test. This interpretation of the "logical connection" requirement must be rejected. First, the issue is not to determine whether the "logical connection" is of a lesser or a higher threshold than the "causal link" test. Second, there is no textual support to the position that the "logical connection" requirement is of a lesser threshold than the "causation" requirement. Third, India errs in considering that merely claiming that there is a "logical connection" between the unforeseen developments and the increased imports is sufficient to comply with Article XIX:1 of the GATT 1994. Indeed, the "logical connection" entails the obligation for the competent authorities to explain *how* the unforeseen developments have the *effect* or *outcome* of resulting in an increase in imports which has caused or is threatening to cause serious injury to the domestic industry.

5. In the present case, the Indian authority failed to demonstrate the existence of the "logical connection" for three reasons. First, the Indian authority failed to explain *how* imports of the products concerned increased *as a result* of the alleged unforeseen developments. In that regard, Japan submits that since there is no clear and automatic link between the identified events and the increased imports into India causing or threatening to cause serious injury to the domestic industry, the Indian authority was required to provide a more detailed analysis including the examination of how the alleged unforeseen developments have modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in

an increase in imports causing or threatening to cause serious injury to the domestic industry. Furthermore, to the extent the Indian authority relied on events which relate to certain specific countries, it had to explain why each of those events resulted in increased exports from those countries and why this caused other countries, with respect to which India failed to provide any explanation, to export more to India, in order to explain that those "unforeseen developments" collectively resulted in the alleged increase in imports causing serious injury to its domestic industry. Finally, since the increase in imports must occur "as a result of" unforeseen developments, the Indian authority was required to demonstrate that the events identified as unforeseen developments occurred before the imports started to surge. The fact that in its response to the Panel's questions India stated that "the 'unforeseen developments' occurred prior to the increase in imports of PUC into India" cannot cure the deficiency of the Indian authority's published report. In any event, such statement lacks any basis and contradicts the information on the record.

6. Second, the Indian authority failed to explain the impact of the "unforeseen developments" on the specific products at issue as the relevant developments refer to "steel" in general. India's responses to the Panel's questions confirm that India failed to examine the relation between the alleged unforeseen developments and the increase in imports of the specific products concerned, thereby failing to demonstrate the "logical connection" required by Article XIX:1(a) of the GATT 1994.

7. Third, the Indian authority failed to provide supporting data to substantiate the assertion that the unforeseen developments *resulted in* the increase in imports causing or threatening to cause serious injury to the domestic industry. Contrary to what India argues, the fact that the Indian authority provided data concerning the increase in imports is not sufficient. The lack of supporting data is confirmed by India's responses to the Panel's questions. Indeed, while India refers to the data submitted by the applicants with regard to the alleged huge production capacities developed in China, Russia, Ukraine, Japan and Korea, Japan has failed to find those data in the Application. In any event, the analysis included in the Final Findings contains no reference to the specific evidence submitted by the applicants. India also confirmed that, while the Indian authority concluded that India was the "natural choice" for export, it failed to establish the connection between the alleged excess capacities in certain exporting countries and the increase in imports into India by not examining whether there were alternative markets with increasing demand and high prices that could absorb those excess capacities.

B. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

8. First, India mischaracterizes the obligation to demonstrate a "logical connection" between tariff concessions and increased imports. Contrary to what India argues, merely indicating that the importing Member has made tariff concessions does not in itself prove a logical connection between those concessions and the increase in imports. Rather, the "logical connection" entails the obligation for the competent authorities to explain *how* the GATT obligations prevented the importing member from addressing the increase in imports allegedly causing serious injury or threat thereof to the domestic industry.

9. Second, contrary to what India argues, the Final Findings fail to demonstrate the logical connection between the obligations incurred by India under the GATT 1994 and the increase in imports. While the Final Findings identify India's bound rate of 40%, the Indian authority failed to demonstrate how that concession of 40% prevented it from addressing the increase in imports causing or threatening to cause serious injury.

10. Third, India's reference to the obligations incurred under Article XXIV of the GATT 1994 is without merit. Indeed, the Indian authority did not identify Article XXIV of the GATT 1994 as one of the obligations incurred under the GATT that was constraining its freedom of action and, in any case, Article XXIV of the GATT 1994 does not impose an obligation on the importing Member to apply a specific duty rate on imports from its FTA/RTA partners.

C. India acted inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

11. Japan submits that, contrary to what India argues, Japan has substantiated its claim under Article 2.1 of the Agreement on Safeguards and thus India's argument that the Panel cannot make findings under Article 2.1 should be rejected.

12. Japan further submits that since the Indian authority has failed to demonstrate the logical connection between the unforeseen developments and the effect of the obligations incurred under the GATT 1994, on the one hand, and the increased imports, on the other hand, it has failed to demonstrate an increase in imports based on imports arising "as a result" of the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

13. Japan has also demonstrated that the Indian authority failed to make a qualitative analysis of the "increase in imports" since its analysis did not enable it to ensure that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury. More specifically, by focusing on the occurrence of an increase in imports between 2013-2014 and the first quarter of 2015-2016, the Indian authority could not ensure that this upward trend over such a short period was not simply a recovery or a return to a previous level of imports. The lack of qualitative analysis is particularly striking when the data of the imports relating to 2011-2012 and 2012-2013 is examined. In order to make a qualitative analysis, the Indian authority should have evaluated the real significance of this short-term trend during the POI in light of longer-term trends or any other methods such as to ensure that this short-term upward trend was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively.

14. Furthermore, India failed to demonstrate an increase in imports that is based on "objective data" because India relied on annualized data for 2015-2016 without explaining why annualization was appropriate in light of the circumstances of this case. While Japan does not take issue with the annualization of data *as such*, Japan considers that, when using that method, the competent authorities are required to explain why the yielded results are representative for the entire year and why the simple annualization of data is appropriate for the purpose of comparison with the annual data from previous years.

15. Finally, Japan submits that, even if it were to be concluded that the Indian authority did not fail to make a qualitative analysis that is based on "objective data," India nonetheless acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 since it failed to provide a reasoned and adequate explanation on how it determined that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury". India did not address that claim.

D. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry

1. *India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards*

16. In all circumstances where the domestic industry does not cover the producers of the product concerned as a whole, the competent authority needs to ensure that the manner in which it defines the domestic industry does not introduce a material risk of distortion. Contrary to what India argues, the mere fact that the domestic producers represented 67% of the domestic production does not automatically imply that there was no material risk of distortion in the definition of the domestic industry. In fact, the "major proportion" test is not a purely quantitative test. A "major proportion" should be understood as "a relatively high proportion that substantially reflects the total domestic production". It has "both quantitative and qualitative connotations".

17. In the present case, there is a material risk of distortion that stemmed from the self-selection process of the domestic producers included in the definition of the domestic industry. Indeed, the domestic producers themselves selected those producers to be included in the domestic industry. The purely quantitative approach followed by the Indian authority, whereby it accepted the domestic

industry as proposed by the applicants simply because they represented more than 50% of the domestic production, cannot exclude the possibility that the domestic producers purposively decided to include in the domestic industry only the low performing producers while ignoring the high performing producers. The information submitted in the application to the Indian authority clearly show that the domestic producers not included in the domestic industry performed substantially differently from those included in the domestic industry. This confirms that the domestic industry did *not substantially reflect* the total domestic production.

2. *India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994*

18. Since the domestic industry has been defined in a manner that is inconsistent with Article 4.1(c), the injury and causation determinations are consequently also inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat thereof

1. *India's determination of serious injury is inconsistent with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards*

19. First, Japan submits that India mischaracterizes the standard of "serious injury". Indeed, contrary to what India appears to argue, not *any* injury can justify the imposition of a safeguard measure. India also misrepresents the obligations imposed on the competent authorities in the context of the serious injury analysis. Article 4.2(a) expressly states that the competent authorities shall "evaluate" all relevant factors including those specifically listed in that provision. While not all injury factors need to show a negative trend, the competent authorities are nonetheless required to carefully analyze each of the injury factors before they can make an overall determination as to whether there is a serious injury. This also implies that, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend. Without such an explanation, the competent authorities are not in a position to reach a reasoned and adequate conclusion with regard to the existence of serious injury.

20. Second, India failed to explain the "bearing" of the relevant injury factors on the situation of the domestic industry. With respect to the analysis of market share, India erroneously argues that it only had to establish that the domestic industry lost its market share to imports. The substantive evaluation required by Article 4.2(a) implies that the Indian authority should have considered the decline in market share against the domestic industry's sales in absolute terms as well as other elements. In any event, India failed to establish that "the market share of the domestic industry has [been] taken away by the increased imports" since no meaningful conclusion could be drawn from merely comparing the change in the market share of the imported and domestic products. Japan also submits that by looking only at the figures relating to non-captive market, the Indian authority examined only one part of the domestic industry. While India argues that the captive segment did not have "any bearing on the performance of the domestic industry", there is nothing on the record that would support this assertion. At the very least the Indian authority should have explained why the performance of the captive segment did not negate its finding of serious injury and threat thereof based on the examination of the non-captive segment of the market.

21. With respect to the analysis of prices, Japan reiterates that without absolute figures or an adequate explanation, it is impossible to draw any meaningful conclusions regarding the "bearing" that the price decrease had on the financial situation of the domestic industry. Furthermore, to the extent that the information concerning captive sales was excluded from the price analysis, the Indian authority was required to conduct a separate analysis of such captive sales or explain why such analysis was not necessary despite the fact that it had relevant data regarding the captive segment of the domestic industry. With respect to the Indian authority's analysis of profitability, although India argues that it "has adequately analyzed the profitability over the entire investigation period", the Preliminary Findings and the Final Findings refer only to the decrease in profitability that occurred in Q1 of 2015-2016 and thus fail to take into account the increase in profitability that took place between 2013-2014 and 2014-2015. Furthermore, as confirmed by India, the Indian authority did

not consider the captive segment of the domestic industry in evaluating profitability. While India argues that the captive production should be considered in the context of all injury factors except sales and profitability, this position has no textual basis in the Agreement on Safeguards. Furthermore, accepting India's position would lead to a distorted analysis of the situation of the domestic industry as the captive market would be analysed in the context of some injury factors but not others. Finally, the Indian authority erred in its evaluation of the overall position of the domestic industry because it failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the competent authority's findings of serious injury. While Japan agrees that not all injury factors need to show a negative trend in order to warrant a finding of a serious injury, when certain injury factors demonstrate a positive trend, it is up to the competent authority to explain how this fact affects the finding of an overall serious injury. This understanding is supported by the panel's findings in *Dominican Republic – Safeguards Measures*, which contrary to what India argues are relevant to the present case.

22. Third, India failed to base its determination on "objective data". First, India does not rebut Japan's *prima facie* case that the determination of serious injury is not based on "objective data" when taking into account the data available in the record which, clearly do not match. Indeed, although India asserts that the exact matching of the figures of inventories, production and sales for a given year of the POI is not possible, it failed to substantiate that assertion. Second, India's argument that the annualization of data for Q1 of 2015-2016 was performed to "make figures of different periods comparable", ignores the fact that the Indian authority should have explained why the yielded results were representative for the entire year and why the simple annualization of data was appropriate for the purpose of comparison with the annual data from previous years.

2. *India's determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards*

23. Japan submits that India's determination of "further threat of greater serious injury" lacks any legal basis in the Agreement on Safeguards which provides for a determination of "serious injury" and "threat of serious injury". In any event, such a determination is irrelevant because a determination of further threat of greater serious injury" is entirely dependent on a prior finding of "serious injury". To the extent India is now trying to argue that the Indian authority made a determination of "threat of serious injury" within the meaning of the Agreement on Safeguards, this constitutes an *ex post* explanation that has no support in the text of the Final Findings and should be rejected by the Panel. In any event, even if the finding of "further threat of greater serious injury" made by the Indian authority was to be considered as a finding of "threat of serious injury" – *quod non* – that finding fails to comply with the various requirements set out in Articles 4.1 and 4.2 of the Agreement on Safeguards.

3. *India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994*

24. Since the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury, it follows that the conditions for the imposition of safeguard measures were not met and, as a consequence, India also acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

F. India acted inconsistently with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof to the domestic industry

1. *India violated Article 4.2(b) of the Agreement on Safeguards*

a. India failed to establish the existence of a causal link

25. India has failed to rebut Japan's arguments that there was no basis for a finding of a causal link. Japan maintains that the Indian authority failed to demonstrate an "overall coincidence" in time between the movements in imports and the movements in injury factors, let alone a direct correlation between the two, as argued by India. In the present case, the analysis of all injury factors shows that there was no overall coincidence in time between the movements in imports and the movements in injury factors (other than market share). It follows that there was no basis for concluding that the increase in imports has caused serious injury or threat thereof to the domestic industry. India did not respond to the argument that it failed to examine the relationship between the *movements* in imports and the *movements* in injury factors because instead of looking at the *trends* in imports and the injury factors, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized).

26. Furthermore, the Indian authority failed to provide a compelling explanation as to why, in the absence of the coincidence in time, there was nevertheless a causal link between the alleged increase in imports and the alleged serious injury or threat thereof. First of all, the conclusion that the decreasing price of the imports prevented the domestic industry from maintaining its prices is baseless as the Indian authority failed to explain why the comparison of the average price of imported products and the average price of domestic products was appropriate given the numerous types of products concerned with very different prices. The competent authorities can only reach a reasonable conclusion regarding the impact of the prices of imports on the domestic prices if they have first established that there is a price-based competition between the imported and domestic products. In any event, the explanations provided by the Indian authority are not reasoned and adequate to the extent that they are based solely on the comparison of indexed data and since the analysis is based on an end-to-end comparison of the results in 2013-2014 and Q1 of 2015-2016. Second, the conclusion that the imports prevented the domestic industry from increasing its production and sales compared to increase in demand/consumption is baseless. Since several elements could have an impact on the domestic industry's inability to increase its production and sales in relation to the increase in demand/consumption despite the existence of spare capacity, without addressing such factors, the Indian authority could not properly explain why it considered that it was the imports that *prevented* the domestic industry from increasing its production and sales compared to increase in demand/consumption. Moreover, while India argues that "there was sufficient spare capacity available with the domestic industry and there were no constraints on their ability to increase its production and sales," the arguments submitted by the interested parties suggest otherwise. To the extent the Indian authority relied on the assumption that the domestic industry was able to increase its production and sales, it was required to explain the basis for making such assumption. Third, Japan has demonstrated that the explanation provided by the Indian authority in the Preliminary and Final Findings did not warrant the conclusion that profitability declined and the domestic industry recorded losses in the degree presented in the Final Findings *due to* the increased imports. The limited *ex post* explanation provided by India in its first written submission cannot cure the deficiencies in the Indian authority's findings.

b. India failed to carry out a proper non-attribution analysis

27. Japan has demonstrated that India acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because it failed to ensure that the serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports. Contrary to what India argues, the obligation to carry out the non-attribution analysis is not limited only to the factors that have been identified as "relevant factors" in the context of the injury analysis under Article 4.2(a). India also errs when arguing that Article 4.2(b) does not require any "independent evaluation" in addition to the analysis carried out under Article 4.2(a). Contrary to what India argues, Articles 4.2(a) and 4.2(b) impose distinct obligations on the competent authorities. While Article 4.2(a) focuses on the elements to be considered by the competent authorities in order to

demonstrate the existence of serious injury (or threat thereof), Article 4.2(b) relates to the demonstration of the causal link between such serious injury and the increased imports.

