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

Final Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS415/R-WT/DS416/R-WT/DS417/R-WT/DS418/R.

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EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. This dispute relates to the provisional safeguard measure ("provisional measure") and the definitive safeguard measure ("definitive measure") imposed by the Dominican Republic on imports of polypropylene bags and tubular fabrics. Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") consider that these measures are inconsistent with the Agreement on Safeguards ("AS") and with the General Agreement on Tariffs and Trade 1994 ("GATT").

2. These measures give rise to serious concerns about the conduct of trade policy in the region of Central America and the Caribbean. They are being used by the Dominican Republic as an instrument to circumvent its regional commitments under the Free Trade Agreement between Central America and the Dominican Republic ("Central America-DR Agreement") and under the agreement between the Dominican Republic, Central America and the United States ("DR-CAFTA"). For that purpose, the Dominican Republic carried out an investigation in accordance with its domestic legislation on safeguard measures, the AS and the GATT. The resulting safeguard measures were notified to the WTO.

3. In carrying out the investigation and adopting the safeguard measure, the Dominican Republic acted in a manner inconsistent with various provisions of WTO law, including: (a) the determination of the domestic industry entails arbitrary definitions of the products under investigation, the failure to consider relevant evidence and the unjustified exclusion of certain domestic producers; (b) there is no determination as to unforeseen developments and the effect of the obligations incurred under the GATT that are alleged to have resulted in increased imports causing serious injury to the domestic industry; (c) the increase in imports is not of the nature or magnitude required by the AS for the application of safeguard measures; (d) the determination of serious injury and causal link relate to a domestic industry of the Dominican Republic which is in a favourable position and suffers no damage on account of imports, but rather, if anything, on account of other factors relating to the domestic industry's own performance or economic conditions in the Dominican Republic; (e) the measures have not been applied on a most-favoured-nation basis, as required by Article 2.2 of the AS (which calls for safeguard measures to be applied to all imports under investigation, irrespective of their source), for which reason an argument was made for the exclusion of specific imports pursuant to Article 9.2 of the AS, without observing the requirement of parallelism.

II. FACTUAL BACKGROUND

4. Tubular fabric is described as a woven fabric of synthetic polypropylene yarn, which is produced from: (i) polypropylene resin; (ii) calcium carbonate; (iii) colouring agent; (iv) flexographic inks; and (v) solvents.[1] The yarn is wound on to bobbins and fed to circular looms in order to give the fabric a tubular form. The tubular fabric constitutes the raw material or main input for the manufacture of polypropylene bags.

[1] Initial technical report of the DEI, page 10.

5. Polypropylene bags are described as bags or sacks for packaging. They are produced from bobbins or rolls of tubular fabric, which in turn are produced from resin and other minor components.[2] Polypropylene bags are used for the packaging of food, agro-industrial and industrial products.[3]

III. THE MEASURES AT ISSUE

6. The provisional measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It was applied from l April 2010 until 17 October 2010 (a period of 200 days). The provisional measure was not applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, nor irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from and/or originating in Mexico, Panama, Colombia and Indonesia.[4] The provisional measure is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 26 March 2010.[5]

7. The definitive measure consisted of an *ad valorem* tariff surcharge of 38 per cent on imports of the products under investigation. It came into effect on 1 April 2010, for a period of 18 months until 21 April 2012.[6] The definitive measure is not being applied on a most-favoured-nation basis, within the meaning of Article I:1 of the GATT, or irrespective of the source of the imports, within the meaning of Article 2.2 of the AS, since the Commission relied on Article 9.1 of the AS, providing for the exclusion from the scope of the measure of imports coming from/or originating in Mexico, Panama, Colombia and Indonesia.[7] The definitive measure is applied as an alternative duty to the MFN tariff and is not a measure provided for in the Schedule of Concessions of the Dominican Republic. Thus, the measure was notified to the WTO Committee on Safeguards on 8 October 2011.[8]

IV. THE FRAMEWORK FOR THE PANEL'S REVIEW

8. The objective assessment by a panel must have certain characteristics. It must be a ***critical and in-depth examination*** of the explanations provided by the investigating authorities[9], in which it determines whether those explanations are ***reasoned and adequate***, as well as ***explicit***.[10] This assessment may not consist of finding "support for [the] conclusions [of the investigating authorities] by cobbling together disjointed references scattered throughout a competent authority's report".[11]

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[2] *Ibid.*

[3] Public notice of provisional measure; public notice of definitive measure.

[4] Addendum to Resolution CDC-RD-SG-061-2010, dated 16 March 2010, deciding on the application of provisional measures, Exhibit CEGH-6, second article.

[5] G/SG/N/7/DOM/1, G/SG/N/8/DOM/1, G/SG/N/11/DOM/1, Exhibit CEGH-18.

[6] Public notice of definitive measure.

[7] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 (final resolution), fourth article. Exhibit CEGH-9.

[8] (G/SG/N/7/DOM/1/Suppl.1, G/SG/N/8/DOM/1/Suppl.1 (Exhibit CEGH-19); G/SG/N/7/DOM/1/Suppl.1/Corr.1, G/SG/N/8/DOM/1/Suppl.1/Corr.1 (Exhibit CEGH-20); G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (Exhibit CEGH-21).

[9] Appellate Body Report, *US – Lamb*, paragraph 106.

[10] *Ibid.*; see also Appellate Body Report, *US – Steel*, paragraphs 287 and 297.

[11] Appellate Body Report, *US – Steel*, paragraph 326.

9. The basis for the assessment by a panel must be the findings, conclusions and analysis contained in the public reports of the authority.[12] This assessment cannot be based on *ex post facto* explanations.

V. LEGAL CLAIMS

A. THE DEFINITION OF THE DOMESTIC INDUSTRY IS INCONSISTENT WITH ARTICLES 3.1, 4.1(c), 4.2(c) OF THE AS

1. The Commission failed to establish adequately and reasonably that the imported products were like or directly competitive products

10. The Regulatory Commission on Unfair Trade Practices and Safeguard Measures (the "Commission") held that the imported product under investigation was a single product jointly comprising tubular fabric and polypropylene bags. However, the Commission and its Investigations Department (DEI) made a number of basic errors in arriving at this definition:

- Despite the fact that the interested parties put forward a variety of questions and factual information concerning the definition of the imported product, neither the Commission nor the DEI gave an adequate and reasoned explanation in response to those objections. The questions concerned pointed to the fact that tubular fabric and polypropylene bags are distinct products and cannot be considered to be the same product.

- The only reason for considering tubular fabric and polypropylene bags as the same product was the classification based on Note 2 in Chapter 63 of the Dominican Republic's Customs Tariff.[13] What would appear to underlie the interpretation given to Note 2 by FERSAN, the DEI and the Commission (to the effect that heading 6305 covers tubular fabric) is the presumption that a tubular fabric is equivalent to an incomplete or unfinished bag. However, that presumption is not explained in any of the relevant reports or resolutions. Moreover, according to the Directorate of Customs of the Dominican Republic, this Note is inconsistent with the Harmonized System Convention.[14]

11. In the absence of reasoned findings and conclusions on the definition of the product under investigation, the Commission defined the product investigated inconsistently with Articles 3.1, last sentence, and 4.2(c) of the AS and, in consequence, defined the domestic industry inconsistently with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

12. In addition, the Commission failed to make a valid determination that the domestic products were directly competitive with the imported products under investigation. The Commission considered the production of tubular fabric and polypropylene bags as the same domestic industry, without having demonstrated that both products, as an input and as final goods, respectively, are

[12] *Ibid*., paragraph 299.

[13] According to Note 2, as described by the Commission in its preliminary resolution, "heading 6305 (corresponding to bags and sacks for packaging) also covers tubular fabric for bags, in accordance with interpretative rule 2(a), (preliminary resolution, paragraph 31).

[14] Communication from the Directorate-General of Customs (DGA) dated 25 November 2009, folio 000089 in the file, Exhibit CEGH-13.

directly competitive with each other. Further, the Commission failed to make a determination with regard to the directly competitive domestic product having the same scope as the imported product, since the Commission considered tubular fabric and polypropylene bags manufactured from resin (excluding bags manufactured from tubular fabric) as the domestic product and, at the same time, considered tubular fabric and polypropylene bags in general (regardless of whether the latter were produced from resin) as the imported product. Finally, the Commission determined the directly competitive products without following the order of analysis established by the Appellate Body for that purpose[15], inasmuch as the Commission first defined the status of FERSAN as that of the domestic industry, and subsequently defined the directly competitive products.[16]

13. The Commission could not have validly identified the domestic producers constituting the domestic industry, and this therefore entails a violation of Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

2. The Commission improperly excluded producers of directly competitive domestic products

14. The Commission considered that the domestic industry is the industry producing tubular fabric and polypropylene bags made from resin[17] and that that status fell to the applicant, FERSAN.[18] However, the Commission reached that conclusion despite making two fundamental errors:

- It excluded out of hand specific categories of producers of the directly competitive domestic product on the basis of an erroneous interpretation of the term "producers" in Article 4.1(c) of the AS. The requirement of being a "producer" of tubular fabric and polypropylene bags *made from resin* makes the status of producer conditional on a specific production process. The Commission's interpretation is contrary to the interpretation given to the term "producers" in the context of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.[19]

- Even under their own interpretation of the term "producers" based on production from resin, the DEI and the Commission excluded domestic producers producing the domestic product from resin, such as the companies FIDECA and TITAN.

15. For these reasons, the Commission failed to define the domestic industry in a manner consistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

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[15] Appellate Body Report, *US – Lamb* paragraph 87.

[16] Initial resolution, page 4: preliminary resolution, paragraphs 13 and 14 and 26-36; definitive resolution, paragraphs 18-23.

[17] Preliminary resolution, paragraph 13; preliminary report, pages 55-58; final resolution, paragraph 18; final report, pages 43-46.

[18] *Ibid.*

[19] Panel Report, *US – Lamb*, paragraph 7.69. See also, with regard to countervailing measures, the Panel Report in *Mexico – Olive Oil*, paragraph 7.192; and with regard to anti-dumping measures, the Panel Report in *EU – Salmon*, paragraph 7.114.

B. THE ABSENCE OF DETERMINATIONS ON UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT IS INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 3.1, 4.2(c) AND 11.1(a) OF THE AS

1. The Commission failed to demonstrate that there were unforeseen developments

16. The Commission produced no reasoned finding or conclusion to demonstrate the existence of unforeseen developments, as well as the logical connection between those developments and the increased imports alleged to have caused serious injury to the domestic industry.