28. In the present case, the Indian authority failed to meet its obligations under Article 4.2(b) because it failed to properly examine the other factors invoked by the interested parties in order to ensure that the injurious effects of those factors were not attributed to the increased imports. First, with regard to five factors addressed by the Indian authority at paragraphs 51-52 of the Final Findings, the Indian authority failed to provide a clear determination that these factors were not causing serious injury to the domestic industry or an explanation why this is so. Second, the Indian authority failed to address at all other factors raised by the interested parties, namely (i) changes in the market share of other Indian producers not included in the definition of the domestic industry, (ii) captive sales of the domestic industry, and (iii) other factors causing the decline in profitability. By ignoring such other factors, the Indian authority failed to make a proper non-attribution analysis.

29. India did not address Japan's argument that it failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

- c. India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

30. Since India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury and threat thereof, India acted inconsistently not only with Article 4.2(b) but also with Articles 2.1 and 4.2(a) of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

G. India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

31. Japan claims that India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to apply the safeguard measures at issue only to the extent and for such time as necessary to prevent or remedy serious injury. Indeed, since the Indian authority failed to make a determination of the causal link between the increased imports and the alleged serious injury and/or threat thereof in accordance with Article 4.2(b), it was unable to ensure that the safeguard measures were applied only to the extent necessary and only for such a period as necessary to address serious injury attributed to increased imports. As confirmed by the Appellate Body in *US – Line Pipe*, the violation of the non-attribution obligation under Article 4.2(b) constitutes a sufficient basis to make a *prima facie* case of violation of Articles 5.1 and 7.1.

H. India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards

32. Japan has demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its various determinations. Thereby, Japan has also demonstrated that India acted inconsistently with its obligations pursuant to Articles 3.1 and 4.2(c) of the Agreement on Safeguards to publish a report that contains a detailed analysis of the case and sets forth findings and reasoned conclusions covering all pertinent issues of fact and law.

I. India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards

33. It has been demonstrated that the challenged safeguard measures are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. It follows that they are also inconsistent with Article 11.1(a) of the Agreement on Safeguards.

II. INDIA FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

34. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards since it notified the provisional safeguard measures to the Committee on Safeguards after the provisional safeguard measures have been taken. Contrary to what India argues, the fact that the measures allegedly had to be imposed "on an urgent basis" does not relieve India from the obligation to notify the Committee on Safeguards before taking the provisional measures. In fact, the notification obligation in Article 12.4 has been imposed taking into account the "urgent" nature of provisional measures.

35. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards because the notifications made after 8 days or 6 days fail to comply with the requirement of "immediate" notification under Article 12.1, taking into account that the notifications were not complex and did not have to be translated. Japan also notes that domestic procedures described by India cannot constitute a justification for failing to make the required notifications pursuant to Article 12.1 of the Agreement on Safeguards "immediately" upon the occurrence of the specified events.

36. Third, India acted inconsistently with Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 does not contain information on (i) the causal link between the increased imports and the serious injury or threat thereof; (ii) a precise description of the product involved; (iii) a precise description of the scope of the proposed measure and; (iv) the proposed date of introduction of the proposed measure. With regard to the first element, contrary to what India argues, the requirement to include information regarding the causal link between increased imports and serious injury clearly follows from the words "caused by" in Article 12.2 which refers to "evidence of serious injury or threat thereof caused by increased imports." With regard to the second element, Japan notes that India's notification failed to indicate which sub-categories of products falling within the scope of the "product under consideration" were excluded from the scope of the safeguard measures. With regard to the third element, Japan submits that India's notification did not indicate that the anti-dumping duty paid would be deducted from the safeguard duty rate nor that the duty should not be imposed on goods imported at or above the MIP. Finally, with regard to the fourth element, contrary to what India argues, the "proposed date" does not mean a "theoretical date" but the actual date on which the safeguard measures will be applied.

37. Fourth, India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because it failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views. In light of the Appellate Body's findings in *US – Line Pipe*, Japan submits that the period of 8 days in the present case was clearly insufficient for Japan to have a meaningful exchange of views within the meaning of Article 12.3. This is even more so as Japan did not know the effective date of application of the measures.

III. INDIA ACTS INCONSISTENTLY WITH ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India acts inconsistently with Article II:1(b) of the GATT 1994

38. India acts inconsistently with Article II:1(b) of the GATT 1994 because, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. Japan notes that India agrees that the measures at issue constitute "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994. Thus, since the safeguard duty is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, there is a violation of Article II:1(b) of the GATT 1994. India's defense that there is no violation of Article II:1(b) of the GATT 1994 because, given that the measure was imposed pursuant to Article XIX, India's obligations under Article II:1(b) *ipso facto* gets suspended must be rejected. Indeed, the fact that a measure is taken pursuant to Article XIX does not automatically imply that there cannot be an inconsistency with Article II:1(b).

B. India acts inconsistently with Article I:1 of the GATT 1994

39. India acts inconsistently with Article I:1 of the GATT 1994 because the measures at issue are not applied to the products originating in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in other WTO Members including Japan. India's argument that there is no violation of Article I:1 of the GATT 1994 since the discriminatory treatment was done in accordance with Article 9 of the Agreement on Safeguards must be rejected. Indeed, the fact that a measure is applied in accordance with Article 9 of the Agreement on Safeguards does not mean that that measure is consistent with Article I:1 of the GATT 1994.

IV. THE CHALLENGED MEASURES ARE SAFEGUARD MEASURES WITHIN THE MEANING OF ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

40. Japan submits that there is no requirement for this Panel to examine, as a preliminary step, whether the measures at issue constitute "safeguard measures" as a result of which the Agreement on Safeguards would be applicable. Indeed, there is no definitional language of what is a "safeguard measure" in Article XIX of the GATT 1994 understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports". At best, it can be deduced from that provision that Article XIX of the GATT 1994 and the Agreement on Safeguards can be relied upon by a Member applying a measure that would otherwise be inconsistent with a GATT obligation provided that the measure complies with all the substantive and procedural requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards. Since the measures at issue which are inconsistent with the GATT obligations have been imposed by India pursuant to Article XIX of the GATT 1994 and notified in advance by India to the WTO Members pursuant to Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, this Panel has to examine whether the measures at issue are consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

41. Furthermore, even if the Panel were to conclude that it is required to examine whether the measures at issue constitute "safeguard measures" understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports", the measures at issue fulfil those conditions, and therefore, constitute "safeguard measures". Indeed, the measures at issue suspend both the obligation under Article II:1(b) of the GATT 1994 in relation to "all other duties or charges" and the most-favoured-nation obligation under Article I:1 of the GATT 1994 with the purpose of preventing or remedying serious injury to the domestic industry.

42. Although India argues that the obligations suspended by the measures at issue also include Article XXIV of the GATT 1994, and, more specifically, Article XXIV:4, XXIV:8 and XXIV:12, Japan submits that none of those provisions imposes an obligation on Members to establish a customs union or a free trade area nor to apply a particular duty rate on imports of products from certain FTA/RTA partners. It follows that India has failed to demonstrate how the measures at issue suspend an obligation under Article XXIV of the GATT 1994.

V. INDIA'S CLAIM THAT JAPAN'S CASE IS NOT COMPLIANT WITH ARTICLE 3.7 OF THE DSU MUST BE REJECTED

43. Japan submits that the Panel should reject India's objection based on Article 3.7 of the DSU and make findings and recommendations with respect to the challenged measures in accordance with its terms of reference.

44. First, with regard to India's claim under the first sentence of Article 3.7 of the DSU that the panel proceedings are not fruitful since the measures imposed by India expired on 13 March 2018, Japan submits that pursuant to the text of that provision, it is before bringing a case that a Member must exercise its judgment as to "whether action under these procedures would be fruitful". Therefore, the fact that the measure expires or is withdrawn during the panel proceedings should not be relevant to the determination as to whether "before bringing a case" the Member exercised its judgement as to "whether action under these procedures would be fruitful".

45. Furthermore, as recognized by the Appellate Body, given the largely self-regulating nature of the requirement of Article 3.7, first sentence, it must be presumed that whenever a Member submits a request for the establishment of a panel, it does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful". India actually does not dispute "the discretion to be enjoyed by any Member in deciding whether to bring a case against another Member under the DSU" nor that "Japan's request for the establishment of a panel was [made] in good faith." It follows that the claim of inconsistency with Article 3.7 of the DSU is manifestly misplaced and, in any event, has no legal merit.

46. Second, with regard to India's claim under the second sentence of Article 3.7 of the DSU that the alleged expiry of the measures at issue should somehow affect the outcome of these proceedings, Japan recalls the Appellate Body's finding that "the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure." In light of the guidelines provided in previous WTO cases, Japan submits that the Panel should not refrain from making findings with regard to the measures at issue.

47. Indeed, the challenged measures were identified in the panel request and thus are within the Panel's terms of reference. Furthermore, since India continues to argue that its measures are fully consistent with its WTO obligations and since Japan, as the complaining party, continues to request that the Panel make findings, there is still a dispute between the parties as to the consistency of the challenged measures with the relevant provisions of the Agreement on Safeguards and the GATT1994. Japan also notes that India could take measures that may give rise to certain of the same, or materially similar, WTO inconsistencies. With regard to India's argument that, because of Article 7.5 of the Agreement on Safeguards which imposes restrictions on imposition of the same measures, there is no possibility of the measures to be easily re-imposed, Japan notes that Article 7.5 only provides for a time limit during which a safeguard measure should not be re-imposed and thus, it does not prevent India from re-imposing the measures once such time limit expires. In any event, India acknowledges that there is no provision in its domestic legislation that would explicitly prevent the Indian authorities from re-imposing the measures. Finally, given the temporary nature of safeguard measures and the increasing delays in dispute settlement proceedings, concluding that no findings should be made where the measures have expired would raise systemic concerns as it would amount to preventing Members from effectively challenging safeguard measures.

48. Japan submits that the Panel should also make recommendations with regard to the challenged measures. Indeed, pursuant to Article 19.1 of the DSU, if a panel makes findings that a challenged measure is inconsistent with a covered agreement, it "shall" recommend that the Member concerned bring the measures into conformity with that agreement. Previous WTO cases suggest that recommendations are to be made in particular with respect to measures that, despite their expiry, continue to exist or to have legal effects. In that regard, Japan submits that, even assuming that the challenged measures have expired (something that India has failed to demonstrate), those measures continue to have effect as they may still apply to imports of the products concerned that took place during the time the safeguard measures were in force but for which the duties were not collected, for instance, due to errors in customs declarations. India has failed to rebut Japan's argument. In particular, India has not shown that an *a posteriori* collection of the challenged safeguard duty is prohibited. There is therefore no basis for the Panel to refrain from making recommendations with respect to the challenged measures given the clear language of Article 19.1 of the DSU.

49. Lastly, refraining from making findings and recommendations would introduce a fundamental risk of circumvention of the dispute settlement procedures under the DSU. Indeed, assuming, for the sake of argument, that India introduces a new measure with effects similar to those of the challenged safeguard measures – whether or not such new measure would be subject to the Agreement on Safeguards – in the absence of findings and recommendations of the Panel, Japan may not be able to challenge the new measure through compliance proceedings pursuant to Article 21.5 of the DSU. Indeed, the newly adopted measure may be found not to be a "measure taken to comply" given that the lack of recommendations to bring the measures into conformity with the relevant agreements may be interpreted as meaning that any measure adopted thereafter is not a "measure taken to comply".

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF INDIA

I. Introduction

1. In the present dispute, Japan has challenged the provisional and definitive safeguard measures imposed by India on imports of certain iron and steel products into India. Japan alleges that India, by way of the present measures, have violated various provisions of the 'Agreement on Safeguards' ('the Safeguard Agreement') and its obligations under the GATT 1994.

2. However, India submits that the measures taken were in full compliance with India's obligations under GATT 1994 and the provisions of the Safeguard Agreement.

II. Standard of Review to be followed by the Panel under Article 11 of the DSU

3. Article 11 of the DSU provides for the panel's standard of review. A panel has to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case. The panel has to also examine 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 for in the covered agreements.

4. "Objective assessment" has been understood as mandating neither a *de novo* review (i.e. the complete repetition of the fact-finding conducted by national authorities) nor "total deference" to domestic authorities (i.e. the simple acceptance of their determination).¹

5. India considers that the appropriate standard of review is to assess, if a reasoned and adequate explanation is discernible from the Competent Authority's findings, and further, that in the event another plausible interpretation is proffered by the complainant, whether that interpretation can supersede the explanation provided by the Competent Authority. The burden of proof that the Competent Authority's findings do not provide a reasoned and adequate explanation rests on the complainant (as opposed to suggestions on the manner in which the Competent Authority ought to have, or could have conducted the determination). Further, if such burden is not discharged by the complainant, the explanation of the competent authority must automatically prevail.

III. Burden of Proof to establish that India acted inconsistently with its obligations

6. Under the Agreement, the complainant bears the burden of proof to demonstrate an inconsistency. Unless the complainant discharges that burden with regard to a particular measure, there would be no basis for the Panel to find that measure to be inconsistent with the WTO Agreement.² India submits that the complainant has not met its burden to establish a *prima facie* case with respect to the claims contained in its panel request. The complainant has merely relied upon unsubstantiated assertions without any supporting evidence or legal support.

IV. India has fully complied with its obligations under Article XIX:1(a) of the GATT 1994

7. India submits that the requirement under Article XIX:1(a), is to show that the developments which led to a product being imported in such increased quantities must have been "unexpected". Therefore, the term "unforeseen developments" covers any change that the negotiators did not foresee when they undertook obligations or tariff concessions with regard to the product subject to the measure. The appropriate focus is on what was actually "foreseen" rather than "theoretically foreseeable".

8. India states that what is required to be demonstrated is a "logical connection" between the "unforeseen developments" and "increased imports". The Final Findings of the Competent Authority

¹ Appellate Body Report, *EC – Hormones*, para. 117.

² Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192 /R.

(i) contains a separate discussion on "unforeseen developments";³ (ii) clearly refers to the panel report in *US – Steel Safeguards*, and, indicates that a confluence of events/circumstances can constitute "unforeseen developments";⁴ and, (iii) contains an identification and discussion of circumstances/events, the confluence of which is regarded as "unforeseen developments" by the Competent Authority.

9. India further submits that the Final Findings clearly demonstrate the factum of "increased imports" of the PUC,⁵ the existence of "unforeseen developments", and, the logical connection between the "unforeseen developments" and the "increased imports". The clear conclusion of the Competent Authority, after detailed discussion on the issue in the findings, is that there was a significant increase in imports of the PUC in absolute terms, and, that the increase in imports of the PUC was linked to "unforeseen developments".⁶ The Preliminary Findings⁷ and the Final Findings⁸, make it clear that a confluence of events/circumstances has been taken to constitute "unforeseen developments" by the Competent Authority. India submits that the demonstration of the "logical connection" referred above, is to be seen in the context of the confluence of events/circumstances treated as 'unforeseen developments' and "increased imports", and not between each such individual event/circumstance. India has fully demonstrated the "logical connection" existing between the "unforeseen developments" and an increase in imports of the product that is causing and threatening to cause serious injury.

10. The panel in *Argentina – Peaches*⁹, has noted that the demonstration of 'unforeseen developments', should at a minimum have some discussion by the competent authorities as to why they were unforeseen at the appropriate time. India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact'¹⁰, and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. Japan seeks to assert¹¹ that in order to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to why identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994. Such understanding of Japan would be tantamount to reading in an additional condition into Article XIX:1(a), which does not emanate from the plain text of Article XIX:1(a).

11. India's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such increased quantities and under such conditions as to cause serious injury. India's analysis also showed that the increased imports and the conditions which caused injury were a result of unforeseen developments. India has addressed the issue of correlation between the unforeseen developments and the subject goods in both the Preliminary Findings¹² as well as the Final findings.¹³ India has also examined the relevant evidences set out as Exhibit IND-20.