17. In the initial report, the DEI transcribed the arguments of FERSAN to the effect that there had been unforeseen developments caused by the obligations assumed in the DR-Central America Agreement for which the total reduction period was ascertained from 2004.[20]

18. In the preliminary report, the DEI stated that FERSAN added to its claim further unforeseen developments such as: (i) the international economic crisis of 2008 and its repercussions on the regional economy, and (ii) the introduction of goods produced under regimes allegedly incompatible with the DR-Central America Agreement, for which reason a bilateral violation of that agreement would qualify as unforeseen developments.[21] The DEI also mentioned FERSAN's argument that, with regard to the economic/financial crisis of 2008, the DEI simply confined itself to affirming that this "had a significant impact on the economy of the region which has not spared the Dominican industry". Moreover, the DEI itself disregarded the relevance of the alleged violation of the 1998 bilateral agreement as an event brought about by unforeseen developments.

19. Lastly, in the final report, the DEI added a new aspect relating to China's accession to the WTO.[22] Moreover, no opinion was given as to whether that fact was not foreseen by the Dominican Republic in its capacity as a WTO Member, at the time of entering into its obligations under the GATT (of 1994).

20. The descriptive and scattered references to unforeseen developments in the initial, preliminary and final determinations fail to satisfy the standard of factual demonstration required by Article XIX:1(a) of the GATT in relation to Articles 3.1, last sentence, and 4.2(c) of the AS. Consequently, the DEI and the Commission acted inconsistently with those provisions.

2. The Commission failed to explain how the GATT obligations caused the increased imports of tubular fabric and polypropylene bags

21. The DEI and the Commission recognized the obligation under Article XIX:1(a) of the GATT to demonstrate the unforeseen developments and the effect of the obligations incurred under the GATT which resulted in increased imports.[23] The Appellate Body has confirmed that, in order to demonstrate the *effect* of obligations assumed under the GATT, it is necessary to demonstrate that specific obligations have been assumed.[24]

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[20] Initial report, page 15.

[21] Preliminary report, pages 70-71.

[22] Final report, page 66. We take it that the reference to "China's incursion into the multilateral trading system" refers to China's accession to the WTO.

[23] Preliminary report, page 69; final resolution, paragraph 27; final report, pages 63-65.

[24] Appellate Body Report, *Argentina – Footwear*, paragraph 91; Appellate Body Report, *Korea – Dairy*, paragraph 84.

22. There is no finding in the reports or resolutions that identifies the GATT obligations alleged to have caused the increased imports, or that indicates how those obligations would have resulted in an increase in the imports concerned. This is inconsistent with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

C. THE DETERMINATIONS REGARDING INCREASED IMPORTS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1 AND 4.2(c) AND 6 OF THE AS

1. The Commission failed to demonstrate an increase in imports in absolute terms that was "recent enough, sudden enough, sharp enough, and significant enough"

23. The Commission reached the conclusion that the imports increased in absolute terms, causing serious injury to the domestic industry[25], despite having found that there was a "marked decrease"[26] in imports in absolute terms towards the end of the period. Nor did the Commission provide an adequate and reasoned explanation as to why, despite the absolute decrease towards the end of the period, it still considered that there had been an increase in imports. It was not demonstrated, therefore, that there had been an increase in imports that was sufficiently sudden, recent, sharp and significant to support the contention of an absolute increase in imports, in line with the interpretation given by the Appellate Body in *Argentina – Footwear*.[27]

24. Likewise, neither the DEI nor the Commission complied with the obligation to examine the upward trend of imports during the period investigated, since they only referred to a comparison of the absolute levels at the beginning and end of the period of investigation.[28]

25. Consequently, the DEI and the Commission failed to establish a reasoned conclusion regarding the increased imports in a manner consistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

2. The Commission failed to demonstrate an increase in imports relative to domestic production

26. The Commission reached the conclusion that imports increased in relative terms, causing serious injury to the domestic industry.[29] However, the Commission reached this conclusion despite having found that the relative share of imports in relation to domestic production fell steadily and uninterruptedly for most of the period of investigation.

27. The Commission's final conclusion is not explained in the light of the factual findings of the DEI. From 2007, imports clearly showed a steady and uninterrupted downward trend in relation to domestic production.

28. Consequently, the Commission's determination that there had been an increase in imports in absolute terms was inconsistent with Article XIX:1(a) of the GATT and Articles 2.1, 3.1, last

[25] Preliminary resolution, first article; final resolution, paragraph 31 and first article.
[26] Preliminary report, page 68; final report, page 61.
[27] Appellate Body Report, *Argentina – Footwear*, paragraph 131.
[28] Appellate Body Report, *US – Steel*, paragraph 354.
[29] Preliminary resolution, first article; final resolution, paragraph 31 and first article.

sentence, 4.2(c), 11.1(a) and, in addition, Article 6 of the AS with respect to the preliminary determination.

D. THE DETERMINATIONS REGARDING SERIOUS INJURY, AND THE DEMONSTRATION OF CRITICAL CIRCUMSTANCES (WITH REGARD TO THE PROVISIONAL MEASURE) ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, 4.1(a), 4.2(a), 4.2(c) AND 6 OF THE AS

29. In both the preliminary and the final determination, the Commission concluded that there was serious injury despite having committed numerous errors:

- It failed to carry out a disaggregated and complete analysis regarding the many segments of the domestic industry, as required by the Appellate Body.[30] Therefore, no separate analysis was provided regarding the production of tubular fabric and regarding the production of polypropylene bags.

- In the preliminary determination, the Commission failed to evaluate all relevant factors listed in Article 4.2(a) of the AS, since it omitted from its analysis the factor relating to the productivity of the domestic industry.

- In the preliminary and final determinations, the Commission concluded that there was serious injury despite the fact that the relevant indicators showed the contrary or were inadequately evaluated.

- Neither the DEI nor the Commission provided an adequate and reasoned explanation of the "critical" nature of the circumstances that allegedly justified the provisional measure in accordance with Article 6 of the AS.

30. The Commission's determination of serious injury to the domestic industry was therefore inconsistent with Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 5 of the AS, as well as with Article XIX:1(a) of the GATT.

E. THE CAUSATION DETERMINATIONS ARE INCONSISTENT WITH ARTICLE XIX:1(a) OF THE GATT AND ARTICLES 2.1, 3.1, LAST SENTENCE, 4.2(a), 4.2(c) AND 6 OF THE AS

31. The Commission imposed the provisional and definitive measures on the basis of its conclusion that imports had increased, "causing" serious injury to the domestic industry of fabrics and bags.[31] In reaching this conclusion, the Commission was guilty of two serious omissions:

- It failed to demonstrate by means of a relevant analytical method the causal relationship between the alleged increase in imports and the alleged serious injury to the domestic industry. The Commission confined itself to making assertions with

[30] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 195, 213, 214; Appellate Body Report, *Mexico – Rice*, paragraphs 180-187.

[31] Preliminary resolution, first article; final resolution, first article.

regard to causation[32], but it failed to provide an adequate and reasoned explanation in this respect.

- It failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS. In violating this obligation, the Commission failed to show that the harmful effects caused by factors other than imports would not be attributed to the imports under investigation.

32. As a result, the Commission determined the causal link between the imports and the serious injury to the domestic industry inconsistently with Articles 2.1, 3.1, last sentence, 4.1(a), and 4.2 of the AS and Article XIX:1(a) of the GATT, as well as with Article 6 of the AS, with regard to the provisional measure.

F. THE MEASURES AT ISSUE VIOLATED THE REQUIREMENT OF PARALLELISM AND ARE INCONSISTENT WITH ARTICLES 2.1, 2.2, 3.1, 4.2, 6 AND 9.1 OF THE AS

33. In accordance with the requirement of parallelism, if a Member decides to exclude certain imports from the scope of a measure, the investigating authorities must satisfy themselves that those imports are also excluded from the evaluations relating to substantive aspects in which they were the subject of analysis.[33]

34. In the analysis of imports, the Commission considered all imports that entered the Dominican Republic between 2006 and 2009.[34] Thus, in the preliminary and final resolutions, the Commission decided to apply the provisional and final measures, respectively, to *all* imports of tubular fabric and polypropylene bags under headings 5407.20.20 and 6305.33.90 of the Dominican Republic's Customs Tariff.[35] Nevertheless, in the same resolutions, the Commission decided to exclude imports from Mexico, Panama, Colombia and Indonesia from the scope of both measures, on the ground that they collectively accounted for 1.21 per cent of the imports investigated.[36]

35. As a result, the Commission decided to apply the provisional and definitive measures inconsistently with Articles 2.1, 2.2, 3.1, last sentence, 4.2(a), 4.2(b), 4.2(c), 6 and 9.1[37] of the AS (the latter provision in relation to the provisional measure).

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[32] Preliminary resolution, paragraph 47; preliminary report, page 88; final resolution, paragraphs 37 and 38.

[33] Appellate Body Report, *US – Steel*, paragraph 441. Appellate Body Report, *US – Tubular Goods*, paragraph 181, with citation from *US – Lamb*, paragraph 103.

[34] Preliminary report, Annexes I and II: final report, Annexes I and II.

[35] Preliminary resolution, second article, as amended by the amending preliminary resolution: final resolution, second article.

[36] Preliminary resolution, fourth article, as amended by the amending preliminary resolution; final resolution, fourth article.

[37] According to the statistics on imports, imports from Thailand amounted to 0.32 per cent of total imports during the period under investigation, and thus constituted less than 3 per cent of imports. It was therefore necessary to exclude imports from Thailand from the scope of the measures at issue, in accordance with Article 9.1 of the AS. However, the resolutions do not exclude Thailand from the scope of the measures at issue.

G. THE DOMINICAN REPUBLIC ACTED INCONSISTENTLY WITH ARTICLE XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

36. The Commission imposed the definitive measure without timely notification and without affording Members with a substantial interest in the products under investigation an opportunity for consultations as provided in Article 12.3 of the AS and Article XIX:2 of the GATT. Nor did the Commission provide an opportunity to obtain an adequate means of trade compensation in accordance with Article 8.1 of the AS and Article XIX:2 of the GATT.

VI. REASONS FOR REQUESTING SUGGESTIONS CONCERNING IMPLEMENTATION OF POSSIBLE RULINGS AND RECOMMENDATIONS BY THE PANEL

37. The complainants request the Panel, on the basis of Article XIX:1 of the DSU, to suggest that the Dominican Republic immediately put an end to the definitive measure. This request is also based on the previous practice followed by other panels.[38]

38. The magnitude and number of the errors committed by the DEI and the Commission in carrying out their investigation lead to a situation analogous to that obtained in the above-mentioned cases, so that the only way in which the Dominican Republic could properly apply the possible rulings and recommendations of the Panel would be through the immediate revocation of the definitive safeguard measure.