12. India expressed its view that the effect of depreciation of currency is felt across products including the PUC, as also observed in the findings of the Competent Authority in terms of the falling prices from these countries. This has been specifically dealt with in the Final Findings¹⁴ and in the Preliminary findings¹⁵ of the Indian Competent Authority.

13. The FTAs entered into by India with Korea and Japan under the aegis of Article XXIV of the GATT 1994 is an 'obligation' under the GATT 1994. India therefore, does not view the fact of lowering of duties as an 'unforeseen development' but considers it as an act in compliance with its obligations

³ Final Findings, (Exhibit IND-11), paras. 71-82.

⁴ Final Findings, (Exhibit IND-11), para. 74.

⁵ Final Findings, (Exhibit IND-11), paras. 34-42.

⁶ Final Findings, (Exhibit IND-11), paras. 102(i) and 102(iii).

⁷ Preliminary Findings, (Exhibit IND-7), para. 24.

⁸ Final Findings, (Exhibit IND-11), para. 79.

⁹ Panel Report, *Argentina – Peaches*, para. 7.23.

¹⁰ Appellate Body Report, *US – Lamb*, para. 76.

¹¹ Japan's first written submission, para. 104.

¹² Preliminary Findings, (Exhibit IND-7), paras. 18-24.

¹³ Final Findings, (Exhibit IND-11), paras. 75 -78 and 79-82.

¹⁴ Final Findings, (Exhibit IND-11), paras. 76-77 and 79 (which incorporates the findings from the Preliminary Findings).

¹⁵ Preliminary Findings, (Exhibit IND-7), paras. 21-22.

under Article XXIV of the GATT 1994. India reiterates that any obligation taken by a member under Article XXIV is also an obligation referred to in the first part of Article XIX:1(a) of the GATT 1994. The subsequent spur of imports (i) in view of the confluence of developments was indeed considered to be an "unforeseen development" which was further triggered by (ii) the effect of India's obligations under the said FTAs under Article XXIV of the GATT 1994.

14. India believes that there is no requirement that the "unforeseen developments" should necessarily coincide in time with the increase in imports. The only legal requirement is that the "increased imports" must be an effect or outcome of the "unforeseen developments". It has not been disputed by any of the interested parties that the currency devaluation indeed took place and also the fact that the imports increased in the more recent part of the Period of Investigation (POI). India also submitted that the interested parties have also not denied the occurrence of the individual circumstances/events - the confluence of which was treated as "unforeseen developments". Therefore, India is of the view that it would be illogical to suggest that the "unforeseen developments" should occur and its effects felt exactly at the time of increase in imports.

15. India states that an investigation for safeguard duties is initiated on the basis of an application by the Domestic Industry. Under the rules, it is incumbent upon the Domestic Industry to provide information on all aspects of the factors which need to be examined by the Competent Authority. The Final Findings at paragraphs 82 and 102(iii) clearly show that the Indian Competent Authority has concluded that the domestic industry was able to demonstrate that the developments in the market, which resulted in a surge in imports of the PUC, were indeed unforeseen. It is therefore, evident that the discussions¹⁶ and conclusions as regards the existence of "unforeseen developments", are only that of the Competent Authority as set out at paragraph 81(g) of India's First Written Submissions.

16. In the context of a request by the Panel to elaborate India's argument that the "logical connection test" under the first part of Article XIX:1 is distinct from the "causal link test" under the second part of Article XIX:1, India submitted that since separate and different expressions are used in the said Article, complete meaning must be given to the use of such separate and distinct expressions. India's contention in this regard also draws support from Article 31.1 of the Vienna Convention on Law of Treaties, which *inter-alia* states that "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

17. India's understanding is that the requirement under Article XIX:1(a) necessitates the existence of a logical connection between the "unforeseen developments" and the increased imports. India submits that Article XIX:1(a) itself uses two distinct expressions namely - "as a result of" and "as to cause or threaten". The expression "as a result of" has been interpreted by the Appellate body in *Argentina- Footwear (EC)*¹⁷ to mean that there should be a "logical connection" between the "unforeseen developments" and the increased imports. The "causation analysis" referred to in the second part of Article XIX:1(a), is therefore, clearly distinct from the "logical connection test" emanating from the first part of Article XIX:1(a). The "logical connection" test is clearly of a lesser threshold when compared to the "causation analysis"/ "causal link test" prescribed in the second part of Article XIX:1(a). In India's view, the logical connection test is limited to the demonstration of a "logical link" between "unforeseen developments" and the increase in imports. However, the causal link test puts an obligation on the party to show a "cause and effect" relationship.

18. The Panel sought India's views in the context of the Appellate Body report in *Korea - Dairy* wherein it is stated 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" (paragraph 85 of the Appellate Body Report). India's understanding on what the "logical connection" entails is set out in detail at paragraphs 82 to 84 of its First Written Submissions.

19. As regards India's views on the scope of discussion - the competent authority's determination should entail regarding 'unforeseen developments' under Article XIX of the GATT 1994, India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the

¹⁶ Final Findings, (Exhibit IND-11), paras. 71-82.

¹⁷ Appellate Body Report, *Argentina - Footwear (EC)*, para. 92.

manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact', and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. The discussion, as opposed to explanation, on 'unforeseen developments' is to be on why identified events/circumstances could be regarded as "unforeseen developments". The test is to consider what was and was not actually "foreseen" rather than what might or might not have been theoretically "foreseeable". Broadly, India considers that there should be some discussion regarding the existence of "unforeseen developments" and there is no requirement of establishing a cause and effect relationship with increased imports. India's understanding is more fully reflected at paragraphs 78 to 80 of India's First Written Submissions.

20. India clarifies that steel production worldwide is measured in terms of the crude capacity and the proportion of the PUC remains the same with respect to the crude production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. The analysis is fully reflected in the Preliminary Findings¹⁸ and the Final Findings¹⁹

21. India submits that its obligation is only to examine whether any unforeseen developments resulted in an increase in imports of the PUC into India. There is no requirement to evaluate the demand pattern in other countries as it is not the case of India that India was the only "natural choice". India is of the view that the determination required to be undertaken under Article XIX: 1(a) of the GATT 1994 was limited only to the extent whether the result of the unforeseen developments was an increase in imports of PUC into India. Since India was not obligated under Article XIX: 1(a) of the GATT 1994 to determine whether there were alternate markets with increasing demand and high prices, no such exercise was required to be undertaken. India states that this examination has been done by the Indian Competent Authority, and the specific findings with respect to increase in imports of as a result of "excess capacity of major exporting nations" are clearly set out at paragraphs 19, 21, 24 of the Preliminary finding of the Indian Competent Authority and also at paragraphs 75, 79 and 82 of the Final Findings of the Indian Competent Authority. As regards the observation relating to decrease in demand in European Union and the United States, the Indian Competent Authority has examined the facts and data on record. The said facts and evidences can be found at pages 101-190 of Exhibit- IND 20.

V. India has demonstrated a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing serious injury

22. India expressed its view that the measure in question is a 'safeguard measure' under Article XIX of GATT 1994. India believes that by way of the impugned measures India has suspended its obligations under Article II and Article XXIV of the GATT 1994. Being in the category of "all other duties or charges of any kind" in terms of article II: 1(b) of the GATT 1994, measures adopted by India lead to the suspension of the obligations of India under Article II: 1(b), second sentence, of the GATT 1994. By way of the impugned measures, India has also suspended obligations incurred under Article I: 1 of GATT in as much as the measures did not apply to imports of subject goods from developing countries other than China PR and Ukraine. India's measures have also suspended its obligation with respect to the FTAs/RTAs formed under Article XXIV of the GATT 1994. Section 13 of Article XXIV: 12 of the "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" provides that "*Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory*". In the *EC-Customs Matters*²⁰, the Panel has noted that Article XXIV:12 of the GATT 1994 is drafted as a positive obligation rather than as a defence. More specifically, the use of the word 'shall' in Article XXIV: 12 of the GATT 1994, indicates that that Article imposes an obligation on Members to take all reasonable measures to ensure that local authorities comply with WTO obligations.

23. The panel decision in *US-Steel Safeguards*²¹, holds that - "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the

¹⁸ Preliminary Findings, (Exhibit IND-7), para. 24.

¹⁹ Final Findings, (Exhibit IND-11), paras. 71-82.

²⁰ Panel Report, *EC – Customs*, para. 7.144.

²¹ Panel Report, *US – Steel Safeguards*, paras. 10.139-10.140.

importing Member has tariff concessions for the relevant product". The Final Findings²² issued by the Competent Authority clearly identifies that India has incurred obligations under the GATT 1994 including tariff concessions and clearly indicate²³ why India has chosen to initiate measures under the Safeguard Agreement and not any measures under the respective Free Trade Agreements.

24. In the context of the recent panel report in *Indonesia – Iron or Steel Products*²⁴, where the panel noted that Article XXIV of the GATT 1994 is a permissive obligation and does not impose any positive obligation to enter into a FTA or to provide a certain level of market access to its FTA partners through bound tariffs (paragraph 7.20 of the panel report), India is of the view that as long as there is an obligation which is incurred by a contracting party under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX on the ground that it is not a positive obligation. A plain reading of Article XIX does not allow any distinction to be made for obligations under different provisions of the GATT 1994. Needless to state that such categorization of obligations in terms of Article XIX would tantamount to adding words to the plain language and further qualifying the plain expressions of Article XIX which is completely against the general rules of interpretation of treaties, the customary rules of interpretation of public international law and the Vienna Convention on the Law of Treaties. Further, the panel report was in the context that Indonesia had no binding tariff obligation with respect to galvalume inscribed into its Schedule of Concessions for the purpose of Article II of the GATT 1994. In India's view, Article XXIV is permissive insofar as the Member country has the option to enter or not enter into a FTA/RTA. However, Article XXIV becomes a mandatory obligation, once the FTA/RTA is entered into and accordingly the Member has to necessarily comply with the provisions of the same. Article XXIV cannot be a defence against other binding obligations unless it confers an obligation in itself. Only if Article XXIV confers an obligation in itself, can, the reduced tariff rates under Article XXIV not be violative of Article I and Article II of the GATT. Such a reading is also consistent when Article XXIV is harmoniously read with the other article of GATT 1994. The interpretation adopted as to the construction of Article XXIV of the GATT 1994 should be consonant with the larger objective of making trade free and without barriers. This interpretation is furthered only if Article XXIV is treated as an obligation under the GATT 1994.

25. As regards the effect of the obligation referred to in Article XIX of the GATT 1994, these have been expressly dealt with at paragraphs 80, 81 and 82 of the Final Findings of the Competent Authority. Paragraph 82 of the Final Findings clearly identifies the effect of the obligations as being the increase in imports of PUC in a sudden, sharp, significant and recent manner into India.

VI. India has complied with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of an increase in imports

26. India submits that Japan's claims regarding the violation or breach of Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994 are not only unsubstantiated but also do not have any legal support. After evaluation of all the factors, the Competent Authority found that the significant increase in imports of the PUC in absolute terms, and the increase in imports of PUC was linked to "unforeseen developments".²⁵ The Preliminary Findings²⁶ and the Final Findings²⁷ make the existence of unforeseen developments abundantly clear and also establish a clear correlation between the confluences of events/circumstances constituting "unforeseen developments" and the spurt in imports.

27. India submits that there is no obligation, direction or even guideline under the Safeguard Agreement regarding the selection of the period of investigation. It has been held by successive panels and the Appellate Body, that selection of a period of investigation is the discretion of the investigating authorities so long as it is established that the period selected by the importing member allows it to focus on the recent imports and the period selected by the investigating Authority is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.

²² Final Findings, (Exhibit IND-11), paras. 80-81.

²³ Final Findings, (Exhibit IND-11), para. 55.

²⁴ Panel Report, *Indonesia – Iron or Steel Products* (under appeal to the Appellate Body).

²⁵ Final Findings, (Exhibit IND-11), paras. 71-82, 102(i) and 102(iii).

²⁶ Preliminary Findings, (Exhibit IND-7), para. 24.

²⁷ Final Findings, (Exhibit IND-11), para. 79.

28. India asserts that the selection of the period of investigation and its breakdown was consistent with Article 2.1 of the Safeguard Agreement and Article XIX. The selection of the period of investigation by the Competent Authority fulfills the requirements as enunciated by the panels and Appellate Body. India considers that the period of investigation selected by the Competent Authority was long enough to establish the requirement of increased imports as well as to allow appropriate conclusions to be drawn regarding the state of the domestic industry. The same has been detailed in the initiation notification²⁸ and the provisional findings²⁹ issued by the Competent Authority.

29. The selection of the period of investigation is the sole discretion of the investigating authorities and cannot be questioned unless it is clearly demonstrated that the selected period of investigation presented a distorted picture of the market. Japan's claim that selection of a longer period would have given a different picture, is also not supported by the facts on record. Even assuming that the period of investigation ought to have started from 2011-12, the trends with regard to the imports would have revealed that the imports had indeed gone up in absolute terms as well as in relation to the domestic production. India submits that its selection of the period of investigation fully enabled the Competent Authority to examine the recentness of the imports in the context of the long-term trends and concluded that increase evidenced a certain degree of *recentness, suddenness, sharpness and significance*.

30. Japan's claim that India was required to examine the data preceding the period of investigation is contrary to the Appellate Body report in the *US Steel safeguards* case. India further submits that annualization of data is actually the most obvious and logical methodology available where the data of unequal periods is required to be compared.

VII. India's determination of 'domestic industry' is compliant with Articles 2.1, 4.1(a), (b), (c), 4.2(a) and (b) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994

31. India submits that there is no violation of Article 4.1(c) of the Safeguard Agreement. Article 4.1(c) of the 'Agreement on Safeguards' provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry".

32. Under the second option, the term "domestic industry" shall be understood as producers that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". The definition does not prescribe any specific percentage of total production to qualify the test of "a major proportion", presumably for the reason that such a prescription would have created practical and conceptual difficulties. In the context of the Anti-Dumping Agreement, the panel in *Argentina – Poultry*³⁰, had an occasion to consider whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The panel considered different dictionary definitions and noted that the word "major" is also defined as "important, serious, or significant". The panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.

33. The panel in *US – Wheat Gluten*³¹ had the occasion to examine the link between the phrase "a major proportion" and the question of data coverage, and, has concluded that the 'major proportion' criteria in the definition of 'domestic industry' implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage".

34. India submits that the portion of the domestic producers considered by the Competent Authority in the facts of the present case as "domestic industry" is accounting for more than 67% of the total domestic production and, therefore, it cannot be said to be a low percentage even

²⁸ Initiation Notification (Exhibit- 4), para. 4.

²⁹ Preliminary Findings, (Exhibit IND-7), para. 9.

³⁰ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341-7.343.

³¹ Panel Report, *US – Wheat Gluten*, paras. 8.54-8.56.

arithmetically, relative to the total production in India. Though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.³² The present case is not a case in which Competent Authority excluded producers that filed information but is a case in which rest of the producers did not cooperate.

35. The fact that the Competent Authority has examined data of 67% of the total domestic production leaves no basis to presume that either the injury or the causation determination could have been distorted. In India's view, a portion of the domestic producers who account for "the major proportion" of the total domestic production, can, under no circumstances, be said to be not "a major proportion" of the total domestic production. In other words, "the major proportion" is invariably "a major proportion" but the vice versa may not be true. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehension.

36. Thus, India submits that the 'domestic industry' was defined in a manner that was consistent with Article 4.1(c). Consequently, the injury and causation determinations were also consistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Safeguard Agreement as well as with Article 2.1 of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994. India has also clarified that the data taken by the Competent authority covers both captive and non-captive segments of the domestic production.

VIII. India's measures are compliant with Articles 2.1, 4.1(a) & (b) and 4.2(a) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of serious injury

37. India submits that it has appropriately determined the serious injury and threat thereof as required by Articles 4.1(a), 4.1(b) and 4.2(a) of the Safeguard Agreement. Further, Japan has failed to demonstrate that the increased imports are not the cause of serious injury to the domestic industry.

38. India evaluated each of the enumerated factors under Article 4.2(a) of the Safeguards Agreement in its Final Findings that were "of an objective and quantifiable nature" and that were "having a bearing on the situation" of the domestic industry. The Competent Authority has thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".³³ As regards the factors specifically mentioned under Article 4.2(a), it is settled position that they have to be necessarily evaluated being *ipso facto* "relevant". However, with regard to the "other factors", the text of Article 4.2(a) specifically empowers the Competent Authority to make a judgment whether a particular factor is relevant or not, based on the twin criteria referred above. It is only after the Competent Authority decides about the "relevance" of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise.

39. There is no specific or implied obligation on the competent authorities to give a detailed explanation as to how the trend of each of the factors individually ties in with the findings of serious injury. There is also no obligation to provide any explanation of the "bearing" or "effect" of each of the factors individually on the situation of the domestic industry.

40. Apart from the existing injury, the Competent Authority in the Final Findings, has clearly analyzed as to why there is threat of injury to the domestic industry. The Competent Authority has held that there is a serious injury to the domestic industry due to the surge of imports and the most recent trend of import volumes entering India. It is clear that the findings of the Competent Authority are based on the analysis of the most recent trend of imports which have admittedly shown a sharp increase over the investigation period.

41. India has clarified that the Period of investigation is 1 April 2013 to 30 June 2015. First quarter of the financial year 2015-16 has been annualized for proper comparison with the preceding years. While determining the period of investigation, the Indian Competent Authority took the most recent data in the context of reasonable and sufficiently longer term trends preceding the POI. India

³² Final Findings, (Exhibit IND-11), para. 2.

³³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis. The detailed reasoning has been explained in paragraphs 139 and 140 of India's First Written Submissions. The analysis of the Competent Authority was solely based on the imports which had already taken place in the first quarter of the financial year 2015-2016 at the time and there has been no forecasting. Annualization does not mean a futuristic comparison or analysis but it is a simple methodology to compare the data of one quarter of that year with a 12 months' data of previous year. However, for the purpose of a fair comparison, the most recent data of the second quarter was considered by the Competent Authority³⁴ for threat of "serious injury" analysis.

42. India submits that the panel statement in *US- Line Pipe* has been referred at paragraph 30 of the Final findings only to highlight the fact that there is no prescription on how long the POI should be under the 'Agreement on Safeguards' and that it is the discretion of the Competent Authority to select the period of investigation. The two factors which require examination while choosing a POI are (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered while fixing the POI as evident from a reading of the Final Findings³⁵ of the Indian Competent Authority.

43. As regards the decision of the Competent Authority not to use the data on volume of imports in 2011-2012 and 2012-2013, India is of the view that under the 'Agreement on Safeguards', there is no prescription on how long the Period of Investigation ('POI') should be. India clarified that it is the discretion of the Competent Authority to select the POI. The two factors which require examination while choosing a POI, as has been noted in the panel statement in *US – Line Pipe* are, (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered by the Indian Competent Authority while fixing the POI as evident from a reading of paragraphs 30 and 31 of the Final findings of the Indian Competent Authority. Without prejudice, India submits that it has already demonstrated in its first written submissions (paragraph 130) that even if the data of previous years had been taken, the trend would have remained the same. In view thereof, India restricted its analysis for the period of investigation only.

44. In the context of paragraph 189 of Japan's First Written Submissions, India submits that there has not been any drop in imports in 2013-14 which requires explanation, as the Competent Authority is only mandated to look at the import trend during the POI and not compare the same to periods preceding the POI.

45. India considers that the expression used in Article XIX:1(a) of the GATT 1994 is "*to cause or threaten serious injury to domestic producers*". Therefore, actual serious injury or threat of serious injury can both be considered simultaneously as there is no such prohibition under the 'Agreement on Safeguards'. The Indian Competent Authority has analyzed³⁶ and given its conclusions with regard to "serious injury" as well as "threat of serious injury".

46. India clarifies that the captive production has been considered for production, demand, inventory and capacity utilization while examining the serious injury to the Domestic Industry, and, that captive production has not been considered for sales and profitability, as no sales transactions are involved. India's view is that imports can certainly affect production meant for captive use as such imports can displace the goods produced for captive use. Fall in production leads to increased costs per unit which has a direct impact on the overall profitability. Consequently, imports can lead to loss of market share even when goods are destined for captive use. India clarifies that the 'Domestic Industry' keeps relevant costs data separately for captive production and non-captive sales. There are no sales data for captive segment as legally or commercially, no sales are involved. As regards Japan's contention concerning captive sales, India submits that the Competent Authority is required to examine the "share of domestic market taken by the increased imports". The Competent Authority has clearly demonstrated³⁷ that the share of imports had gone up which leads to the inescapable conclusion that the share of the domestic market was reduced.

³⁴ Final Findings, (Exhibit IND-11), paras. 27-28 and 100-101.

³⁵ Final Findings, (Exhibit IND-11), paras. 30-31.

³⁶ Final Findings, (Exhibit IND-11), paras. 45-59 and 100-101.

³⁷ Final Findings, (Exhibit IND-11), para. 49.

47. In India's view, once the products are covered under "Products under Consideration" ('subject goods'), then no further division/categorization is required with respect to the goods covered under PUC. Consequently, there is no requirement of any such price comparison for categories within such PUC. India submits that in contradistinction to anti-dumping, a safeguard investigation does not envisage detailed model-wise or source-wise price analysis as the focus of the investigation is "increased imports".

48. India submits that increasing or stable trends in injury factors do not necessarily suggest a positive development in the situation of the domestic industry. For example, if the demand in the market has increased and the sales of the domestic producers remain constant, it could still be an indicator of "serious injury" as the entire growth in the market has been taken away by increased imports. Even if some trends suggest a positive development, the conditions may still be sufficient to meet the standard of serious injury. India's view is that only other "relevant factors" and not all "other factors" are required to be examined in the context of injury determination.³⁸

49. India submits that the imposition of safeguards measures by India are only in relation to "Products under Consideration" ('PUC') and that all the comments of interested parties have been fully dealt with while determining the 'PUC'.³⁹

IX. India has complied with Articles 2.1, 4.2(a) and 4.2(b) of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof

50. India submits that it has fully established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b) of the Safeguard Agreement. India has also adequately determined that the increased imports have caused or are threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994.

51. India submits that in its causation assessment, it has evaluated all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. India has based its assessment on the principles set out in the panel report in *Korea – Dairy*.⁴⁰ India submits that Japan has failed to point out any "other factors" which "are of a quantifiable and objective nature" and "have a bearing" on the situation of the domestic industry.

52. India submits that the panel in *US – Wheat Gluten* expressed its views that "overall coincidence" is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the Competent Authority has considered. India further submits that detailed findings have been recorded in respect of the coincidence of increased imports and the factors which the Competent Authority has considered as relevant. Therefore, Japan's claim that India has failed to establish overall coincidence in time between the movements in imports and the movements in injury factors, does not have either the factual or legal support. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan that the Competent Authority must carry out the causation analysis of all injury factors. The Competent Authority has also adequately analyzed the movement of the decreasing price of the imported products and the decreasing price of the domestic products.⁴¹

53. India submits that the entire analysis of the Competent Authority is based on the actual data made available to it, keeping in view the obligations under Article 3.2 of the 'Agreement on Safeguards'. Further, no 'What if' type analysis were undertaken by India, as there is no such obligation under the 'Agreement on Safeguards'.

54. India refutes Japan's claim that the Final Findings do not contain any non-attribution analysis in the section entitled "Causal Link between Increased Import and Serious Injury or Threat of Serious Injury". The Competent Authority has clearly determined that for the purpose of determining causation, all relevant factors of an objective and quantifiable nature having a bearing on the

³⁸ India's first written submission, paras. 181-192.

³⁹ Final Findings, (Exhibit IND-11), paras. 18-23.

⁴⁰ Panel Report, *Korea – Dairy*, paras. 7.89-7.90.

⁴¹ Preliminary Findings, (Exhibit IND-7), para. 25(g); Final Findings, (Exhibit IND-11), para. 49(g)(ii).

situation of that industry have been evaluated⁴². There was no occasion to refer to any other factor in view of the determination by the Competent Authority that none of the "other factors" can be considered as relevant on account of the fact that they were neither objective nor quantifiable in nature, nor did they have a bearing on the situation of the industry.

55. India also clarifies that imports from all sources including those from Japan and Korea have been considered as a "relevant factor of an objective and quantifiable nature having a bearing on the situation of [domestic] industry". In India's view, it is not permissible to carry out the injury analysis in the context of any particular country or a group of countries as the entire analysis is in the context of "imports" alone irrespective of its source. Further, any bilateral safeguard proceedings under the respective FTAs would not have addressed the imports from other sources which are not a part of the relevant FTA.

56. In view of the above, India submits that it has fully complied with its obligations and appropriately demonstrated the causal link between the increased imports and the serious injury or threat thereof.

X. India's safeguard measures are in accordance with Articles 5.1 and 7.1 of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994

57. India submits that the safeguard measure adopted by India clearly reflect that India levied the safeguard duties only to the extent and duration necessary to prevent and remedy serious injury to its domestic industry in terms of Article 5.1 & 7.1 respectively of the 'Agreement on Safeguards'. Further, there is no obligation as such to provide any justification or reasoning to demonstrate the necessity of the measures except when there are quantitative restrictions. India further submits that Japan has failed to show any obligations emanating from Article 5.1, which make it imperative for the Indian Authority to have "explained and attributed" the serious injury due to increased imports and decided upon the extent of applicability of safeguard measures explaining a nexus between serious injury due to increased imports and the extent of safeguard measures applied. India further submits that Japan has not provided any reason in support of their claim nor have they established as to how there is a violation of Article 7.1 when India has fully complied with its obligations under Article 4.2(b).

58. India clarifies that there is no indication or even a suggestion in the text of the Agreement that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Safeguard Agreement.

XI. India acted in full compliance with Articles 3.1 and also 4.2(c) of the Safeguard Agreement and its obligation thereto.

59. India submits that the analysis of the panel in *US – Steel Safeguards* dispute⁴³ makes it abundantly clear that the requirement as to reasoned conclusion under Article 3.1 is limited to "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the Safeguard Agreement only. In other words, Article 3.1 does not require any additional explanation than what is expressly prescribed under Agreement on Safeguards or Article XIX of the GATT 1994. Further, Article 4.2 (c) requires the Competent Authority to publish a report containing detailed analysis of the case under investigation and to demonstrate relevance of the factors examined. India submits that the report of the Competent Authority was clearly in accordance with the above provisions, fulfilling every condition required therein.

60. Also, India has clearly demonstrated in the previous sections that the Indian Competent Authority has fully complied with its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 and has provided a reasoned and adequate explanation of its determination concerning "all pertinent issues of facts and law". Therefore, India has not violated any of its obligations under Agreement on Safeguards or under Article XIX:1(a) of the GATT 1994.

⁴² Final Findings, (Exhibit IND-11), para. 65.

⁴³ Appellate Body Report, *US – Steel Safeguards*, para. 304.

XII. India has complied with Article 11.1(a) of the Safeguard Agreement.

61. India submits that since the safeguard measures imposed by India are fully in compliance with the provisions of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994, there can be no violation of Article 11.1(a) of the Safeguard Agreement.

XIII. India has complied with Article 12 of the 'Agreement on Safeguards'

62. India submits that the Competent Authority had come to a conclusion that increased imports of subject goods into India has caused and threatened to cause serious injury to the domestic industry of subject goods, and, that any delay in application of provisional safeguard duties would have caused damage which would have been difficult to repair. Imposition of provisional safeguard duties ('*which measure has now elapsed*') on an urgent basis was necessitated due to the existence of critical circumstances. India had immediately thereafter notified the fact of imposition of a provisional safeguard measure to the "Committee on Safeguards". India states that it notified the relevant requirements in all instances to the Committee of safeguards within 6-8 days of the date of initiation, findings of serious injury or the imposition of definitive safeguard measures and has complied with the requirement under Article 12.1 of the Safeguard Agreement as interpreted by the panel in *US – Wheat Gluten*.

63. The nature of information provided by India in the notification to the "Committee on Safeguards" is in accordance with the requirements under Article 12 of the "Agreement on Safeguards" as interpreted by the Appellate Body decision in *Korea -Dairy*. Further, the notification by India contained all the necessary facts and information which were required to be provided to the committee on Safeguards.

XIV. There is no violation of India's obligations under Article I:1 or Article II:1(b) of the GATT 1994

64. India submits that since the measures at issue were imposed in pursuance of Article XIX of GATT 1994, the obligation of India under Article II:1(b) and Article I:1 *ipso facto* gets suspended. Since the measures at issue was imposed in the form of a safeguard duty in terms of Article XIX of GATT 1994 and the Safeguard Agreement, the question of any violation of Article II:1(b) or Article I:1 of GATT does not arise.

65. Under the Indian legislation, safeguard duties are not "ordinary customs duties" as they can only be imposed only through the application of the law on safeguards, strictly adhering to all the conditions prescribed therein like progressive liberalization, facilitation of adjustment and the obligation to impose it only for the time and to the extent necessary. Therefore, under the Indian legislation too, like Article II:1(b) of GATT, safeguard duties would be considered as "any other type of duties". India is of the view that as long as a measure has been taken under the provisions of the 'Agreement on Safeguards' and 'Article XIX of the GATT 1994', it can only be regarded as a "safeguard measure".

XV. Conclusion

66. Firstly, India and Japan both unanimously agree that the measures in issue are Safeguard measures and have been levied under Article XIX:1(a) of the GATT 1994 read with the Safeguard Agreement. In this regard, India submits that India considers the measures in dispute as "other duties and charges" in terms of Article II:1(b) of the GATT 1994.

67. Secondly, Japan seems to be not too sure about the fruitfulness of the dispute or its outcome.

68. Thirdly, both India and Japan agree that the requirement in the first part of Article XIX, i.e., the test of "as a result of" is different from the "causation analysis" mentioned in the second part of Article XIX:1(a) of the GATT 1994.

69. Fourthly, Japan accepts that the "change in the competitive relationship between the imports and the domestic sales" is not emanating out of the text of either the Safeguard Agreement or the GATT 1994.

70. Fifthly, India understands that both the parties agree that the requirement with regard to "unforeseen developments" has to find "at least some discussion" in the Final Findings of the Authority as opposed to an elaborative analysis.

71. Sixthly, Japan does not dispute the fact that the examination of both injury as well as the threat to injury is possible under the Safeguard Agreement.

72. India submits that it has adequately demonstrated that the measures in dispute have not violated any requirement emanating from its international obligations. In particular, there were no violation with respect to India's determination with regard to unforeseen developments, domestic industry, serious injury or threat to serious injury determination, causal link and any other specific provisions contained in GATT 1994 or in Agreement on Safeguards.

73. For the foregoing reasons, India requests the Panel to find that the measures that the Complainant has challenged are not inconsistent with India's WTO obligations that the Complainant has cited.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF INDIA

1. In its First Written Submission, Second Written Submission and in its oral statements in the first and second substantive meetings, India clearly established that the measure taken by India is in compliance with its obligations under the Agreement on Safeguards and the GATT, 1994. Further, in India's reply to the questions posed by the Panel and its comments on Japan's responses to the questions posed by the Panel, India has elaborately explained why the issues raised by Japan do not hold any factual or legal merit.