VII. REQUEST FOR RULINGS AND RECOMMENDATIONS

39. On the basis of the foregoing, the complainants request the Panel to issue the following findings and rulings: (i) the provisional measure and the definitive measure are inconsistent with Article XIX:I(a) of the GATT and Articles 2.1, 2.2, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the AS; and (ii) the Dominican Republic acted inconsistently with Article XIX:2 of the GATT and Articles 8.1 and 12.3 of the AS.

40. Pursuant to the provisions of the second sentence of Article 19.1 of the DSU, the complainants request the Panel to make suggestions for the application of its rulings and recommendations with regard to the definitive measure.

[38] Panel Report, *Argentina – Poultry*, paragraph 8.7; Panel Report, *Guatemala – Cement II*, paragraph 9.6; Panel Report, *Mexico – Steel Pipes and Tubes*, paragraph 8.12.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. This dispute concerns the Dominican Republic's imposition of a 38 per cent tariff on imports of polypropylene bags and tubular fabric by means of a provisional measure and, subsequently, a definitive measure. These measures are contested by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") in the light of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and various provisions in the Agreement on Safeguards ("AS").

2. As the course of action followed by the Dominican Republic did not, however, result in suspension of the obligations undertaken with respect to these products, or withdrawal or modification of concessions, neither Article XIX nor the AS are applicable to the measures contested by the complainants. Consequently, there are no grounds for this dispute and the present procedure before the Panel cannot continue.

3. If the Panel does decide that Article XIX of the GATT and the AS do apply to the measures contested, the Dominican Republic affirms, as a preliminary, that several claims are adequately identified in terms of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and are not covered by the Panel's terms of reference, or that the complainants have not been able to make a prima facie case for any violation. This is the case for the complaint based on the alleged omission of determinations of unforeseen developments and the effect of GATT obligations, an omission which, in the view of the complainants, resulted in inconsistency in the determinations of the increase in imports, serious injury and the causal link.

4. Likewise, the Panel's terms of reference do not include Article 4.1(a) of the AS as the legal basis for the complaint concerning the causal link, which was not included in the request for consultations. For the same reason, the complaint concerning the obligation to reach agreement on a means of trade compensation, based on Article 8.1 of the AS, does not fall within the Panel's terms of reference. Lastly, the complainants failed to elaborate on some complaints in their first written submission, and it is therefore the Dominican Republic's understanding that they have been withdrawn. This is the case for the complaints in points (h), (i), (l) and (m) of the request for the establishment of a panel submitted by the complainants.[1] The last three complaints (points (i), (l) and (m)) are not included in the Panel's terms of reference either.

5. If the Panel should decide to consider the measures at issue in the light of the GATT and the AS, the Dominican Republic affirms that, contrary to what is asserted by the complainants, the measures at issue fully comply with the GATT and the AS, particularly as regards the following:

- The definition of the domestic industry;
- determinations of the existence of unforeseen developments and the effect of the obligations incurred under the GATT;
- determinations of the increase in imports, the serious injury, the critical circumstances and the causal link;

[1] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.

- the parallelism requirement; and
- notice of the measure and the holding of consultations.

6. Contrary to the contention by the complainants, the definition of the domestic industry is based on valid determinations of the imported product under investigation and the directly competitive domestic product. As to the **imported product under investigatio**n, the complainants question the treatment of tubular fabric and polypropylene bags as a single product to be investigated. The previous reports on which the complainants base their case, however, provide little, if any, guidance. The paragraphs mentioned in the Appellate Body Report on *US – Lamb* refer to the inclusion of certain actors in the domestic industry, without dealing with determination of the imported product under investigation or the likeness of the lamb meat produced in the United States and that imported. The facts and the products under consideration are, moreover, very unlike each other.

7. The other Appellate Body Report mentioned, *Chile – Price Band System*, only mentions in this connection *US – Lamb* and, what is more, relates to a situation in which the Chilean authorities had only made an implicit affirmation of likeness or direct competition, simply providing an *ex post facto* explanation. This is in direct contrast to the present case, where there are many and detailed findings about the product under consideration and the directly competitive product in the initial report and resolution, the public notice of initiation, the preliminary report and resolution, as well as the final report and resolution of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic ("the Commission"). It is difficult to claim, therefore, that the considerations of the Appellate Body in that case are relevant to the present case. The reports and resolutions cited also show that, contrary to what is asserted by the complainants, the Commission and the Investigation Department (DEI) took into account comments by certain importers, exporters, and government authorities, even when they did not respond to them.

8. The complainants' analysis provides no conclusive legal grounds based on Article XIX of the GATT or on the AS to indicate that treating tubular fabric and polypropylene bags as a single product for the purposes of the investigation is inconsistent with the covered agreements. Prior Reports by Panels in *US – Softwood Lumber V, EC – Salmon (Norway)* or *Korea – Certain Paper* found that the Anti-Dumping Agreement did not provide any guidance on the way in which the product under consideration had to be determined, reasoning that also applies to the AS.

9. As regards the **determination of the directly competitive domestic product**, it is clear that it was based on what FERSAN, the petitioner in the procedure before the Commission, stated in its request for initiation of the investigation. It is necessary to emphasize, however, that the Commission's reports and resolutions show that numerous factors were evaluated affirming that the domestic product and the product under consideration were directly competitive. The complainants also contend that there must be symmetry between the definition of the product under consideration and the definition of the domestic product. This symmetry would be lacking as the product has been defined as "produced from resin". The technical reports and the resolutions show, however, that the criterion "produced from resin" was not a priori imposed when defining the directly competitive product, but is the logical result of the exclusion from the definition of the domestic industry of those manufacturers which import the product under consideration. Furthermore, the complainants do not indicate the legal basis from which the alleged obligation to respect symmetry in the definition of products that are in direct competition derives.

10. The complainants also put forward an order for the analysis which the Dominican authorities should have followed in their reports, based solely on a finding by the Appellate Body in its Report in *US – Lamb*, without indicating how such an obligation could be derived from Article 3.1, last sentence, or Article 4.2(c) of the AS. Even though the Dominican Republic questions the existence of such an obligation, it should be noted that the logical sequence of the preliminary and definitive reports that are an integral part of the respective resolutions are consistent with the order of analysis put forward by the complainants.

11. In definitive, the Dominican authorities defined the product under consideration as "polypropylene bags and tubular fabric" and the directly competitive domestic product as "polypropylene bags and tubular fabric"; the direct competition relationship is obvious and, furthermore, similar practices in anti-dumping investigations have been approved in a manner consistent with the Reports of the various Panels, as is the case for *US – Softwood Lumber V*, *Korea – Certain Paper* or *EC – Salmon (Norway)*. As the definitions of the product under consideration and the directly competitive domestic product are valid, they constitute an appropriate basis for the Dominican authorities' determination of the domestic industry.

12. With regard to the **determination of the domestic industry**, the Dominican authorities pointed out that three producers declared themselves to be interested parties, in two of which most of the output used imported tubular fabric, in other words, the product under consideration. Those manufacturers which import the product under consideration were excluded, in accordance with Law No.1-02, whose consistency with the AS was not questioned by the complainants, following an adequate and reasoned explanation. Consequently, there was no a priori exclusion of certain categories of producer, and the procedure was not based on an erroneous interpretation of the word "producers", there is no violation of Article 4.1(c) or other provisions of the AS in this sense, and the selection of FERSAN as the only component of the domestic industry is valid. Moreover, independently of the exclusion of certain manufacturers in the present case, the Dominican Republic points out that it reserves the right to require a minimum level of processing or value added before an economic actor can be deemed to be a "producer" within the meaning of Article 4.1(c) of the AS, so the idea that whoever cuts and sews tubular fabric is considered to be a "producer" of polypropylene bags is highly questionable.

13. With regard to unforeseen developments pursuant to Article XIX of the GATT, the Dominican Republic considers that their determination does not constitute a binding obligation as a prerequisite for the application of a safeguard measure. This understanding is based on the fact that the AS does not contain such an obligation and therefore derogates from Article XIX in this sense. This interpretation is corroborated by the intention of the States which negotiated the Uruguay Round, by the text, and the exhaustive nature of the AS, the legislation of other WTO Members, and by ambiguous declarations and the absence of clear guidelines in this respect on the part of the WTO's decision-making bodies. For these reasons, the Dominican Republic also expresses its disagreement with the prior Reports of the Appellate Body in *Argentina – Footwear* and *Korea – Dairy*, which require proof of the unforeseen developments that resulted in increased imports.

14. Despite the foregoing, if the Panel decides that proof of unforeseen developments constitutes a binding obligation, both the Preliminary Technical Report and the Final Technical Report contain detailed findings and conclusions in this regard, mentioning the tariff reduction process with the entry into force of the DR-CAFTA and the DR-Central America Treaty. Reference is also made to the form submitted by FERSAN, in which the rising cost of producing polypropylene bags and tubular fabric is addressed, as well as the increase in energy costs, which harmed its competitive position and opened the way to use of less costly imports. The Dominican authorities therefore provided a reasoned and

adequate explanation of the unforeseen developments whose effect was an increase in imports, complying with Article XIX.1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS.

15. Regarding the effect of GATT obligations, the Dominican Republic gave a 40 per cent tariff concession for products classified under subheadings 5407.20.20 and 6305.33.90, concerning polypropylene bags and tubular fabric. The Dominican Republic therefore complied with this requirement in Article XIX of the GATT to the effect that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations, including tariff concessions, in accordance with the words of the Appellate Body in its Report on *Argentina – Footwear*.

16. Concerning the increase in imports, the Commission's findings indicated a recent enough, sudden enough, sharp enough and significant enough increase, both in qualitative terms and qualitatively, to cause serious injury. Despite the existence of this increase, there was a 14.68 per cent drop recorded in the last year of the investigation period, whereas the increase was 50.06 per cent over the whole period investigated, also taking into account the aforementioned drop. According to the findings of the Dominican authorities, this decrease towards the end of the investigation period was more of an incidental and temporary nature as it was caused by the lower rate of economic growth in the Dominican Republic in 2009, which saw a decrease of 30.03 per cent in total imports, while during this period, imports of the product under consideration fell by a lesser amount. In addition, the Commission determined that there was a recovery in imports of tubular fabric and polypropylene bags in early 2010.