2. One of the preliminary issues in the current dispute remains whether the Panel should give its ruling in the present dispute and whether such a ruling would serve the objective set out in terms of Article 3.7 of the DSU. In this regard, the Panel had raised a specific question¹ to Japan regarding India's request that the Panel specifically determine whether the complaint brought by Japan in these proceedings is in accordance with Article 3.7 of the DSU. Japan, in its response², submitted that it is the discretion of the Members to decide upon bringing a case against another Member under the DSU.

3. In this context, India reiterates that it does not question the discretion enjoyed by any Member in deciding whether to bring a case against another Member under the DSU. However, in India's view, this Panel may appreciate the relevance of the second part of Article 3.7 which refers to the possible remedy or outcome of any decision of the DSB. Even if this Panel rules that the measures imposed by India are not consistent with its obligations under the WTO Agreements, the only possible outcome in the present case would be withdrawal of the measures by India. Since the measures imposed by India have already expired on 13 March 2018, it is clear that no useful purpose would be served if Japan wishes to pursue with its claims.

4. In its Second Written Submissions India clarified that the measure at issue has expired on 13.03.2018.³ In its oral statement at the second substantive meeting, Japan stated that even if the measures have expired, "those measures will continue to have effect after their alleged expiry".⁴ India in its response to the question posed by the Panel clarified that Section 28 of the Customs Act, 1962, which Japan has referred to, cannot be applied to any imports subsequent to the date of the expiry of the measure in dispute i.e., after 13 March, 2018.⁵ India also submitted that since the safeguard measure in question has already lapsed, it cannot be renewed under any circumstances. In fact, India is proscribed from even imposing a fresh safeguard measure against the products in question in terms of Article 7.5 of the Agreement on Safeguards for the period equivalent to the period in which the measure in dispute was in force i.e., for two years and six months from 13 March, 2018.⁶ Japan also contended that India failed to demonstrate that the measure in dispute has indeed expired.⁷ In this regard, India submits that the document imposing the measure in question itself categorically states that the measure shall be in force only until 13 March, 2018.⁸ Further, India's notification dated 04.04.2015 to WTO Committee on Safeguard also clearly states that the measure is in force only until 13 March, 2018.⁹ Thereafter, in its Second Oral Statement, India has formally clarified that the measure has not been extended beyond 13 March 2018 and that it has expired on that date.¹⁰

¹ Panel question No. 13.

² Japan's response to Panel question No. 23.

³ India's second written submission, para. 2.

⁴ Japan's opening statement at the second substantive meeting of the Panel, para. 19.

⁵ India's response to Panel question No. 76.

⁶ India's response to Panel question No. 75. See also, India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para. 17.

⁷ Japan's response to Panel question No. 72.

⁸ Customs Notification No. 1/2016 (SG) dated March 29, 2016 (Exhibit – IND 13).

⁹ Notification under Article 12.1(b) of the Agreement on Safeguards, notification pursuant to Article 12.1(c) of the Agreement on Safeguards, notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, dated 04.04.2016 (Exhibit – IND 14).

¹⁰ India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para 12.

5. Japan claims that India has failed to demonstrate that the challenged measure has expired on the basis of the provisions of section 28 of the Customs Act.¹¹ India submits that Japan has failed to appreciate that Section 28 of the Customs Act, 1962 is a provision meant only for collection of duties which were not levied or have been short levied or erroneously refunded. Section 28 is not even remotely connected with the imposition of duties. India submits that the existence or expiry of a measure is to be understood in the context of "levy" or "imposition" alone and not with reference to its "collection". Therefore, any reference to a collection mechanism of a duty (which was otherwise due at the time of importation) for making a claim that the effect of the measure still survives, is completely misplaced.¹² India would also submit that non-collection of any duty which was due prior to the expiry of the measure as a consequence of a ruling of the Panel, would amount to giving effect to the Panel's recommendations retrospectively which would be contrary to the decision of the Appellate Body in *US – Cotton case* and the text and interpretation of the DSU.¹³

Japan's claims regarding "unforeseen developments" are without merit

6. India submits that it has fully complied with its obligations under Article XIX:1(a) of the GATT 1994. India states that the entirety of Japan's claims regarding "unforeseen developments" are premised on (i) erroneous interpretations which do not find support from either the text of Article XIX:1(a) or the 'Agreement on Safeguards'; (ii) reading in additional words/obligations into the text of Article XIX:1(a) which is impermissible; (iii) incorrect application of the decisions of the panels or the Appellate Body; (iv) a "what if" kind of analysis based on assumptions and presumptions instead of countering the analysis carried out by Competent Authority on merits, and (v) erroneous and incomplete reading of the Preliminary Findings and Final findings of the Competent Authority.¹⁴

7. While India's understanding is that Article XIX of the GATT, 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated, India has, as a matter of fact, provided adequate explanation as to why they were unforeseen at the appropriate time. In fact, Japan itself in its Second Written Submission at paragraphs 8 and 15 clearly accepts that the requirement as per the panel and Appellate body decisions is only of "some discussion" in the published report.¹⁵ The Final findings of the Competent Authority clearly refer to the panel report in *US – Steel Safeguards*, which observes that a confluence of events can constitute 'unforeseen developments',¹⁶ and, thereafter, contains an identification and discussion of circumstances/events, the confluence of which constitutes "unforeseen developments". The Preliminary Findings,¹⁷ also clearly indicate that a confluence of circumstances/developments, has been taken to constitute "unforeseen developments" by the Competent Authority¹⁸. Japan itself does not dispute that a confluence of circumstances can together form the basis of "unforeseen developments"¹⁹.

8. Further, Japan is not correct in believing that the obligation of demonstrating the existence of "unforeseen developments" should be only with respect to the specified products. India states that while the determination of "increased imports" should be with respect to the PUC, the existence of "unforeseen developments" need not be limited to the PUC alone. Japan's interpretation is based on an erroneous reading of Article XIX:1(a). Also, the specific findings in the Final Findings under the heading "increased imports", clearly demonstrate that the determination of "increased imports" has been made only in relation to the PUC²⁰.

9. While Japan asserts that the "unforeseen developments" should modify the competitive relationship between the imported and domestic products, it has not addressed the issue raised by the Panel as to what are the elements demonstrating the change of competitive relationship to the detriment of domestic products resulting in increased imports causing serious injury to the domestic

¹¹ Japan's opening statement at the second substantive meeting of the Panel.

¹² India's comments on Japan's response to Panel question No. 72, para. 4.

¹³ India's comments on Japan's response to Panel question No. 72, para. 5.

¹⁴ India's opening statement at the second substantive meeting of the Panel, para. 9.

¹⁵ Japan's second written submission, paras. 8 and 15.

¹⁶ Final Finding, (Exhibit IND-11), para. 74.

¹⁷ Preliminary Findings, (Exhibit IND-7), para. 24.

¹⁸ India's first written submission, para. 81.

¹⁹ Japan's second written submission, para. 10.

²⁰ Final Findings, (Exhibit IND-11), paras. 34-42. See India's opening statement at the second substantive meeting of the Panel, para. 10(c).

industry. India submits that such obligation/requirement does not flow from Article XIX: 1(a) and that Japan is trying to read in additional obligations/requirements into Article XIX: 1(a), where none exists. India believes that since there is no such requirement under the GATT or the Agreement on Safeguards, it would neither be necessary nor possible to identify elements demonstrating the same.²¹

10. Japan has, apart from a mere assertion that it is a complex matter, not discharged its burden of proof to demonstrate that how the present investigation can be considered as a complex matter²² as it involves only a single safeguard measure. India's understanding is that a complex matter, requiring a more detailed discussion, would be in the nature of that referred to in the panel report in *US – Steel Safeguards*, which dealt with ten safeguard measures applied by the USA on imports of ten different products.²³ Thus, India has fully complied with its obligations under Article XIX: 1(a).

11. While Japan has claimed that for those developments which are specific to certain exporting countries, the Competent Authority should have made an analysis on a country-specific basis²⁴, Japan does not cite any basis/authority in support of its claim. India submits that Japan's assertion that India has to show a causal link between "unforeseen developments" with respect to some specific countries and increase in imports from all the sources, is misplaced. The Agreement on Safeguards or the GATT does not require a member to impose safeguard duties only against the sources from where there has been an increase in imports or the sources with respect to which "unforeseen developments" have occurred. Such a requirement would indeed result in creating a paradoxical situation where the Competent Authority would have to impose the duties against sources from where there has been no increase in imports even after an express finding that they are not causing serious injury in terms of Article 4.²⁵

12. As regards Japan's contention regarding the need to explain the impact of the "unforeseen developments" on the specific product at issue,²⁶ India reiterates that steel production worldwide is measured in terms of the crude steel capacity. The proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. Japan has, apart from making certain bare allegations²⁷, not provided any evidence to prove to the contrary. In fact, Japan itself proceeds on the assumption that the production of PUC increases in the same proportion as the production of crude steel.²⁸

13. Japan further asserts that the Preliminary Findings and Final Findings do not contain any explanation with regard to crude capacity. In this regard India submits that paragraph 24 of the preliminary findings clearly refers to the report published in *World Steel Dynamics* while concluding that the world excess capacity and increasing Indian demand are the reasons of increase in imports.²⁹ Since it is a known fact that the steel production worldwide is measured in terms of the crude steel capacity, it is apparent that the steel capacity mentioned in the above analysis of the Competent Authority is the crude steel capacity. India reiterates that the proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain.³⁰

14. India vehemently disagrees with Japan's contention that the conclusions regarding "unforeseen developments" in the Final Findings are that of the domestic industry. India reiterates its submissions made in response to question 23 of the Panel that paragraph 102 of the Final Findings indeed reflects the conclusion of the Competent Authority. That the events constituted "unforeseen developments", is clearly a conclusion reached by the Competent Authority in the Final Findings at

²¹ India's second written submission, paras. 9-10.

²² India's second written submission, para. 88.

²³ India's opening statement at the second substantive meeting of the Panel, para. 10(e).

²⁴ Japan's first written submission, para. 124.

²⁵ India's comments on Japan's response to Panel question No. 89, para. 24.

²⁶ Japan's second written submission, para. 53.

²⁷ Japan's second written submission, paras. 57-58.

²⁸ Japan's second written submission, para. 59. See also, India's comments on Japan's response to Panel question No. 89, para 27.

²⁹ India's comments on Japan's response to Panel question No. 89, para. 27.

³⁰ Refer to pages 82 to 86 of the petition filed by DI on 27.07.2015, which was a part of the public file (Exhibit – IND 20).

paragraph 82 and 102(iii). These are the conclusions of the Competent Authority on the basis of which the safeguard measures were notified. The mere fact that submissions of domestic industry in this context were accepted by the Competent Authority, does not make them the conclusions of the domestic industry. The conclusion clearly remains that of India's Competent Authority.³¹

15. In view of India's submissions, Japan's claim that India did not properly determine whether the unforeseen developments resulted in increased imports in such quantities and under such conditions so as to cause or threaten to cause serious injury to the domestic industry, deserves to be rejected by the Panel.

Japan's claims regarding absence of logical connection between increase in imports and unforeseen developments are baseless

16. Japan disputes India's understanding that the "logical connection" requirement is a test of lesser threshold as compared to the "causation" requirement.³² It states that there is no textual basis to argue that one is of a lesser threshold than the other and that they merely relate to different elements examined in a safeguard investigation.³³ India submits that the said statement of Japan is contradictory to its own response to the question 24 asked by Panel³⁴ wherein Japan has stated that the logical connection test requires demonstrating how the increase in imports causing serious injury or threat thereof is connected or linked to the unforeseen developments and the effect of the obligations incurred under the GATT 1994.³⁵ Japan further states that the causal link test requires demonstration of the existence of a causal link, i.e., a genuine and substantial relationship of cause and effect between the increased imports and the serious injury or threat thereof suffered by the domestic industry.³⁶ It is evident from Japan's own submission that the logical connection test requires merely a connection or link whereas the causal link test requires the demonstration of a genuine and substantial relationship. Evidently, the requirement of demonstrating a connection or link is of a lower threshold than that of demonstrating a genuine and substantial connection.³⁷ Further, Japan while acknowledging that the two tests are inherently different³⁸, denies the difference in the threshold in any of the tests. However, as stated above, Japan itself contradicts its stance wherein it has clearly expressed its understanding as to how the logical connection test is of a lower threshold as compared to that of the causation test.³⁹

17. Japan further argues that increase in imports would occur when imported products replace domestic products, resulting in both an increase in imports as well as a decrease in sales of domestic products in absolute or relative terms.⁴⁰ Japan's interpretation does not emanate from the plain text of the GATT 1994 or the Agreement on Safeguards which requires the Competent Authority to merely demonstrate an increase in imports in absolute or relative terms.

18. In view of the above, India submits that Japan has clearly failed to indicate any flaw in the examination of the Competent Authority with regard to unforeseen developments and its logical connection to increased imports.

Japan failed to substantiate its claim regarding improper determination of 'period of investigation'

19. In response to question 94 by the Panel, Japan asserts that the Indian authority failed to make a qualitative analysis of the increase in imports such as to ensure that the alleged increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both quantitatively and qualitatively. Further, while Japan does not point out any specific shortcoming in the Competent Authority's selection and analysis of the POI, it suggests that the Competent Authority should have

³¹ Final Findings, (Exhibit IND-11), paras. 34-42. See India's opening statement at the second substantive meeting of the Panel, para. 10(i).

³² Japan's second written submission, para. 29.

³³ Japan's second written submission, para. 29.

³⁴ Japan's response to Panel questions, paras. 23-24.

³⁵ Japan's response to Panel questions, para. 23.

³⁶ Japan's response to Panel questions, para. 24.

³⁷ India's opening statement at the second substantive meeting of the Panel, paras. 12-14.

³⁸ Japan's response to Panel questions, para. 25.

³⁹ India's opening statement at the second substantive meeting of the Panel, para. 15.

⁴⁰ Japan's second written submission, para. 38.

conducted its examination as per the methods suggested by it.⁴¹ Further, Japan takes retreat from its previous claim⁴² and clarifies that its claim focuses on the fact that the Indian authority failed to make a qualitative analysis, noting that while examining data outside the POI or determining a longer POI would be one possible method to ensure a qualitative analysis, there may be other methods to do so.⁴³

20. In this regard, India reiterates that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.⁴⁴ While Japan expressly admits that there could be various methods of doing qualitative analysis⁴⁵, it fails to specifically point out how the POI selected by the Competent Authority does not qualify the test of 'qualitative analysis'. Japan further contends that determining a longer POI would be one possible method to ensure a qualitative analysis. However, it does not indicate how much longer a POI (3 years, 4 years or 10 years) would have qualified its understanding of the test of 'qualitative analysis'. Further, when specifically asked by the Panel in question 96(a) that whether a period of investigation of two years and three months would be sufficient in order to make an objective analysis of import trends, Japan refrains from providing any answer to the said question. Therefore, while Japan's claims regarding POI lack factual or legal basis, Japan also failed to discharge the burden of proof to establish that the period selected by the Competent Authority was not in accordance with the Agreement on Safeguards or the legal framework as interpreted by panels and the Appellate Body.⁴⁶

21. Japan notes that there is no provision in the Agreement on Safeguards which prohibits the examination of data outside the POI.⁴⁷ India agrees with Japan that there is no bar on the Competent Authority to examine the data outside the POI. However, India notes that the discretion, in this regard, lies with the Competent Authority.⁴⁸

22. As regards the basis of the selection of the POI, in paragraphs 30 and 31 of the Final Findings, the Competent Authority has clearly provided the basis of selection of the POI. As discussed in paragraph 30 of the Final Findings, the selection of the POI was based on (i) principles set out in the panel findings in *US – Line Pipe*; (ii) facts of the present case; and (iii) the information and sources of information analyzed by the Competent Authority. Further, in paragraph 31 of the Final Findings the Competent Authority clearly considered it appropriate to take the present POI in view of the decision of panel mentioned in paragraph 30.⁴⁹

Japan failed to substantiate its claim regarding improper determination of 'Increase in imports'

23. In its Second Written Submission, Japan seeks to dispute India's claim that the Panel cannot be called upon by Japan to rule with regard to the alleged violation of Article 2.1 of the Agreement on Safeguards.⁵⁰ Japan contends that it has, at various junctures, claimed violation of Article 2.1. However, India submits that Japan did not make any claim with respect to the violation of Article 2.1 *per se* and all its claims are merely consequential. India further submits that a mere reference by Japan to an Appellate Body report cannot be construed as an independent claim of violation of Article 2.1. India submits that the facts of the present case are *similis* to the panel's finding in *Korea – Dairy* to the extent that Japan has merely stated (without specifically claiming) that India violated Article 2.1 of the Agreement on Safeguards and all the claims regarding such violation are merely consequential. However, in its submissions, Japan did not specifically claim nor did it submit any evidence in respect of violation

⁴¹ Japan's response to Panel question No. 94, para. 39.