17. Moreover, contrary to what is asserted by the complainants, the Dominican Republic did not limit itself to comparing the end points in the investigation period but undertook a point-by-point analysis for each period separately, taking into account both the rate and the volume of the increase. It thus fully complied with the obligation to analyse the trend in imports, as specified by the Appellate Body in *Argentina – Footwear*. The Commission also conducted an analysis of the relative increase in imports, finding an increase in 2007 alone. Nevertheless, having previously proven the existence of an increase in absolute terms, it complied with Article 2.1 of the AS, which requires an increase in absolute terms or relative to domestic production, compliance with one of these requirements being sufficient. The claims by the complainants that there was no increase in imports or that its existence was not determined in accordance with Articles 3.1, last sentence, 4.2(c) and 11(a) of the AS should therefore be rejected.

18. With regard to the determination of serious injury, the claim that the Commission did not undertake a separate and comprehensive analysis of the numerous segments of the domestic industry should be rejected as there is no positive obligation in the AS requiring that serious injury be evaluated by segment or separately. It clearly emerges from the reports, moreover, that there was a joint analysis of the polypropylene bags and tubular fabric segments, and that the analysis was not limited to the production of bags alone, as contended by the complainants. Both the wording of the technical reports and the figures provided by the domestic industry (which are expressly mentioned in the reports) show that the investigating authority proceeded on the basis of aggregate data for polypropylene bags and tubular fabric.

19. Regarding the alleged failure to evaluate the "productivity" indicator in the preliminary determination, the Dominican Republic affirms that a finding by the Panel in this regard would clearly not be necessary in order to ensure a positive settlement of the dispute inasmuch as the measure is no longer in effect and has been replaced retroactively by the final determination, about which the complainants have not made the same claim. In addition, the trend in this indicator compares

production in volume and value terms with the number of employees, and both indicators are to be found in the preliminary report. When the complainants require that productivity be evaluated under a specific heading in the preliminary report, they are adopting a purely formalist approach, which is obviously inappropriate for a preliminary determination. In fact, Article 6 of the AS, concerning provisional measures, indicates that Article 4.2 of the AS applies to the investigation subsequent to the provisional measure and not to the preliminary determination, inasmuch as the obligation to evaluate all indicators of injury concerns the "subsequent investigation" after the adoption of a preliminary measure.

20. With regard to proof of serious injury, the Dominican authorities found conclusive indications of significant overall impairment, based on consistent and growing losses suffered by the domestic industry, the negative impact on increases in inventories, the relative contraction in the value of production, negative cash flow and the problems encountered by the domestic industry in gaining a larger market share despite its large investment and loss-making selling prices. In definitive, the investigating authority gave an adequate and reasoned explanation of the serious injury suffered by the domestic industry, so the Dominican Republic fully complied with Article XIX.1(a) of the GATT and Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a), 4.2(c) and 6 of the AS.

21. Concerning the alleged failure to prove the critical nature of the circumstances that justified the imposition of the provisional measure, the Dominican Republic sees no need to reach findings regarding the provisional measure, which has expired and been replaced by the definitive measure. Even so, the investigating authority proved the existence of injury difficult to repair in terms of Article 6 of the AS if no provisional measure was adopted. The investigating authority noted, among other indicators, a 206 per cent decline in financial performance and a 199 per cent increase in inventories.

22. Regarding the claims relating to the alleged failure to determine a causal link, many of the complainants' claims are biased. They mention that the domestic industry's share of domestic apparent consumption showed a sharp rise, whereas in fact it only exceeded its 2006 share in 2009, but remained below it in 2007 and 2008. The same applies to their interpretation of the share of imports, which only from 2009 onwards and by selling at a loss on the part of FERSAN, managed to fall below the 2006 levels. The same also applies to the alleged downward trend in imports, whereas they increased steadily from 2006 to 2008, with only an incidental and temporary drop in 2009.

23. The complainants also allege that the DEI and the Commission did not act consistently with the AS in attributing the financial losses to the imports, although it is shown in the preliminary and final reports that, if it had not been for the flow of imports, the domestic industry could have coped with the loans it contracted through economies of scale resulting from its investment without suffering financial losses. Likewise, the technical reports, by showing how imports replaced sales of domestic products, indicated how the increase in inventories is attributable to the increased imports. As regards cash flows, the decrease follows FERSAN's strategic decision to keep its prices low and its production levels high, precisely because of the pressure exercised by imports, so the negative trend in this factor as well has to be attributed to the imports, contrary to what is contended by the complainants.

24. The argument that injury caused by competition from the domestic producers excluded was wrongly attributed to the imports should be rejected as well. The reason why these producers were excluded was, precisely, because they imported the product under consideration, so the injury resulting from competition on their part was directly caused by the imports. It should, therefore, be found that the investigating authority conducted an appropriate analysis of the causal link between the increased imports and the serious injury to the domestic industry.

25. Regarding the parallelism requirement, the Dominican Republic points out that the final resolution provides for the application of a 38 per cent tariff, whereas the DEI had found that a tariff of 40 per cent was justified. Bearing in mind also that the imports not excluded from the investigation only represent 1.21 per cent of total imports, the Dominican Republic maintains that the findings in the technical reports did not vary, given this infinitesimal share.

26. Concerning the notice of the measure in accordance with Article XIX:2 of the GATT, this provision requires that the safeguard measure be notified to the Committee on Safeguards immediately after and not before its adoption, so the notice of the measure to the Committee only three days after the decision to impose it should be considered as immediate notice in conformity with Article XIX:2 of the GATT and Article 12 of the AS.

27. It also emerges clearly from the final report that the Dominican authorities gave adequate opportunity for consultations pursuant to Article 12.3 of the AS. The final technical report contains evidence of a large number of communications and notifications between the Commission and the complainants, as well as the holding of a public hearing on 12 May 2010. It cannot, therefore, be validly claimed that adequate opportunities for consultations were not given to Members having a substantial interest.

28. As regards the complainants' claim concerning Article 8.1 of the AS, which requires the maintenance of a substantially equivalent level of concessions and other obligations to that existing, it simply cannot be asserted that such a level was not maintained as, even after the imposition of the measure, the tariffs were lower than the bound tariffs, which set a ceiling of 40 per cent.

ANNEX B

SUBMISSIONS OF THE THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX B-1

EXECUTIVE SUMMARY OF THE SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia is participating in this dispute because of its systemic interest in the application of Article XIX of the General Agreement on Tariffs and Trade (GATT 1994) and the Agreement on Safeguards (AS) and in the belief that safeguards are vital tools for the management of a country's trade policy and that, in practice, their use should not be prohibited but allowed, in conformity with Members' obligations under the aforementioned agreements.

2. In this statement, Colombia expresses its views on the six points set out below.

II. APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND OF THE AS TO THE PRESENT DISPUTE

3. In a request for a preliminary ruling the Dominican Republic asked the Panel to rule on the non-applicability of Article XIX of the GATT 1994 and of the AS with respect to the measures at issue in this dispute. The complainants responded to this request by rejecting the claims of the Dominican Republic. On 12 May 2011, the Panel sent the parties and third parties a communication stating that it considered it inappropriate to decide this point by means of a preliminary ruling and that it would pay special attention to the arguments of the third parties. In the light of the above and without prejudice to the decision already taken by the Panel concerning the timing of its ruling on the applicability of Article XIX of the GATT and the AS to the present dispute, Colombia is taking this opportunity to comment on certain aspects of the Dominican Republic's request for a preliminary ruling.

4. Specifically, the Dominican Republic suggests that Article XIX of the GATT 1994 and the AS are not applicable to the measures challenged by the complainants. Colombia believes that the main reason put forward by this Member is that the 38 per cent tariff surcharge does not exceed its bound tariff of 40 per cent for tariff headings 5407.20.20 and 6305.33.90, and that consequently there is no suspension, in whole or in part, of tariff concessions, as indicated in Article XIX of the GATT 1994.[1]

5. With respect to the possibility of pleading the non-applicability of certain provisions within the context of a preliminary ruling, the Dominican Republic argues that paragraph 15 of the Panel's working procedures in this case establishes the possibility of requesting preliminary rulings, at the latest, with the respondent's first written submission.[2] The Dominican Republic then connects this procedure with the provisions of Articles 7.1, 7.2 and 11 of the DSU.[3] The Dominican Republic develops its arguments on the basis of a panel's obligation to make an objective assessment of the facts of the case, the applicability of the covered agreements and the conformity of the former with the latter, and asserts that it would be more useful to settle this question of the applicability of

[1] Dominican Republic, Request for a preliminary ruling, Section 3.4, paragraphs 37-46.
[2] Paragraph 15 of the Panel's working procedures.
[3] Dominican Republic, Request for a preliminary ruling, Section 3.1.

Article XIX of the GATT 1994 and of the AS by means of a preliminary ruling, this being a preliminary and global matter.[4]

6. Colombia notes, in particular, two arguments made by the complainants in response to the request for a preliminary ruling: (i) Article XIX of the GATT 1994 and the AS are applicable to the measures in question, considering that the latter were the result of an investigation initiated, conducted and concluded under their provisions and those of the national safeguards legislation; moreover, the measures were notified in conformity with the procedures laid down for safeguard measures[5]; and (ii) preliminary rulings deal with procedural issues and not matters of substance.[6]

7. The parties to this dispute disagree about what issues can form the subject of a preliminary ruling. Colombia notes that preliminary rulings arose out of a practice among Members which has been endorsed by panels and the Appellate Body[7]; however, there is no provision in the DSU that regulates this practice. On the other hand, Articles 11, 12, 13, 14, 15 and 16 of the DSU contain specific provisions regarding panel reports. In this connection, Colombia notes that the general rule is to issue a panel report and exceptionally a preliminary ruling. Colombia also notes the relevance to the analysis of this case of certain rules identified by panels and the Appellate Body. In particular, it wishes to draw attention to the panel report in *Canada – Aircraft* in which, in relation to a discussion over jurisdiction, the panel declined to give an advance ruling, as requested by one of the parties (Canada), considering that there was no requirement in the DSU or any established practice that indicated an obligation to rule on a preliminary issue in advance of the panel report.[8] Moreover, neither does paragraph 15 of the Panel's working procedures specify when the Panel should rule on preliminary issues.

8. For Colombia, the rules that can be extracted from certain panel and Appellate Body reports show that it is incumbent on whoever raises the preliminary question to demonstrate that the issuing of a ruling in advance of the final report is justified.[9] In this connection, it should be borne in mind that the general rule is for rulings to be made in the final report.

9. In Colombia's opinion, if a Member has stated that it is implementing a procedure aimed at applying a safeguard measure and its actions throughout the investigation and notification process have been consistent with the application of a measure of this kind, then it would seem that to maintain, during the course of panel proceedings, that its measure was not really a safeguard measure would be inconsistent with its previous course of action. Within this context, it is relevant to consider the application of Article 3.10 of the DSU and in particular the reference to the spirit of good faith in which the parties should engage in the proceedings.