⁴² Japan's first written submission, para. 179.

⁴³ Japan's response to Panel question No. 94, para. 40.

⁴⁴ India's first written submission, paras. 118-140.

⁴⁵ Japan's response to Panel question No. 94, para. 40.

⁴⁶ India's comments on Japan's response to Panel question No. 94, para. 35.

⁴⁷ Japan's response to Panel question No. 96.

⁴⁸ India's comments on Japan's response to Panel question No. 96, para. 39.

⁴⁹ India's response to Panel question No. 99.

⁵⁰ India's first written submission, para. 120.

of Article 2.1. India submits that in such circumstances, the Panel may refrain from ruling upon the alleged violation of Article 2.1 of the Agreement on Safeguards.⁵¹

24. Japan contends that the Indian authority failed to make a qualitative analysis of the "increase in imports".⁵² In this regard, India observes that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.⁵³

Japan failed to substantiate its claim regarding improper determination of Domestic Industry

25. Japan seems to disagree with India's contention that there is no violation of Article 4.1(c) because the producers included in the domestic industry accounted for more than 67% and therefore constituted a "major proportion" of the total domestic production. As already explained in India's First Opening Statement, the term "domestic industry" under Article 4.1(c) of the Agreement on Safeguards is defined as "the producers as a whole of the like or directly competitive products" or "those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". It is undisputed that Article 4.1(c) of the Agreement on Safeguards provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry". Under the second option, the term "domestic industry" shall be understood as producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".⁵⁴

26. Under the second option, the Agreement on Safeguards consciously does not specify any precise definition in terms of a percentage of total production to qualify the test of "a major proportion" presumably for the reason that such a prescription would have created practical and conceptual difficulties. For example, any prescription of a particular percentage, say more than 50% for applying the test of "major proportion" in Article 4.1(c) of Agreement on Safeguards in the context of fragmented industry, may result in practical difficulties not only for data collection but also for injury and causation analysis. India considers that it is in this backdrop that Article 4.1(c) of the Agreement on Safeguards is silent on what proportion of total production of domestic producers must be taken into consideration for evaluating whether a certain percentage constitutes "a major proportion".⁵⁵

27. Japan places reliance on *Russia – Commercial Vehicles* to assert that the determination of the Domestic Industry by the Competent Authority was flawed. In this regard, India submits that Japan's reliance on *Russia – Commercial Vehicles* is completely misplaced in the facts and circumstances of the present case. The panel in *Russia – Commercial Vehicles* had found that the investigating authority: (a) had decided not to include a domestic producer of the like product after having reviewed that producer's data; and (b) had not provided the reasons for the exclusion of that producer in the investigation report. On the contrary, the present case is not about the exclusion of certain domestic producer. In the present case, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, nevertheless questionnaires were sent to all other known producers of the PUC, as reflected in the Final Findings.⁵⁶ Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meet

⁵¹ India's opening statement at the second substantive meeting of the Panel, para. 18.

⁵² Japan's second written submission, para. 103.

⁵³ India's first written submission, paras. 118-140. See, India's opening statement at the second substantive meeting of the Panel, para. 21.

⁵⁴ India's opening statement at the first substantive meeting of the Panel, paras. 16-17.

⁵⁵ India's opening statement at the second substantive meeting of the Panel, para. 25.

⁵⁶ Final Findings, (Exhibit IND-11), para. 2.

the requirements set out under the Agreement on Safeguards.⁵⁷

28. Further, in response to question 104 by the Panel, Japan agrees that the facts in *Russia – Commercial Vehicles* and in the investigation at issue are different. However, Japan claims that the way the Indian authority determined the domestic industry introduced a material risk of distortion. Japan also makes an assumption that, in the present case, the Indian authority received information concerning all six domestic producers but only three were included as a part of the domestic industry. Japan states that although the three producers (not included in the domestic industry), did not expressly indicate their willingness to be included in the domestic industry, they had provided information in the application and expressly supported the application.⁵⁸

29. India vehemently denies the claims made by Japan as they are neither supported by facts of the case or the information available on record nor are they supported by any evidence. Indeed, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.⁵⁹ In fact, since the other domestic producers did not respond to the questionnaire sent to them by the Competent Authority or sent any request for being considered as an interested party, the said other domestic producers were not even considered as interested parties in the present investigation.⁶⁰ Japan's claim that the Competent Authority had the data and information pertaining to the domestic producers not constituting domestic industry is also not supported by any evidence on record. Japan fails to appreciate that in the absence of cooperation from domestic producers not constituting domestic industry, the Competent Authority is required only to ensure that the information relied upon to reach its conclusions, meets the requirements under the Agreement on Safeguards.⁶¹

30. While Japan considers the method of determination of domestic Industry by India as a "mere quantitative approach", it fails to present any alternative method of such determination or point out any legal inconsistency in the method adopted by the Competent Authority. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehensions. India respectfully submits that injury determination of Competent Authority is based on wide-ranging information regarding domestic producers and is not distorted or skewed as is evident from the details in the Final Findings.⁶²

31. In question 106 when Panel asked Japan to substantiate its claim that only the alleged low performing producers were *on purpose* included into the definition of the domestic industry, Japan states that such evidence is not necessary.

32. Japan further alleges that in the present case there was a 'self selection' of the Domestic Industry by the domestic producers.⁶³ India submits that the Japan's contention is presumptuous as there was neither any 'self-selection' by the Domestic Industry nor any 'automatic acceptance' by Competent Authority. Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meets the requirements set out under the Agreement on Safeguards. In any case, Japan failed to indicate any alternate method by which the Competent Authority could have examined the other producers whose data was also not available with the Competent Authority.⁶⁴

33. India submits that Japan's claim with respect to violation of Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) is based on the presumption that the determination of the "domestic industry" by the Competent Authority is inconsistent with its obligations under Article 4.1(c) which India vehemently denies. As explained earlier, India has sufficiently established that its determination of the "domestic industry" was wholly consistent with the provisions of Article 4.1(c).⁶⁵

⁵⁷ India's response to Panel question No. 105.

⁵⁸ Japan's response to Panel question No. 104.

⁵⁹ Final Findings, (Exhibit IND-11), para. 4.

⁶⁰ Final Findings, (Exhibit IND-11), para. 5.

⁶¹ India's comments on Japan's response to Panel question No. 104, para. 45.

⁶² Final Findings, (Exhibit IND-11), paras. 24-26. See *also*, India's opening statement at the second substantive meeting of the Panel, para. 29.

⁶³ Japan's response to Panel question No. 106.

⁶⁴ India's comments on Japan's response to Panel question No. 106, para. 48.

⁶⁵ India's opening statement at the second substantive meeting of the Panel, para. 30.

Japan's claims regarding improper determination of serious injury and threat thereof are without merit

34. Japan stated in its Second Written Submission that the standard of serious injury is, on its face, "very high" and "exacting".⁶⁶ It further contends that India misread the Appellate Body's findings in *US – Wheat Gluten* when it argues that "the term 'exacting' was used in the context of the 'legal standard in the Agreement on Safeguards' and not for 'serious injury' itself".⁶⁷ In this regard, India reiterates that "serious injury" is defined under Article 4.1(a) of the Agreement on Safeguards as "a significant overall impairment in the position of a domestic industry" and there is no obligation, explicit or implicit, that the standard of "serious injury" set forth in Article 4.1(a) is, on its face, "very high" and "exacting", as proposed by Japan.⁶⁸ India also reiterates that the observation of the Appellate Body was unambiguously in the context of making a contradistinction between the term "material injury" in the Anti-dumping Agreement and "serious injury" as defined under Agreement on Safeguards. India further submits that while the term "serious injury" may be of a higher standard as compared to "material injury" under the Anti-dumping Agreement, the observations of the Appellate Body cannot be construed to give the term "serious injury" the status of an absolute standard, as proposed by Japan. The obligations of the Members in terms of Article 4.1(a) have to be understood and given its meaning within the framework of the Agreement on Safeguards and there is no room for casting any additional burden or obligation on a Member than what is specifically provided in the Agreement on Safeguards.⁶⁹ In other words, the Appellate Body merely stressed the point that the legal standards have to be exacting which cannot be construed to mean that the assessment of "serious injury" itself ought to be "exacting".⁷⁰

35. With regard to Japan's contentions relating to obligations imposed on the competent authorities in the context of the serious injury analysis⁷¹, India reiterates that the Competent Authority in its findings has not only evaluated the listed factors in Article 4.2(a) to justify a determination of 'serious injury' under the Agreement on Safeguards⁷² but has also thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".⁷³ The Competent Authority has indeed conducted a substantive evaluation of the 'bearing', or the 'influence' or 'effect' or 'impact' that the relevant factors have on the 'situation of the domestic industry' as suggested in the Appellate Body Report, *US – Lamb*.⁷⁴

36. Japan disagrees with India's argument that the "other factors" that must be examined in the framework of the non-attribution analysis pursuant to Article 4.2(b) are factors that are found by the competent authorities to be "relevant".⁷⁵ In India's view, whether a factor is "relevant" depends on whether it is "of an objective and quantifiable nature" and "having a bearing on the situation" of the domestic industry pursuant to Article 4.2(a). India claims that "it is only after the Competent Authority decides about the 'relevance' of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise".⁷⁶

37. Further, Japan contends that there is no textual basis to support India's understanding that the "other factors" examined under Article 4.2(a) and Article 4.2(b) of the Agreement on Safeguards should be identical. According to Japan, the "other factors" examined pursuant to Article 4.2(b) in the context of the non-attribution analysis are factors which have an effect on the state of the domestic industry.⁷⁷ India submits that Japan is attempting to read words and phrases which are not a part of the Agreement. There is nothing in the text of the Article to suggest that the non-attribution obligation requires a distinct examination in the context of "factors which have an effect on the state of the domestic industry". It is submitted that the two paragraphs of Article 4.2 cannot

⁶⁶ Japan's second written submission, para. 135.

⁶⁷ Japan's second written submission, para. 136.

⁶⁸ India's opening statement at the second substantive meeting of the Panel, para. 33.

⁶⁹ India's opening statement at the second substantive meeting of the Panel, para. 34.

⁷⁰ India's first written submission, para. 180.

⁷¹ Japan's second written submission, section E. 2 (ii), paras. 138-142.

⁷² Appellate Body Report, *Argentina – Footwear (EC)*, para. 138.

⁷³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

⁷⁴ Appellate Body Report, *US – Lamb*, para. 104. See also, India's opening statement at the second substantive meeting of the Panel, para. 36.

⁷⁵ India's first written submission, paras. 276, 278 and 279.

⁷⁶ India's first written submission, para. 279. See, India's second written submission, para. 16.

⁷⁷ India's second written submission, para. 17.

be read disjunctively as is being suggested by Japan. It is very clear from a plain reading of Article 4.2(a) that in the investigation to determine whether increased imports have caused serious injury or are threatening to cause serious injury, the competent authorities shall evaluate "all relevant factors". Thus, the examination is not restricted to some factors but extends to all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry. It is important to note that Article 4.2(b) is intricately linked to Article 4.2(a) inasmuch as the opening sentence itself states that "The determination referred to in sub-paragraph (a) shall not be made ...". Thus, it is clear that Article 4.2(b) only imposes an additional burden on the competent authorities to demonstrate the causal link between increased imports and serious injury based on the examination of the factors referred to in Article 4.2(a).⁷⁸

38. Further, the last sentence of Article 4.2(b) merely prohibits the competent authorities from attributing injury caused by "factors other than increased imports" to increased imports. In India's view, there is no independent or separate identification envisaged under Article 4.2(b). Therefore, the phrase "factors other than increased imports" has to be necessarily understood to refer to only those factors that have been found to be relevant in terms of Article 4.2(a). It also needs to be appreciated that the last sentence of Article 4.2(b) does not envisage any independent evaluation but only presupposes an analysis elsewhere which obviously is under Article 4.2(a). It may also be noted that unlike Article 3.5 of the Anti-dumping Agreement, no separate identification of "other factors" is envisaged under Article 4.2(b) of the Agreement on Safeguards. Accordingly, Japan's reference to the panel's findings in *EC – Tube or Pipe Fittings* is also misplaced.⁷⁹

39. Further, as confirmed by India in response to question 119⁸⁰ by the Panel, there is no conflict in the decision of the Appellate Body in *US – Line Pipe* and India's argument that there is no independent or separate identification envisaged under Article 4.2(b). In India's view, the factors required to be analyzed in terms of Article 4.2(b) are the ones identified in terms of Article 4.2(a). India's view is also fully supported by the report of the panel in *US – Steel*.

40. Regarding Japan's claim of mismatch in the figures of inventories, production and sales, India has already clarified in its First Written Submissions that the production, sales and inventories have been duly verified from the excise records of the domestic industry and that they were correct.⁸¹ Further, regarding the issue of annualization of data, India reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis.⁸² Annualization does not result in a change in the POI but is only a statistical tool used for comparing periods which are dissimilar. In India's views, whenever the periods are different over the length of the investigation period, the only methodology that can be adopted for a proper comparison is to bring the periods to a common denominator. For instance, if the period of investigation is nine months, it cannot be directly compared to a preceding period of 12 months.⁸³

41. Japan also asserts that the analysis of "further threat of greater serious injury" as examined under the Final Findings of the Competent Authority, does not have any legal basis and the same is different from "threat of serious injury" as prescribed in the Agreement on Safeguards. In this regard, India reiterates that the expression "further" has been used in the context of the findings of the Competent Authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.⁸⁴ Therefore, Japan's contention in this regard is without any merit.⁸⁵

⁷⁸ India's second written submission, para. 18.

⁷⁹ India's second written submission, para. 19.

⁸⁰ India's response to Panel question No. 119.

⁸¹ India's first written submission, para. 228.

⁸² India's response to Panel question No. 31.

⁸³ India's response to Panel question No. 95.

⁸⁴ India's response to Panel question No. 47. See also, India's opening statement at the second substantive meeting of the Panel, para. 42.

⁸⁵ India's opening statement at the second substantive meeting of the Panel, para. 39.