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[4] Dominican Republic, Request for a preliminary ruling, Section 3.2.

[5] Objection of the complainants to the request for a preliminary ruling, Section III.B.3 and 4, paragraphs 90, 124, etc.

[6] Objection of the complainants to the request for a preliminary ruling, Section III.A.1 and 3, paragraphs 14 to 21, 24 to 34.

[7] The complainants acknowledge this in paragraph 14 of their written objection to the request for a preliminary ruling and the Dominican Republic does so in paragraphs 13 and 27 of its request for a preliminary ruling.

[8] Panel Report in *Canada – Aircraft*, paragraph 9.15.

[9] Considering that the argument used in this case is that of the usefulness of the preliminary ruling for settling the present dispute, it is clear that this usefulness must actually be specifically identified and demonstrated, not just mentioned. This conclusion is reinforced by the Appellate Body ruling in *EC – Hormones* (paragraph 152), where an objection raised by a party had to be sufficiently specific to enable the Panel to address it.

III. THE DETERMINATION OF THE PRODUCT BEING IMPORTED AND THE DOMESTIC PRODUCT IN THE AS

10. The complainant claims that the Dominican Republic: (i) failed to establish correctly that the products imported and the domestic products were like or directly competitive[10] and (ii) wrongly interpreted the term "producers" as used in the AS, with the result that domestic producers of directly competitive products were excluded.[11] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the AS was not properly established.

11. Colombia notes that the legal problem facing this Panel is specifically centred on determining whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the Dominican Republic's obligations under the AS, especially with respect to the concept of "domestic industry".

12. A fundamental element used in defining the domestic industry is the determination of the product under investigation, from the outset of the investigation, since the scope given to this term defines the context for determining where the "like or directly competitive products" are to be situated, while also forming the basis for identifying the domestic producers that make up the domestic industry and the data needed to analyse the injury. An incorrect identification of the products under analysis would necessarily lead to an inappropriate definition of the domestic industry. Furthermore, according to the findings of the Appellate Body in *US – Lamb*, the identification of the products which are like or directly competitive is the first step in determining the scope of the "domestic industry".[12]

13. Like the complainants, Colombia is of the opinion that this particular order of analysis established in cases of anti-dumping investigations[13] should be applied to safeguard cases *mutatis mutandis*, since it is the rational order for any safeguard investigation, insofar as both its main purpose and its scope revolve around the *product under investigation*.

14. Colombia agrees with the observations made by the Dominican Republic in paragraph 138 of its first written submission, where it points out that there are no previous determinations concerning how the product under investigation should be defined under the AS and that there are no express rules on this point. However, it does not agree with the Dominican Republic that this question is completely unregulated by the AS and that there are therefore no clear criteria for defining how this finding should be made.

15. Colombia suggests that a systemic interpretation of the AS under Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) would yield sufficient evidence to establish the meaning of "product under investigation" and how that product should be identified in a safeguard investigation. The second paragraph of the preamble to the AS expressly states that the Agreement clarifies and reinforces Article XIX of the GATT 1994 entitled "Emergency Action on

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[10] First written submission of the complainants, paragraphs 77-80.
[11] First written submission of the complainants, paragraphs 160-163.
[12] Appellate Body Report in *US – Lamb*, paragraph 87.
[13] Footnote 89 of the first written submission of the complainants reads as follows:
"We note that in disputes concerning anti-dumping duties at least two panels have confirmed that the starting point in the analysis of likeness is the definition of the imported product under investigation, so that this product can be compared with the domestic product. See Panel Reports in *US – Softwood Lumber V*, paragraphs 7.152 and 7.153, and *EC – Salmon*, paragraph 7.51."

Imports of Particular Products" (emphasis added), which suggests that the product it is intended to investigate should be delimited and established using some sort of criterion. Likewise, Article 2.1 of the AS specifies that "a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities […]" (emphasis added). This Article is even more emphatic in stipulating that the scope of the product on which the safeguard measure is imposed (which should be taken to mean the product under investigation itself) is fairly limited, inasmuch as it uses the term *product* in the singular and not in the plural, as in other parts of the AS. If an exegetical interpretation of the ordinary meaning of the words is applied, in accordance with the rule envisaged in paragraph 1 of Article 31 of the Vienna Convention, Article 2.1 of the AS would appear to indicate that the product under investigation could only be a single product and could not comprise multiple products. However, Colombia considers that, in fact, the product under investigation can be made up of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the systemic interpretation of the AS.

16. Colombia considers that the rule in Article 4.1(c) of the AS also applies to the determination of the product under investigation because of the close relationship between the definition of the domestic industry and the product investigated. If it were not accepted that the products investigated ought to be, at least, like or directly competitive, it would not be possible to make this finding with respect to domestic products since it would be impossible to compare dissimilar categories of products. The present case involves precisely this situation: although it might perhaps be said that the imported tubular fabric competes with or is like the domestic product, the same cannot be said about the imported tubular fabric and domestic polypropylene bags.[14] Insofar as the standard of Article 4.1(c) requires the domestic and imported products to be like or directly competitive, if the "product investigated" contained products which in themselves were not, it would be impossible to prove the existence of such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry for the purposes of the investigation.

17. Colombia notes that the Dominican Republic has not specified any criterion for establishing how several products, i.e. tubular fabric and polypropylene bags, can be included in a single category. Apparently, this finding is based solely on considerations of a customs nature, as follows from Section 3 et seq. of the final report of the Investigations Directorate of the Dominican Republic's Regulatory Commission on Unfair Trade Practices and Safeguard Measures.[15] Acceptance of this interpretation would run contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[16], inasmuch as it would enable products of virtually any kind to be included as a single product in an investigation, whatever the relationship between them. Under this interpretation products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules that can be applied, a result that is manifestly absurd and contrary to the AS.

[14] As will be explained later, Colombia considers that the argument according to which inputs are part of a production chain is not sufficient to demonstrate a relationship of likeness or direct competitiveness.

[15] Final Technical Report of the DEI, dated 13 July 2010.

[16] In the following cases the Appellate Body referred to the application of the principle of effectiveness in the interpretation of treaties in the course of settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

18. In Colombia's opinion, the Panel should reject the Dominican Republic's argument according to which, for reasons of a customs nature, the two products should be treated as the same product investigated.[17]

19. Colombia concludes that the grouping together of tubular fabric and polypropylene bags in a single category of products under investigation, without making an analysis of likeness or direct competitiveness between the products in question, is inconsistent with Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

IV. THE "UNFORESEEN DEVELOPMENTS AND EFFECT OF THE OBLIGATIONS" REQUIREMENT UNDER ARTICLE XIX:1(a) OF THE GATT 1994 AND THE AS

20. With respect to this point, according to the complainants, the Dominican Republic was unable to demonstrate the existence of unforeseen developments, insofar as it failed to give a reasoned explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis, and (iii) the entry of China into the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the Dominican authorities' explanations of why these events were unforeseen developments are inadequate.[18]

21. In Colombia's opinion, the Panel should take into account the fact that although there are certain requirements which any Member of the WTO must satisfy in order to prove this element, the standard cannot be construed in such a way as to preclude the application of the said developments de facto by establishing requirements that are difficult to satisfy in practice.

22. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to permit a clear and workable application of the concept, for the purpose of enabling the application of safeguard measures under the conditions envisaged in Article XIX of the GATT 1994 and the AS.

V. ASSESSMENT OF THE INCREASE IN IMPORTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AS

23. The complainants and the Dominican Republic are at one in accepting that the requirements that must be met in determining the nature of the increase in imports for the purposes of Articles XIX:1(a) of the GATT 1994 and 2.1 of the AS are those outlined by the Appellate Body in its report in *Argentina – Footwear*.[19] Moreover, they also agree that, as decided by the Appellate Body[20],

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[17] See footnote 35.

[18] Paragraph 197 of the first written submission of the complainants reads as follows:
"The Commission recognized the obligation incurred under Article XIX:1(a) of the GATT to the effect that, in order to apply a safeguard measure, it is necessary to show that the unforeseen developments and the effect of the obligations incurred under the GATT are giving rise to increased imports which are causing serious injury to the domestic industry. However, the Commission did not establish any finding or well-founded conclusion that would demonstrate the existence of unforeseen developments, or a logical connection between those developments and the increased imports said to have caused serious injury to the domestic industry. This omission by the Commission is therefore incompatible with Article XIX:1(a) of the GATT and Articles 3.1, last sentence, 4.2(c) and 11.1(a) of the AS."

[19] First written submission of the complainants, paragraph 241, and first written submission of the Dominican Republic, paragraph 309.

in evaluating the increase the authorities should take the trend in imports during the period of investigation into account rather than concentrate on one or more points.[21]

24. Nevertheless, the complainants consider that the Dominican Republic's assessment of the behaviour of imports during the period of investigation does not satisfy the above-mentioned legal requirements and is therefore at odds with Articles XIX:1(a) of the GATT 1994 and 2.1, 3.1, 4.2(c) and 6 (solely with respect to the preliminary determination) of the AS.[22] For its part, the Dominican Republic claims to have made a proper assessment of the increase in imports, which showed that that increase was sudden, sharp, significant and recent.[23]

25. Colombia considers that certain additional elements could help to clarify how, in this specific case, the increased imports criteria should be taken into account. Colombia therefore wishes to draw attention to the following aspects mentioned in panel and Appellate Body reports: (i) the increase in imports should be assessed on a case-by-case basis[24]; (ii) the analysis of the increase in imports should be conducted with a view to establishing whether it is such as "to cause or threaten to cause serious injury to the domestic industry", that is to say, the increase in imports should be analysed in the light of all the actions of the investigating authority, in the same way as the determination of injury and the causal link between the increased imports and the said injury[25]; (iii) the increase should be assessed over a specific period of time and, rather than a comparison of the end points, should involve consideration of the trends in imports over the period investigated.[26] Moreover, special emphasis should be placed on analysing the data from the end of the period of investigation.[27]

26. Within this context, Colombia disagrees with the complainants' contention that there is a general rule according to which a decrease towards the end of the period of investigation indicates that there has not been an absolute increase in imports.[28] As the analysis should be made on a case-by-case basis, there could be a case in which a decline in imports towards the end of the period might not be significant and from a consideration of the whole of the increase during the period of investigation it might be concluded that there was in fact an absolute increase in imports, despite their decreasing towards the end of the period.[29]

27. Colombia considers that in examining whether the Dominican Republic made a proper and reasoned assessment of the increase in imports, the Panel should take into consideration the general assessment criteria described above.