42. Japan, while relying on its First Written Submission, also reiterated that India's determination does not meet the standard of "threat of serious injury".⁸⁶ India submits that it has clearly demonstrated in its First Written Submissions⁸⁷ that apart from the existence of serious injury, there was also a further threat of serious injury to the domestic industry.⁸⁸

Japan's claims regarding determination of the causal link are without merit

43. India submits that it has clearly established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b). Further, the determination of the Competent Authority has also demonstrated that the increased imports had caused or were threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.⁸⁹

44. Japan contends that in the present case there was no overall coincidence in time between the movements in imports and the movements in injury. India submits that Japan's contention is bereft of factual support. The Competent Authority in its findings has discussed and come to a conclusion that while the imports have gone up, the domestic industry has lost its share in the same period. At the same time, decline in profitability of the domestic industry is also of exactly the same period when the increased imports have taken place. As a matter of fact, the entire injury analysis is for the period when the increased imports have taken place.⁹⁰ Further, the Competent Authority has clearly held that there is a direct correlation (emphasis added) between the increase in imports and serious injury suffered by the domestic industry as imports in absolute terms increased approximately three times during the year 2015-16 (Annualized on the basis of the figures of Q1) as compared to base year 2013-14. The domestic industry's market share declined so did the landed price of imports per ton. Consequently, the domestic industry has suffered losses. It is, thus, evident that injury to the domestic industry has been caused by the increased imports.⁹¹ Clearly, in the facts of the present case, the Competent Authority has not only established a mere "coincidence" but has, as a matter of fact, established a "direct correlation" between the increase in imports and serious injury suffered by the domestic industry.⁹²

45. Further, India reiterates that the Competent Authority is required to establish a relationship between the movements in import volume and the movements in only those factors which are held to be a cause of injury. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan.⁹³

Japan's Claims regarding violation of the Article 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 are without merit

46. Japan has clarified that its claims under Articles 5.1 and 7.1 of the Agreement on Safeguards are consequential to a finding of violation of Article 4.2(b) of the Agreement on Safeguards. Japan seems to indicate that its entire claim of violation of Article 5.1 and 7.1 is based on the presumption of improper non-attribution and therefore, a violation of Article 4.2(b).⁹⁴ Further, in response to question 127 by the Panel, Japan seems to change its stance and accept that a violation of Article 4.2(b) of the Agreement on Safeguards does not necessarily mean a violation of Article 5.1. Contrary to the position taken earlier where Japan disagreed with India's understanding that the violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1, Japan seems to concede the point.⁹⁵

⁸⁶ Japan's second written submission, para. 182.

⁸⁷ India's first written submission, paras. 237-243.

⁸⁸ India's opening statement at the second substantive meeting of the Panel, para. 40.

⁸⁹ India's first written submission, paras. 244-291. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 42.

⁹⁰ India's opening statement at the second substantive meeting of the Panel, para. 43.

⁹¹ Final Findings, (Exhibit IND-11), para. 66. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 44.

⁹² India's opening statement at the second substantive meeting of the Panel, para. 45.

⁹³ India's first written submission, para. 261. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 46.

⁹⁴ Japan's response to Panel question No. 62.

⁹⁵ Japan's response to Panel question No. 63.

47. In response to the questions posed by the Panel subsequent to the first substantive meeting⁹⁶ and in its opening oral statement at second substantive meeting⁹⁷, India clarified that in its understanding a violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1 and Article 7.1. It may be recalled that India has relied upon the text of Article 5.1 and 7.1 which does not contain any indication or even a suggestion that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Agreement on Safeguards.⁹⁸ India has clearly demonstrated that in the present case, India has fully complied with each and every requirement of Article 4.2(b) of the Agreement on Safeguards. Further, India has also demonstrated through its First Written Submissions and subsequent submissions⁹⁹ that the duties levied were only to the extent necessary in terms of Article 5.1 of Agreement on Safeguards. India further submits that Japan has clearly failed to even indicate *how* the duties levied by India are not only to the extent necessary and *what* should have been the extent of duties which would have been proper in its understanding. Therefore, Japan has completely failed to establish even a *prima facie* case that the duties levied by India were not only to the extent necessary to counter the injurious effects of increased imports.¹⁰⁰

Japan's Claims regarding violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are without merit

48. Japan's claim regarding the violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are wholly consequential to its presumption that by way of measures at issue, India has violated other provisions and requirements under GATT 1994 and Agreement on Safeguards.¹⁰¹ India submits that since it has fully complied with the obligations under the GATT 1994 and the Agreement on Safeguards, there can be no question as to the violation of Article 3.1, Article 4.2(c) and Article 11.1(a). Therefore, the Panel should reject the contention of Japan in this regard.¹⁰²

⁹⁶ India's response to Panel question No. 63.

⁹⁷ India's opening statement at the second substantive meeting of the Panel, para. 49.

⁹⁸ India's response to Panel question No. 127.

⁹⁹ India's opening statement at the first substantive meeting of the Panel.

¹⁰⁰ India's comments on Japan's response to Panel question No. 127, para. 62.

¹⁰¹ Japan's second written submission, paras. 244-245.

¹⁰² India's opening statement at the second substantive meeting of the Panel, para. 50.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF AUSTRALIA

I. Introduction

1. Australia's written submission and response to questions in this dispute have addressed the proper interpretation of Article XIX:1(a) of GATT 1994 and the Agreement on Safeguards (Safeguards Agreement) with respect to the constituent elements of a safeguard measure. Drawing on this analysis, Australia has examined the parties' arguments with respect to:

- i. the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry;
- ii. the application of obligations under Article I:1 of the GATT with respect to the disputed safeguard measure; and
- iii. the application of obligations under Article II:1(b) of the GATT with respect the disputed safeguard measure.

II. The proper interpretation of Article XIX:1(a) of the GATT 1994

2. In Australia's view, Article XIX:1(a) of GATT 1994 provides clear direction for determining whether a measure contains the constituent elements of a safeguard measure. It enables a Member to temporarily suspend an obligation incurred under the GATT 1994 where as a result of that obligation, a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the Member's domestic industry producing like products. The Appellate Body has confirmed this view:

... 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*. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend *the obligation* in whole or in part["]...¹ (emphasis added)

3. In Australia's view, Article XIX:1(a) therefore establishes that a "safeguard measure" is a measure that:

- i. suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff concession; and
- ii. suspends that GATT obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue.

4. In Australia's view, these two elements can be seen as: (i) the *content* of a safeguard; and (ii) the *objective* of a safeguard. Both must be present for a measure to constitute a safeguard measure.

III. The Parties' arguments with respect to the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry.

5. Japan claims India has violated Article XIX:1(a) of the GATT 1994 because it failed to demonstrate a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to its like

¹ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

domestic industry.² In response, India claims the logical connection exists through the existence of tariff concessions for the relevant product.³

6. As set out above, Australia holds the view that the suspension, withdrawal or modification of a GATT obligation through a safeguard measure must be undertaken with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue. The mere existence of an obligation or concession would not be satisfactory to demonstrate the logical connection between the effect of the obligations incurred and the surge in imports. The Appellate Body has noted there must be:

... **[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 [regarding increased imports] in the second clause of Art XIX:1(a) for the imposition of a safeguard.**⁴

7. In the current dispute, Australia considers that if India's measure did not in fact suspend, withdraw or modify its bound tariff concession of 40 per cent under GATT 1994, the Panel should find that the measure lacked the requisite content of a safeguard. It therefore would not constitute a safeguard measure under Article XIX:1(a) of the GATT 1994.

IV. The application of obligations under Article I:1 of the GATT 1994 with respect to the disputed safeguard measure

8. Japan submits India has violated Article I:1 of GATT 1994 because its purported safeguard measure does not apply equal tariffs to all WTO Members.⁵ India submits it is permitted to suspend the obligations in Article I:1 of GATT 1994 through a safeguard measure.⁶ India further submits that Article 9 of the Safeguards Agreement permits the application of safeguard measures in a manner which favors developing country WTO Members.⁷

9. In light of the requisite link between the content and objective of a safeguard, outlined above, Australia submits that a "suspension" of MFN obligations under Article I:1 in the application of a safeguard measure is permitted only to the extent that this derogation addresses the cause or threat of serious injury to the like domestic industry.

10. Australia's view is supported by the Panel in *Indonesia – Iron or Steel Products*, which said it failed to see:

... **how a course of action that dilutes the protective impact of a safeguard measure ... could result in the suspension of a Member's MFN obligations under Article I:1 for the purpose of Article XIX:1(a)**, given that the fundamental objective of Article XIX:1(a) is to allow Members to "escape" their GATT obligations to the extent necessary to prevent or remedy serious injury to a domestic industry.⁸ (original emphasis modified)

11. The panel further noted:

... **the discriminatory application of a safeguard measure for the purpose of affording [special and differential treatment] pursuant to Article 9.1 [of the Safeguards Agreement] does not result in a suspension of a Members obligations under Article I:1, within the meaning of Article XIX:1(a) of the GATT 1994.**⁹ (original emphasis)

12. Therefore, where the obligation or concession being suspended, withdrawn or modified did not *contribute* to the surge in imports which injured or threatened to injure domestic industry

² Japan's first written submission, paras. 152, 162-3.

³ India's first written submission, paras. 117-118.

⁴ Appellate Body Report, *US – Steel Safeguards*, para. 317, referring to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

⁵ Japan's first written submission, para. 521.

⁶ India's first written submission, paras. 337, 342.

⁷ India's first written submission, paras. 337, 342.

⁸ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.28.

⁹ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.30.

producing like goods, the requisite *objective* of the safeguard measure is not present. Where the *objective* of the purported safeguard measure is not present, then no safeguard has been imposed. In such circumstances, obligations under Article I:1 of GATT 1994 have not been suspended, and the exception under Article 9.1 of the Safeguards Agreement cannot apply.

V. The application of obligations under Article II:1(b) of the GATT 1994 with respect to the disputed safeguard measure

13. Japan submits that India violates Article II:1(b) of GATT 1994 because through the measures at issue, India imposes "other duties or charges" in violation of the second sentence of that provision; and that while the disputed measures are duties levied in customs, as safeguard measures they are by nature "extraordinary" or "exceptional" and not "ordinary" measures.¹⁰ India submits that since the measures at issue were imposed in pursuance of Article XIX of the GATT 1994, the obligation of India under Article II:1(b) ipso facto is suspended, and therefore the question of any violation under Article II:1(b) does not arise.¹¹

14. In the present dispute, India's Schedule permitted it to impose a tariff rate of 40 per cent on the particular products at issue.¹² Prior to imposing the purported safeguard measure, India applied a tariff rate in the order of 7.5 per cent – well below its scheduled tariff concession.¹³ To address "the effect of such low applied tariffs",¹⁴ India imposed a purported safeguard measure comprising an additional tariff of around 10 - 20 per cent.¹⁵

15. In these circumstances, neither the *content* or *objective* of a safeguard measure are present:

i. India's imposition of the purported safeguard measure did not in fact withdraw or modify its scheduled tariff concession of 40 per cent; and

ii. India's imposition of the purported safeguard measure did not in fact address serious injury to its like domestic industry caused or threatened by a surge of imports resulting from its scheduled tariff concession of 40 per cent.

16. As such, Australia does not consider that India's measure constitutes a safeguard measure within the meaning of Article XIX of the GATT 1994 and the Safeguards Agreement.

VI. Conclusion

17. In summary, Australia submits that this dispute provides an opportunity for the Panel to clarify a number of questions of legal interpretation regarding the scope and application of provisions in the GATT 1994, and Safeguards Agreement. In Australia's view, the constituent *content* and *objective* of a safeguard measure are not present in this instance. In light of that, India has failed to implement a safeguard measure, and the measure it has implemented contravenes a number of GATT obligations.

¹⁰ Japan's first written submission, paras. 503, 513.

¹¹ India's first written submission, paras. 344, 346.

¹² India's first written submission, para. 48.

¹³ Japan's first written submission, paras. 160 - 163; also India's first written submission, para. 49.

¹⁴ Japan's first written submission, para. 160.

¹⁵ Japan's first written submission, paras. 27 - 30.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. A measure should be deemed a safeguard within the meaning of Article XIX of GATT 1994, when it: (i) suspends an obligation under the GATT 1994 or withdraws or modifies a scheduled tariff concession; (ii) with purpose of remedying or preventing injury caused by an increase in imports. The obligation that may be suspended in accordance with the last part of Article XIX:1(a) of the GATT 1994 refers to the obligation which, according to the first part of the Article, has given rise to the increase in imports which has caused or threatens to cause serious injury.

2. In the view of the EU, the nature of a safeguard measure under Article XIX of GATT 1994 is that of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it is not a safeguard measure within the meaning of Article XIX of GATT 1994 and, consequently, does not fall under the Agreement on Safeguards. The EU notes in this respect that the Agreement on Safeguards provides for the possibility of compensation and that several provisions make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted, precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

3. Unlike the anti-dumping rules that apply to any "specific action against dumping" of exports, Article XIX of GATT 1994, read together with the Agreement on Safeguards, makes clear that certain measures can only be considered as safeguards if they suspend an obligation under the GATT 1994 in whole or in part or withdraw or modify a concession.

4. Therefore, an increase of the applied tariff rate, while still remaining at or below the level of the bound tariff rate, would thus not require (or indeed allow) the adoption of safeguard measures.

5. The application of Article 9.1 of the Agreement on Safeguards does not qualify a specific measure as a safeguard measure for the purposes of Article XIX GATT 1994 and the Agreement on Safeguards, but rather presupposes the existence of a safeguard. The application of Article 9.1 of the Agreement on Safeguards does not violate the MFN obligation in Article I:1 of GATT 1994 as the former prevails if and to the extent there is a conflict with the latter. Moreover, if compliance with the obligation under Article 9.1 were to be tantamount to a suspension of an obligation within the meaning of Article XIX of the GATT 1994, that would mean that compliance with an obligation under the Agreement on Safeguards would give rise to compensation rights for other Members under Article 8 of the Agreement on Safeguards without suspension, withdrawal, or modification of obligations or concessions that caused the alleged serious injury. Clearly such a result would be absurd.

6. Article 9 in practice operates as a limited exception to the non-discrimination obligation as reflected in Article 2.2 of the Agreement on Safeguards for safeguards measures and the MFN principle, as reflected in Article I:1 of the GATT 1994 for trade in goods generally. However, in the absence of language clearly designating it as an exception to these provisions, this should be dealt with as a case of legal conflict between obligations which are simultaneously applicable but mutually exclusive. According to the General Interpretative Note to Annex 1A to the WTO Agreement, which deals with conflicts between the GATT 1994 and any of the other agreements in Annex 1A, including the Agreement on Safeguards, priority should be given to the Agreement on Safeguards, which prevails if and to the extent there is a conflict. As for the conflict between Article 2.2 and 9.1 of the Agreement on Safeguards, the principle of *lex specialis* directs to set aside the general obligation under Article 2.2 in favour of the more specific obligation under Article 9.1 to the extent there is a conflict between them.

7. The nature of duties imposed following a safeguard investigation ordinary is contingent upon their design and structure. If they have the essential attributes of customs duties they could be qualified as "ordinary customs duties" within the meaning of Article II: 1 of the GATT 1994; otherwise they fall in the residual category of "other duties or charges of any kind". In the present case, the EU considers that the duties imposed are "ordinary customs duties" within the meaning of Article II: 1 of the GATT 1994.

8. The EU also notes that while a Member could carry out a safeguards investigation in accordance with the procedures of the Agreement on Safeguards, the ensuing measures in the form of an increase in the tariff may not need to go above the bound rate in order to "prevent or remedy serious injury and to facilitate adjustment". In such circumstances, it is plausible to argue that the Agreement on Safeguards would nonetheless apply to all acts that have already taken place.