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[20] Appellate Body Report in *Argentina – Footwear*, paragraphs 129 and 130, and *US – Steel Safeguards*, paragraph 354.

[21] First written submission of the complainants, paragraph 243, and first written submission of the Dominican Republic, paragraph 326.

[22] First written submission of the complainants, paragraphs 27-284.

[23] First written submission of the Dominican Republic, paragraphs 302-343.

[24] Appellate Body Report in *US – Steel Safeguards*, paragraph 360.

[25] Appellate Body Report in *US – Steel Safeguards*, paragraphs 345 and 346.

[26] Appellate Body Reports in *Argentina – Footwear*, paragraph 129, and *US – Steel Safeguards*, paragraph 354.

[27] Appellate Body Reports in *US – Lamb*, footnote 88 to paragraph 138, and *US – Steel Safeguards*, paragraph 370.

[28] First written submission of the complainants, paragraph 247.

[29] This was the analysis made by the Panel in *US – Steel Safeguards* with respect to increased imports of rebar, paragraphs 10.224-10.225.

28. In addition, although in the light of the findings of an increase in imports and the reasons given by the Dominican Republic in the Final Technical Report it might be concluded that the Dominican Republic made a reasoned assessment of that increase[30], Colombia has doubts about whether the analysis was properly conducted, since following the determination of the product investigated, the Dominican Republic restricted its assessment to the cumulative increase in imports of tubular fabric and polypropylene bags.[31] That is to say, it did not specify which of the two products it was whose imports accounted for the increase revealed in the above-mentioned trends. Therefore, following the line of reasoning in Section III concerning the close relationship between the determination of the product under investigation and its treatment in the AS, the conclusion concerning the increase in imports and its causal link with the alleged injury is inadequate inasmuch as it is not made clear which imports increased: imports of tubular fabric or imports of polypropylene bags.

29. As this analysis is linked with that described in Section III, Colombia considers that if the Panel were to conclude that the conditions described in that section for two products to be grouped together in a single category and under the same safeguard investigation were satisfied, the conclusion with respect to this point should be consistent with that determination concerning the definition of the product investigated. In Colombia's opinion, the Panel could make the AS much clearer by taking the rule incorporated in Article 3.6 of the Anti-Dumping Agreement into account in the cumulative analysis.

VI. DEFINITION OF THE CONCEPT OF "CRITICAL CIRCUMSTANCES" IN ARTICLE 6 OF THE AS

30. The complainants consider that the Dominican Republic has failed to show the "critical" nature of the circumstances invoked in justification of the imposition of the provisional measure.[32] For its part, the Dominican Republic considers that a finding concerning this measure would not help to achieve a positive settlement of the dispute and that in any case it has explained the critical circumstances and assessments required to establish the need for the provisional measure.[33] Colombia considers that the debate between the parties affords a unique opportunity for the Panel to rule on a question which has not yet formed the subject of panel or Appellate Body rulings, namely: what should be understood by "critical circumstances" in Article 6 of the AS.

31. In Colombia's opinion, based on a systemic interpretation of Article 6 of the AS[34], the Panel could take into consideration as factors that make the damage "difficult to repair" aspects of the economic reality of the enterprise such as: its stocks, its sales, its profit margins and the price of like products, which should be compared with the most recent fluctuations (in the last six months) in imports, in order to determine whether, if no provisional measure were imposed, the damage would be difficult to repair.

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[30] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, viewed at: http://www.cdc.gob.do/docweb/informes/Informe%20Tecnico%20Final%20-Publico-.%20Caso%20SG%20Tejido%20Tubular%20y%20Sacos%20de%20Polipropileno.pdf.

[31] First written submission of the Dominican Republic, paragraph 307.

[32] First written submission of the complainants, paragraphs 370-379.

[33] First written submission of the Dominican Republic, paragraph 409.

[34] That is to say, taking into account the fact that the purpose of safeguard measures is to counteract the serious injury or threat of serious injury that increased imports may cause to domestic producers of like or directly competitive products. Article XIX:1(a) of the GATT 1994.

VII. NOTIFICATION AND CONSULTATION REQUIREMENTS WITH RESPECT TO SAFEGUARD MEASURES IN THE AS

32. According to the complainants, the Dominican Republic imposed the definitive measure without making timely notification or providing Members having a substantial interest in the products investigated with an opportunity to hold the consultations mentioned in Article 12.3 of the AS and Article XIX:2 of the GATT 1994. Likewise according to the complainants, the Dominican Republic failed to afford an opportunity to obtain adequate means of trade compensation under Article 8.1 of the AS and the Article XIX:2 of the GATT 1994.[35]

33. Colombia considers that the failure of a Member to hold adequate prior consultations before imposing a safeguard measure is a violation of the procedure laid down in Article 12.3 of the AS. Moreover, the non-notification of a safeguard measure before it is imposed is contrary to Article XIX:2 of the GATT 1994.

VIII. CONCLUSION

34. Colombia considers that the present case raises important questions concerning the application of Article XIX of the GATT 1994 and the AS. Although not taking a final position on all aspects of the substance of the dispute, Colombia requests the Panel carefully to review the scope of the claims of the parties in the light of the observations made in this submission. Colombia reserves the right to make additional comments in the section of the first hearing with the parties and the Panel in which third parties are allowed to participate.

[35] First written submission of the complainants, paragraphs 46-460.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE UNITED STATES

I. THE COMPLAINANTS PROPOSE THE WRONG APPROACH FOR DETERMINING CAUSATION OF SERIOUS INJURY

1. Article 2.1 of the Safeguards Agreement states that a Member may apply a safeguard measure only if the Member finds that the product in question is being imported "in such increased quantities ... as to cause or threaten to cause serious injury to the domestic industry". In their first written submission, Costa Rica, El Salvador, Guatemala, and Honduras (collectively "complaining parties") argue that, under Article 2.1, the increase in imports of the product in question must be "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry.[1] The complaining parties rely upon the Appellate Body's report in *Argentina – Footwear (EC)* in support of their interpretation of Article 2.1.[2] As shown below, and contrary to the complaining parties' assertion, the Safeguards Agreement does not require such an approach to determine the causation of serious injury under Article 2.1.

2. In *United States – Steel Safeguards (AB)*, the Appellate Body referenced the same passage from *Argentina – Footwear (EC)* that the complaining parties rely upon in their first written submission. The Appellate Body clarified that the statement in question was about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement" and that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e. their consideration of serious injury/threat and causation)".[3]

3. Consequently, there is no basis for the complaining parties' assertion that Article 2.1 of the Safeguards Agreement requires the competent authorities to conduct a separate analysis of the volume of imports to determine whether it is "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry before proceeding to the rest of the analysis. It is sufficient to find that they have increased, and then address through the remainder of the analysis whether those increased imports cause serious injury or threat of serious injury.

II. THE METHOD OF PRODUCTION CAN BE RELEVANT FOR DETERMINING THE LIKE OR DIRECTLY COMPETITIVE PRODUCT

4. Article 4.1(c) of the Safeguards Agreement defines the "domestic industry" for purposes of the injury analysis as the "producers ... of the like or directly competitive products". The complaining parties argue that the Dominican Republic incorrectly defined the like or directly competitive product under Article 4.1(c) in the course of its investigation. They argue that the competent authority for the Dominican Republic, the Department of Investigations of the Regulatory Commission for Unfair

[1] Complaining Parties' First Written Submission, paragraphs 239-248.

[2] Complaining Parties' First Written Submission, paragraph 241.

[3] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted 10 December 2003, paragraph 346 ("*United States – Steel Safeguards (AB)*").

Trade Practices and Protection Measures of the Dominican Republic ("DEI"), defined the like or directly competitive product based, in part, on the production process used - i.e. tubular fabric and polypropylene sacks made *from virgin resin*.[4] According to the complaining parties, DEI did not treat polypropylene sacks made from a different production process (e.g. polypropylene sacks made from tubular fabric rather than virgin resin) as a like or directly competitive product. The complaining parties contend that the exclusion of producers who did not use virgin resin from the domestic industry is inconsistent with Article 4.1(c) of the Safeguards Agreement.

5. The United States takes no position regarding the adequacy of the Dominican Republic's approach to this issue in the challenged investigation, especially in light of the fact-intensive nature of the analysis. It is helpful, however, to consider certain observations regarding the determination of like or directly competitive products under the Safeguards Agreement.

6. In *United States – Lamb Meat (AB)*, the Appellate Body concluded that while the focus of the like or directly competitive product inquiry must be on the identification of *the product*, the production process may provide information on the like or directly competitive nature between products.[5] The Appellate Body further observed that "{w}e can ... envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products".[6]

7. Indeed, one can envisage a scenario in which the production process is highly relevant to the like or directly competitive nature between two products due to the qualities the process imparts on the product. For example, customers may demand items produced via a certain method because only that method guarantees the requisite level of quality or adherence to a given tolerance level. Under this scenario, products manufactured according to a different process may not be like or directly competitive.

III. THERE IS NO GENERAL RULE REGARDING THE IMPACT OF DECREASES IN IMPORTS TOWARD THE END OF THE PERIOD OF INVESTIGATION

8. Under Article 2.1 of the Safeguards Agreement, the competent authority must determine that there are increased quantities of imports, either absolute or relative to domestic production, in order to apply a safeguard measure. In paragraph 247 of their first written submission, the complaining parties argue that, as a general rule, a decrease toward the end of the period of investigation is an indication that there has been no absolute increase in imports.[7] According to the complaining parties, where the record shows a decline in imports toward the end of the period of investigation, only exceptional circumstances justify a finding by the competent authority of increased absolute imports under Article 2.1. The complaining parties purport to base their argument on the Appellate Body's report in *United States – Steel Safeguards (AB)*. But *United States – Steel Safeguards (AB)* does not support the complaining parties' proposed approach, and their position is otherwise unsupportable under the Safeguards Agreement.

[4] Complaining Parties' First Written Submission, paragraph 129.

[5] Report of the Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paragraph 94, footnote 55 ("*United States – Lamb Meat (AB)*").

[6] *United States – Lamb Meat* (AB), fn. 55.

[7] Complaining Parties' First Written Submission, paragraph 129.

9. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports, nor does it place special emphasis on the level of imports at the end of the period of investigation. Article 2.1 states that the competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production ... as to cause or threaten to cause serious injury to the domestic industry". Article 4.2(a), in turn, states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms." Neither article provides any reference to the period of time near the end of the period of investigation, nor otherwise indicates any special role for any particular period of time within the overall period of investigation. Accordingly, there is no textual basis in the Safeguards Agreement for the complaining parties' position.

10. Moreover, in *United States – Steel Safeguards (AB)*, the Appellate Body has explicitly rejected the argument on decreased imports toward the end of the period of investigation now made by the complaining parties. In that dispute, the Appellate Body stated that "Article 2.1 does *not* require that imports need to be increasing at the time of the determination" and that it did "*not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'".[8] Indeed, for a number of the products in question in *United States – Steel Safeguards (Panel)*, the Panel found that the investigating authority's determination of imports in such increased quantities was consistent with Article 2.1 notwithstanding a decline in imports toward the end of the period of investigation.[9]

11. In sum, the Appellate Body did not establish in *United States – Steel Safeguards (AB)* a general rule regarding decreases in imports toward the end of the period of investigation. The Appellate Body found, rather, that given the magnitude of the decrease in imports toward the end of the period of investigation for certain (but not all) products in that particular dispute, the competent authority had not provided a reasoned and adequate explanation of how the facts supported its determination that the product was "being imported in … such increased quantities".[10]

12. Accordingly, the complaining parties' assertion that there is a general rule regarding the impact of decreases in imports toward the end of the period of investigation is erroneous.

IV. IMPORTS EXEMPTED FROM APPLICATION OF THE SAFEGUARD MEASURE UNDER ARTICLE 9.1 ARE NOT EXEMPTED FROM THE INJURY AND CAUSATION DETERMINATIONS UNDER ARTICLE 2.1

13. In their first written submission. the complaining parties also allege that the Dominican Republic violated the requirements of "parallelism" under Articles 2.1 and 2.2 of the

[8] *United States – Steel Safeguards (AB)*, paragraph 367.

[9] Report of the Panel, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, paragraph 10.224 (rebar), paragraph 10.233 (welded pipe), and paragraph 10.253 (stainless steel bar) ("*United States – Steel Safeguards (Panel)*"). The Appellate Body did not review the section of the Panel's report regarding increased imports of rebar, welded pipe, and stainless steel bar.

[10] *United States – Steel Safeguards (AB)*, paragraph 368.

Safeguards Agreement.[11] The principle of parallelism derives from the use of the same text - "product ... being imported" - to describe both the investigation conducted by the competent authorities under Article 2.1 of the Safeguards Agreement and the authority to impose a safeguard measure under Article 2.2. The Appellate Body explained that "{i}n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in Articles 2.1 and 2.2."[12]

14. The complaining parties assert that (1) the DEI exempted imports from developing country Members (i.e. Mexico, Panama, Colombia, and Indonesia) from application of the safeguard measure under Article 9.1 of the Safeguards Agreement[13], but that (2) the DEI included imports from these countries in its analysis of injury and causation under Article 2.1.[14] According to the complaining parties, the fact that imports from these four countries were exempted from the application of the safeguard measure, but included in the injury and causation analysis, violates the requirements of parallelism between analysis of injury and application of the safeguard measure. The complaining parties' argument is fatally flawed, however, because it compares Article 2.1 of the Safeguards Agreement with Article 9.1, which is not included in the parallelism requirement.

15. Article 9.1 of the Safeguards Agreement states that "{s}afeguard measures *shall not be applied* against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned".[15] Thus, while Article 9.1 acts as an exception to the obligation under Article 2.2 of the Safeguards Agreement to apply safeguard measures to "a product being imported regardless of its source", it does not create an exception from the obligation under Article 2.1 to reach a determination with regard to all of the product. Assuming that the Dominican Republic found that each of the four countries accounts for less than 3 per cent of total imports and that it also found that the four countries collectively (and any other developing countries that individually account for less than 3 per cent of total imports) do not account for more than 9 per cent of total imports, there is no support in the text of the Safeguards Agreement for the complaining parties' argument that exemption from application of the safeguard measure for imports from developing countries under Article 9.1 also necessitates exclusion from the injury and causation analysis under Article 2.1.

16. Indeed, the Panel in *Argentina – Footwear (Panel)* affirmed that an exemption from application of the measure pursuant to Article 9.1 of the Safeguards Agreement does not mandate exclusion from the analysis under Article 2.1. The Panel observed that "Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures *where the injury and causation fully reflect the effects of those imports from developing countries*".[16] In deciding not to extend the exemption from application of the safeguard measure to the injury and causation analysis, the Panel reasoned "that where the

[11] Complaining Parties' First Written Submission, paragraph 449.

[12] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, paragraph 96 ("*United States – Wheat Gluten (AB)*").

[13] *See* Complaining Parties' First Written Submission, paragraph 54.

[14] Complaining Parties' First Written Submission, paragraph 446.

[15] Emphasis added.

[16] Report of the Panel, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121, paragraph 8.85 ("*Argentina – Footwear (Panel)*") (emphasis added).

Safeguards Agreement provides for an exception it does so in clear and explicit terms" and that no such exemption was provided for in Article 2.1.

17. Accordingly, there is no basis for the complaining parties' assertion that the requirements of parallelism under Articles 2.1 and 2.2 of the Safeguards Agreement apply to imports exempted from application of the safeguard measure by operation of Article 9.1.

ANNEX B-3

SUBMISSION OF NICARAGUA

I. INTRODUCTION

1. Nicaragua welcomes the opportunity to present its views in the proceedings initiated by Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") with respect to the consistency of the provisional safeguard measure and the definitive safeguard measure imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20 and 6305.33.90 of the Dominican Republic Tariff, with the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards ("AS")*.

2. Nicaragua has decided to participate as a third party in this dispute because of its systemic interest in the correct interpretation of the provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")*.

3. As a general matter, Nicaragua is of the view that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as is made clear by the title of Article XIX of the GATT 1994. In the Appellate Body's words, "Article XIX is clearly, and in every way, an extraordinary remedy".[1] It should only be invoked when all of the strict requirements set out in WTO law have been fulfilled, in particular because reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters.

4. Nicaragua will limit its submission to the Dominican Republic's request for a preliminary ruling by the Panel ("Request") and to the issue of failure to comply with the requirement of parallelism of the measures at issue, and reserves its right to comment at the third party session on other issues of legal interpretation which it considers to be of particular interest.

II. REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING ON THE NON-APPLICABILITY OF ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

5. The Dominican Republic has requested the Panel to issue a preliminary ruling on the non-applicability of Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT") and the *Agreement on Safeguards* ("AS") with respect to the measures at issue in this dispute.

[1] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, paragraph 86 ("*Korea – Dairy*"); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, paragraph 93 ("*Argentina – Footwear*").

6. In support of its Request, the Dominican Republic relies, *inter alia*, on the following claims and assertions:

Paragraphs 37 and 38, in which it claims that the legal provision in GATT Article XIX:

"is worded conditionally and consists of two parts: a first part establishing a series of conditions ("If ... any product is being imported ... in such increased quantities...") that must be met in order that a WTO Member may take the course of action described in the second part (the ... party shall be free ..."). The remainder of Article XIX sets forth a series of procedural requirements and disciplines that must be observed in the event that such a measure is adopted. In other words, if the conditions in the first part are satisfied, the WTO Member is authorized under the preceding provision to adopt the course of action outlined in the second part, provided that it complies with the disciplines and procedural requirements contained in the remainder of Article XIX. If the first part is not fulfilled, no such authorization will exist.

Conversely, if the course of action described in the second part of Article XIX:1(a) of the GATT is not adopted, there is no need to meet the conditions set out at the beginning of this provision or to comply with the disciplines and procedural requirements in the remainder of Article XIX. The course of action which may, or may not, be authorized is to suspend the obligation, in whole or in part, in respect of the product, or to withdraw or modify the concession."

Paragraphs 39 and 40, in which it asserts that:

"The course of action adopted by the Dominican Republic through the measures at issue clearly does not constitute any of the actions that may be authorized under Article XIX of the GATT, because neither of the two measures, preliminary or definitive, nor the underlying investigation involved a suspension, in whole or in part, of the obligations in respect of such product. Nor was there any modification or withdrawal of the concession."

"Given that the measures challenged by the complainants make no use of the authorization established in the last part of Article XIX:1(a), the conditions, disciplines and procedural requirements established in the Article do not apply to the measures in question."

Paragraph 46, in which it concludes with the assertion that:

"the Dominican Republic has not suspended an obligation, in whole or in part, nor has it modified or withdrawn a concession through the measures challenged by the complainants. Hence, Article XIX of the GATT does not apply to the measures challenged by the complainants."

Paragraphs 47 and 48, in which it claims and concludes that:

"As stated in Article I of the AS:

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

Given that the measures at issue did not consist of any of those envisaged in Article XIX of the GATT, as explained above in the light of the ordinary meaning of the terms of Article XIX and its object and purpose, the rules established in the AS do not apply."

7. In order to justify the above, the Dominican Republic applies the definitive measure as an alternative duty to the MFN tariff, and this is not a measure that would have been provided for in the country's Schedule of Concessions, presumably in order to circumvent its WTO obligations.

8. Nicaragua submits that the Request of the Dominican Republic does not find support in, and is rather contrary to, *Article XIX of the General Agreement on Tariffs and Trade 1994* and the *Agreement on Safeguards* and unduly impairs the rights conferred upon Members by the *WTO Agreement*. Accordingly, it respectfully requests that the Panel reject the Dominican Republic's request.

9. Moreover, we consider that the *sui generis* application of the definitive safeguard measure by the Dominican Republic undermines the security and predictability of the multilateral trading system and that these should be assured by the WTO dispute settlement system.

III. FAILURE TO COMPLY WITH THE REQUIREMENT OF PARALLELISM OF THE MEASURES AT ISSUE

10. Nicaragua agrees with the complainants that, although Mexico, Panama, Colombia and Indonesia are excluded from the scope of the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric, classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic, the investigating authority of the Dominican Republic, i.e. the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, failed to conduct a new analysis of increased imports, the alleged serious injury and causality. Neither the reports nor the preliminary and final resolutions gave any reasons as to why it was not necessary to observe parallelism between the scope of the provisional and definitive measures and the scope of the imports under investigation.

11. We consider that the Appellate Body's statement in *US – Line Pipe* applies in this regard: ... "establish[ing] explicitly" implies that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination".[1] "… To be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[2]

[1] Appellate Body Report, *US – Line Pipe* (WT/DS202/AB/R), paragraph 181.
[2] *Ibid*., paragraph 194.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SUBMISSION OF PANAMA

I. INTRODUCTION

1. Panama intervenes in this dispute because it considers that the definitive safeguard measure of the order of thirty-eight per cent (38%) *ad valorem* imposed by the Dominican Republic on imports of tubular fabric and polypropylene bags, classified under subheadings 5407.20.20 and 6305.33.90 of the Fourth Amendment to the Dominican Republic's Customs Tariff, is inconsistent with the Agreement on Safeguards (AS) of the World Trade Organization (WTO).