9. Finally the European Union submits that the wording "obligations" in the first clause in Article XIX: 1(a) of the GATT 1994 includes all obligations incurred under the GATT 1994. However, some obligations are not capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers. For example, Article XXIV of the GATT does not appear to impose obligations under the GATT 1994 that are capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers.

II. CLAIMS UNDER ARTICLE II: 1 (B) AND ARTICLE I: 1 OF THE GATT 1994

10. The EU submits that safeguard measures, within the meaning of Article 1 of the Agreement on Safeguards, which comply with the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards, do not breach Article II: 1(b) and Article I: 1 of the GATT 1994.

11. Assuming, *quod non*, the measures at issue in this dispute are safeguard measures within the meaning of Article 1 of the Agreement on Safeguards, any breach of Article II: 1(b) and Article I: 1 of the GATT 1994 would have to be consequential to a breach of the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards.

12. To put it differently, if a measure is a safeguard measure, it is clear for everybody that the Member imposing it would have to comply with Article 9.1 of the Agreement on Safeguards, and thus would have to exclude developing countries meeting the conditions set out in Article 9.1 from the scope of the measure. The simple exclusion of developing countries meeting those criteria could thus not reasonably be considered as a breach of Article I: 1 of the GATT 1994. Unless the challenge is really directed against e.g. the wrongful application of Article 9.1 (or some other provision) of the Agreement on Safeguards, with a consequential breach of Article I: 1 of the GATT 1994.

13. The EU notes that Japan does not frame its claims under Article II: 1(b) and Article I: 1 of the GATT 1994 as purely consequential to a breach of the Agreement on Safeguards. At the same time it is not entirely clear to the EU whether Japan wishes to challenge the specific duty at issue as a stand-alone measure (i.e. regardless of whether or not it can be considered as a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards).

14. The EU would limit itself to recalling the standing case-law of the Appellate Body that "a party's submissions during panel proceedings cannot cure a defect in a panel request"¹, a principle which is "paramount in the assessment of a panel's jurisdiction". The Appellate Body has stressed that "although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request" and that "in every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing".²

¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642, quoting Appellate Body Reports, *EC – Bananas III*, para. 143 and *US – Carbon Steel*, para. 127.

² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE
SEPARATE CUSTOMS TERRITORY OF TAIWAN,
PENGHU, KINMEN AND MATSU

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu offers comments on the following issues:

- (a) characterization of the measure at issue;
- (b) whether country-specific analysis was required to demonstrate a logical connection between unforeseen developments and increased imports; and
- (c) the logical connection between obligations incurred and increased imports.

II. CHARACTERIZATION OF THE MEASURE AT ISSUE

2. Australia and the European Union consider that a measure does not constitute a safeguard measure within the meaning of Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards if it does not suspend a GATT obligation or withdraw or modify a concession. We consider this approach to be flawed, as it undermines the procedural and substantive obligations of the Agreement on Safeguards, and has no basis in the text of Article XIX: 1(a) of the GATT 1994 and the Agreement on Safeguards.

3. We believe that the ordinary meaning of the term "safeguard measure" encompasses all measures taken to safeguard the domestic industry against serious injury arising from increased imports, without any limitation to particular types of measures. In this dispute, because India's safeguard measure was taken to safeguard its domestic industry against serious injury arising from increased imports, it constitutes a safeguard measure within the meaning of Article XIX: 1(a) and the Agreement on Safeguards.

4. However, even if one were to accept the argument that a measure must "suspend" a concession or obligation in order to constitute a safeguard measure, that condition would be satisfied in this case. The measure at issue was imposed on a product for which a tariff binding exists (40%). Therefore, the measure at issue could result in a violation of the prohibition on "other duties and charges" (ODC) under Article II: 1(b), second sentence of the GATT 1994. Here, because Indian law appears to treat safeguard duties as an exceptional measure distinct from ordinary import duties, we believe that the measure at issue constitutes an ODC. Since India has not inscribed this type of ODC in its WTO Schedule of Concessions¹, the safeguard measure gives rise to a suspension of India's obligation under Article II: 1(b), second sentence.

III. WHETHER COUNTRY-SPECIFIC ANALYSIS WAS REQUIRED TO DEMONSTRATE A
LOGICAL CONNECTION BETWEEN UNFORESEEN DEVELOPMENTS AND INCREASED
IMPORTS

5. Regarding demonstrating a logical connection between unforeseen developments and increased imports, Japan argues that, "for those developments which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis".² India argues that such analysis is impossible as it is a confluence of circumstances and not a single event which constitutes unforeseen developments.

6. We consider that India's reliance on a confluence of circumstances does not detract from its ability to analyze trade flows and price and demand developments occurring in any specific country.

¹ Schedule of Concessions XII – India, annexed to the Marrakesh Protocol.

² Japan's first written submission, para. 124. (emphasis original)

Moreover, we consider it incumbent on the Indian authority to conduct its analysis on a per country basis because the Indian authority relied on shifts of imports from individual import markets to India. Because the Indian authority did not perform analysis on a per country basis, we consider that the Indian authority failed to sufficiently demonstrate a logical connection between the alleged unforeseen developments and increased imports.

IV. LOGICAL CONNECTION BETWEEN OBLIGATIONS INCURRED AND INCREASED IMPORTS

7. India argues that Article XIX:1(a) of the GATT 1994 requires only that an investigating authority show that the importing Member has incurred tariff concessions for the relevant product.³

8. We consider that the phrase "**as a result of ... the effect of the obligations incurred by a contracting party under this Agreement**" in Article XIX:1(a) of the GATT 1994 requires a showing of three elements: (1) an obligation incurred under the GATT 1994; (2) the effect of that obligation; and (3) how such effect resulted in increased imports causing or threatening to cause serious injury.

9. In this dispute, the Indian authority only explains how India's applied rates might have the effect of increased imports. This is not an explanation of how India's *bound rates*—the relevant GATT obligation here—have the effect of increased imports. Thus, the Indian authority failed to make the relevant inquiry, and has not met the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

³ India's first written submission, paras. 114-118.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF UKRAINE

I. Introduction

1. Ukraine's submissions in this dispute have focused on several points with respect to some of the India's methodologies used in the investigation that led to the imposition of safeguard measures on imports of certain steel products.

II. Methodology used for imports trend examinations

2. First of all, Ukraine would like to address the issue of Indian authority's approach of showing the increase in imports based on an annualized forecast because proper analysis of the import development is the key issue to justify imposition of safeguard measures. Indeed, Article 2.1 of the Agreement on Safeguards does not stipulate any kind of annualization methodology or usage of forecasted data for the import development. In fact, the language of Article 2.1 of the Agreement on Safeguards "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'".¹ Usage of such wording as "product is being imported" and "increase in imports must have been" indicates that the investigation requires examination of factual imports and not forecasted trends.

3. Therefore, Ukraine considers that the conclusions made on distorted evidence and imposition of safeguard duties basing on forecasted data on imports would be inconsistent with Article 2.1 of the Agreement on Safeguards.

4. Ukraine agrees with Japan's point that quadrupling figures relating to first quarter of 2015-2016 in order to obtain data for 2015-2016 (Annualized) would be inconsistent with requirements that the investigating authority must rely on "objective data" pursuant to Article 4.2(a) of the Agreement on Safeguards. Indeed, such a simple assumption that indicators of imports and industry operation in each of three other quarters of 2015-2016 would be the same as in the first quarter of this period is rather groundless. The investigating authority did not provide any explanation of why such an assumption was reasonable.

5. Ukraine submits that usage of annualization methodology for analysis of import development and domestic industry position would result in lack of objectivity in the safeguard investigation and therefore would be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.

III. Evidence of serious injury

6. Ukraine notes that the existence of serious injury in the safeguard investigation should be demonstrated properly within the meaning of Article 4 of the Agreement on Safeguards. According to Article 4.1 (a) of the Agreement on Safeguards, under 'serious injury' shall be understood to mean a significant overall impairment in the position of the domestic industry. In addition, the term 'serious injury' means a high standard of injury. However, as long as certain key industry indicators – including domestic sales, production of domestic industry, capacity utilization, employment and productivity – showed positive trends or as mentioned in the Indian Notification 'remained same over the injury period'² the position of the domestic industry should not be qualified as being seriously injured.

7. Therefore, in Ukraine's view, conclusions based on forecasted data with lack of objectivity that imports have caused serious injury to the domestic industry do not constitute a sufficient justification for the application of safeguard measures pursuant to the Agreement on Safeguards and Article XIX of the GATT 1994.

¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

² G/SG/N/8/IND/28-G/SG/N/10/IND/19-G/SG/N/11/IND/14/Suppl.2.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE UNITED STATESEXECUTIVE SUMMARY OF U.S. ANSWERS TO THE PANEL'S QUESTIONS TO THIRD PARTIES

I. QUESTION REGARDING ARTICLE XIX:1 OF THE GATT 1994

1. The expression "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1 of the GATT 1994 refers not only to a tariff concession, but also to any obligation a Member assumed at the time the WTO was established or at the Member's accession. The text of Article XIX:1 refers to "obligations incurred by a contracting party" and, as an example of this, "include[es] tariff concessions" expressly. It would be contrary to the text of the provision to limit the type of obligations that may result in the increase of imports to those that are only a result of tariff concessions.

2. Besides tariff obligations, any WTO obligation affecting importation may potentially be a relevant obligation if it results in an unforeseen increase of imports that causes serious injury to a Member's domestic producers. Accordingly, each safeguard measure should be evaluated on a case-by-case basis while taking into consideration the relevant facts and context in which a Member has decided to take action to prevent or remedy an injury.

II. QUESTION REGARDING THE NATURE OF DUTIES RESULTING FROM APPLICATION OF A SAFEGUARD MEASURE

3. GATT 1994 Article II:1 provides that an imported product shall be accorded treatment no less favourable than that set out in a Member's Schedule and further contemplates that an imported product shall be subject to scheduled ordinary customs duties and (as set out in the Understanding on Article II) designated other duties or charges. A duty pursuant to a safeguard measure (or "emergency action") would not, in principle, be an ordinary customs duty – for example, set out in the customs tariff of a Member normally corresponding to the Harmonized System.

4. Duties imposed pursuant to a safeguard measure could, in principle, be considered an "other duty or charge" under the second sentence of Article II:1(b). Should those duties be applied consistent with the requirements of Article XIX (and the Agreement on Safeguards), a Member would be in conformity with its WTO obligations (including those under GATT 1994 Article II). This is explicit in the text of Article XIX: (1)(a) of the GATT 1994, which provides that a Member "shall be free" to suspend an obligation, in whole or in part, or modify a concession – "including tariff concessions". That is, Article II would not prevent the application of a WTO-consistent safeguard measure because the Member "shall be free" to apply that measure.

III. QUESTION REGARDING THE DEFINITION OF SAFEGUARD MEASURE

5. The United States agrees, in part, with the argument Chinese Taipei raises with respect to the relevance of the Appellate Body's reasoning in *US – 1916 Act*. The United States acknowledges that the Appellate Body found, for purposes of the Antidumping Agreement, that the phrase "anti-dumping measure" is not immediately clear and that, without an express definition, the phrase could apply to all measures taken to address imported products sold for less than their fair market value. From this, Chinese Taipei extrapolates that a safeguard measure, which also does not have an express definition in the Agreement on Safeguards, is any measure taken to safeguard a domestic industry from increased imports.

6. However, Chinese Taipei does not recognize that, to qualify as a safeguard measure, the measure at issue must be to remedy or protect domestic producers from serious injury or a threat of serious injury and that the action a Member takes must be related to the suspension, withdrawal, or modification of a GATT obligation or concession.

IV. QUESTION WHETHER APPLICATION OF A MEASURE BELOW A BOUND RATE CAN BE CONSIDERED A SAFEGUARD MEASURE

7. A Member has, in effect, two bound rates in relation to the charge it may impose on an imported product. The first, under the first sentence of GATT 1994 Article II:1(b), is in relation to the rate it may impose as an "ordinary customs duty". The second, under the second sentence of that provision, is in relation to the rate it may impose as an "other duty or charge". The bound rate for an ordinary customs duty is as set out in a Member's Schedule. Under the Understanding on Article II, a Member was required to specify in its schedule the nature and level of any "other duty or charge" it could apply on an imported product. In the absence of any such scheduled "other duty or charge", a Member would not be able to apply a duty or charge on importation other than an ordinary customs duty.

8. If there is a duty or charge resulting from application of a safeguard measure, the issue is whether this duty or charge falls under the first or second sentence of GATT 1994 Article II:1(b). In principle, it would not seem that "emergency action" and application of a duty or charge while suspending, withdrawing, or modifying a concession (Article XIX:1) would normally result in an "ordinary customs duty". Therefore, that a duty or charge resulting from a safeguard measure falls within a Member's bound rate for an ordinary customs duty would not seem relevant. Instead, the proper analysis would seem to be whether the duty or charge resulting from a safeguard measure falls within a Member's bound rate for an "other duty or charge".

V. QUESTION REGARDING A PERIOD OF INVESTIGATION UNDER THREE YEARS

9. Most Members use at least three years as a baseline period of investigation. The most important aspect, however, is that the time period is unbiased and fair, and especially that it is not manipulated or otherwise selected to achieve a particular outcome during the investigation. Accordingly, the United States believes that a period of investigation under three years should not always be considered per se inadequate, although a reasonable explanation of that choice may be warranted.

VI. QUESTION REGARDING THE POSSIBILITY OF FINDING BOTH SERIOUS INJURY AND THREAT OF SERIOUS INJURY FOR THE SAME SAFEGUARD INVESTIGATION

10. Under the Agreement on Safeguards, it is possible to have findings of both serious injury and threat of serious injury for the same safeguard investigation. Under Article 2.1, a Member may impose a measure if imports cause or threaten to cause serious injury, and the text does not exclude that both situations may arise.

11. The Appellate Body addressed this issue in the context of whether discrete findings were necessary under the Agreement on Safeguards. In *US – Line Pipe*, the Panel found that the Member imposing the measure had breached the Agreement on Safeguards because the Member had determined that increased imports were the substantial cause of serious injury or the threat of serious injury and, in the Panel's view, the Agreement on Safeguards required a discrete determination as to one or the other.

12. On appeal, the Appellate Body reviewed the Panel's analysis. As an initial matter, the Appellate Body agreed with the Panel that Article 2.1 of the Agreement on Safeguards necessitates the inclusion of "findings" or "reasoned conclusions" in a published report from the competent authorities. The Appellate Body, however, questioned the kind of findings that must appear in the published report.

13. In particular, the Appellate Body examined the meaning of the term "or" in the phrase "cause or threaten to cause" serious injury. That is, it examined whether the use of this term required discrete findings or allowed the possibility of finding one (serious injury), the other (threat of serious injury), or both. The Appellate Body focused on the context in which the term "or" is used. The Appellate Body determined that the phrase "or" did not necessarily mean "one or the other, but not both" and that the clause could mean "either one or the other, or both in combination" and, as such, it did not see that it matters, for purposes of imposing a safeguard measure, whether the competent authority finds the one (serious injury), the other (threat of serious injury), or the one or the other (serious injury or the threat of serious injury). On this basis, it found that the Member's determination had established the right to apply a safeguard.

VII. QUESTION REGARDING IMMEDIATE NOTIFICATION UNDER THE AGREEMENT ON SAFEGUARDS

14. The term "immediately" as used in Article 12.1 suggests a certain level of urgency. At the same time, the use of this term would not support a bright line test. Indeed, if the negotiators had intended to adopt a bright line test, they would have included that test in the text of the Agreement. Accordingly, each circumstance must be evaluated on a case-by-case basis. Appropriate considerations would include whether a Member subject to a safeguard received sufficient time to adequately defend its rights and support its position during and after the safeguard investigation.