2. The Dominican Republic failed to consider important elements of procedure set forth in the AS; the obligation stipulated in Articles 12.3 of the AS and XIX:2 of the GATT to give timely notice and hold prior consultations with Members having a substantial interest in the measure was not fulfilled, nor were opportunities provided to obtain adequate means of trade compensation, as established in Articles 8.1 of the AS and XIX:2 of the GATT.

3. Panama also considers that there are flaws in the investigation conducted by the Investigating Authority of the Dominican Republic, particularly in the approaches to the following: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination of increased imports; (iv) determination of injury; and (v) causal link between the imports and injury, as will be discussed below.

II. NO OPPORTUNITIES WERE PROVIDED FOR PRIOR CONSULTATIONS AND REACHING AN UNDERSTANDING ON TRADE COMPENSATION

4. The Dominican Republic initiated a safeguards procedure, which was notified to the Committee on Safeguards pursuant to Article 12.1(a) of the AS[1], without any opportunity being provided for prior consultations, as stipulated in Article 12.3 of the AS, with a view to reaching an agreement on trade compensation as required by Article 8.1.

5. The Dominican Republic failed to meet the obligation to notify the definitive safeguard measure in a timely fashion so as to allow Members having a substantial interest in the matter to hold prior consultations, as provided for in Article 12.3 of the AS.

III. INCONSISTENCY IN THE DEFINITION OF DOMESTIC INDUSTRY

6. The Dominican Republic defined the product as both the input (tubular fabric) and the final product (polypropylene bag), indicating that both are of the same nature and that they should be considered as a single product. In so doing, the Investigating Authority failed to prove in its investigation that the input and the final product are directly competitive or like products, as established by the Appellate Body in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*. The Dominican Republic thus defined the domestic industry in a manner inconsistent with Articles 4.1(c) and 2.1 of the AS.

[1] G/SG/N/6/DOM/3 of 14 January 2010.

7. As regards the domestic industry, in defining producers the Investigating Authority of the Dominican Republic failed to consider the provisions of the AS inasmuch as it: (a) excluded from the domestic industry other producers that qualified at the same level as those assessed in the investigation; and (b) for the purposes of applying the safeguard measure, it included the producers of the inputs (tubular fabric) and the producers of the final product (polypropylene bags) without distinguishing between the two.

IV. FAILURE TO DEMONSTRATE UNFORESEEN DEVELOPMENTS RESULTING IN INCREASED IMPORTS SUCH AS TO CAUSE SERIOUS INJURY

8. There was no indication that the Investigating Authority of the Dominican Republic demonstrated conclusively and with sufficient evidence that unforeseen developments directly affecting the domestic industry had occurred, nor did it successfully demonstrate a logical connection between the conditions set forth in Article XIX of the GATT and those unforeseen developments.

V. LACK OF DEMONSTRATION OF A RECENT, SUDDEN, SHARP AND SIGNIFICANT INCREASE IN IMPORTS

9. There is no supporting determination in the investigation to show that the imports underwent a recent, sudden, sharp and significant increase.

10. There is no indication, in the conclusions reached by the Investigating Authority of the Dominican Republic at the end of the import investigation, of a demonstration that the increase in imports displayed the characteristics of being sudden, sharp, recent and significant, as required under the AS for the purposes of substantiation. Therefore the measures imposed are, in our view, inconsistent with Articles XIX of the GATT and 2.1, 4.2(c), 6 and 11.1(a) of the AS.

VI. LACK OF PREMISES FOR THE DETERMINATION OF SERIOUS INJURY

11. Panama considers that the Investigating Authority of the Dominican Republic did not carry out a detailed analysis for purposes of determining the serious injury sustained by the domestic industry, nor did it produce objective and positive evidence in support of its investigation or the application of the safeguard measures adopted.

12. The lack of substantiation by the Dominican Republic of the factors corroborating serious injury is inconsistent with Articles 4.2(a) and 2.1 of the AS.

VII. LACK OF JUSTIFICATION OF CAUSATION

13. The Investigating Authority of the Dominican Republic provided no justification for the determination of serious injury and causation in respect of a domestic industry that enjoys a favourable position; moreover, it provided no supporting evidence to show that the industry is currently being affected by the alleged increase in imports, nor did it identify other factors that might have affected the domestic industry and that bear no direct relation to the imports.

14. Panama considers that in the investigation conducted by the Investigating Authority of the Dominican Republic there were flaws in establishing the causal link between the allegedly unforeseen increase in imports and the alleged injury to the domestic industry, since it was not demonstrated that the imports were a sufficient and necessary cause for the alleged serious injury sustained by the

domestic industry, particularly with respect to the financial losses and alleged decline in production and consumption of the domestic product.

VIII. CONCLUSION

15. The Panel is requested to examine the actions of the Investigating Authority of the Dominican Republic as regards compliance with the procedures set forth in the AS and in particular the consultation procedure established in Article 12.3 in conjunction with Article 8.1 of the Agreement; and to review the Dominican Republic's failure to comply with the provisions of the GATT and the AS, as shown in this document.

ANNEX B-5

SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in the proceedings of the dispute. Turkey is participating in this case because of its systemic interest in the interpretation and implementation of the Agreement on Safeguards. Turkey would like to highlight the importance of imposing such measures in conformity with WTO obligations and its basic principles.

2. In this submission, Turkey is not in the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements. Turkey wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

3. Therefore, with this submission, Turkey aims to contribute to the Panel's analysis by interpreting the relationship between two provisions of the Agreement on Safeguards; Article 2.2 which determines the general rule as to how safeguard measures are to be applied and Article 9.1 which encloses special and differential rules to be applied to developing countries.

II. APPLICATION OF SAFEGUARD MEASURES TO DEVELOPING COUNTRIES

4. As is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source.

> "Article 2: Conditions
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source."

5. Article 2.2 sets forth an important obligation that a safeguard measure be imposed on the imported product "irrespective of its source". In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

6. On the other hand, Article 9.1 of the Agreement on Safeguards offers special and differential treatment to developing countries. Article 9.1 of the Agreement reads as follows:

> "Article 9: Developing Country Members
>
> 1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

7. According to the wording of Article 9.1 of the Agreement on Safeguards, safeguard measures shall not be applied to a developing country Member on the account that two conditions exist. These are (i) the share of imports of a certain product originating from the developing country shall not exceed 3 per cent among the imports of that product by the country applying the safeguards measure and (ii) the amount of imports from developing country Members which meet the first condition shall account for less than 9 per cent of the total amount of imports of that certain product by the country applying the safeguard measure.

8. On the basis of this interpretation, Article 9.1 provides a mandatory "special and differential treatment" in favour of developing countries. Turkey would like to emphasize that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply "special and differential treatment" to all developing countries that meet the conditions provided above. Therefore, Turkey believes that safeguard measure shall not be applied to all developing countries, whose total export to that country is below the threshold level of 3 per cent. In this respect, pursuant to the Article 9.1 of the WTO Safeguard Agreement; Turkey, as a developing country, shall be excluded from this measure.

III. CONCLUSION

9. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review the comments stated in this submission, in interpreting the Agreement on Safeguards.

ANNEX B-6

EXECUTIVE SUMMARY OF THE SUBMISSION OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. The Complainants appear to argue, among other things, that the *Agreement on Safeguards* applies with regard to any measures which are aimed at preventing or remedying injury caused by an increase in imports. For the reasons set out below, the European Union considers that this is indeed a necessary condition for the application of the *Agreement on Safeguards*, but not a sufficient condition in itself.

2. The Dominican Republic's request must be examined in the light of Article 1 of the *Agreement on Safeguards*. Article 1 makes it clear that the *Agreement on Safeguards* is concerned only with the application of measures of the type "provided for in Article XIX of GATT 1994", to the exclusion of any other safeguard measures.

3. In the European Union's view, the determination of whether a measure belongs to the category of safeguard measures "provided for in Article XIX of GATT 1994" is an objective determination, to be made having regard to each measure's structure and design. The subjective intent of the Member applying the measure may provide a useful indication, but can never be dispositive. Otherwise, the applicability of the *Agreement on Safeguards* would be left to the applying Member's own discretion.

4. The European Union considers that a safeguard measure is of the type "provided for in Article XIX of GATT 1994" where it has the following two characteristics: (1) it purports to remedy injury caused by an increase in imports; and (2) it involves the suspension of an obligation or the withdrawal or modification of a concession under the *GATT 1994*. By denying the relevance of the second of the above-mentioned characteristics, the Complainants fail to recognize the specific function of Article XIX within the *GATT 1994*, which, as made clear by the last part of Article XIX:1(a), is to authorise emergency action that would be otherwise prohibited by the *GATT 1994*.

5. Should the Complainants' views prevail in this dispute, any Member would ever consider in its interest to subject itself to the strictures of the *Agreement on Safeguards* in order to take measures which it could, in any event, adopt without the requirements of that agreement, simply by refraining from characterizing those measures as a response to an increase in injurious imports.

6. Furthermore, the European Union is concerned about the possible unintended consequences of the Complainants' interpretation. For example, the trade laws of many WTO Members, including the European Union, provide for the possibility of suspending the tariff preferences accorded under a Free Trade Area ("FTA") Agreement or unilaterally as part of a GSP scheme in response to injury caused by an increase in the preferential imports concerned. Those measures are often referred to as "safeguard measures" under the relevant FTA agreements or applicable domestic laws. But it is generally understood that they fall outside the scope of Article XIX of *GATT 1994* because they do not involve the suspension of any obligation or the withdrawal or modification of any concessions under the *GATT 1994*.

7. First, in addressing the Dominican Republican's request it is relevant to consider also Article 11.1(a) of the *Agreement on Safeguards*. The terms "shall not take or seek" indicate that the applicability of the obligations provided in the *Agreement on Safeguards* is not conditional upon a Member having effectively taken a safeguard measure of the type "provided for in Article XIX of GATT 1994". The *Agreement on Safeguards* governs the conduct of investigations opened with a view to the possible imposition of a safeguard measure of the type provided for in Article XIX of *GATT 1994*, even if no such measure is eventually imposed as a result of the investigation.

8. Second, the measures at issue do involve the suspension of certain GATT obligations of the Dominican Republic in so far as they do not apply with regard to all imports of like products originating in all WTO Members. The Dominican Republic has exempted from their application certain developing countries whose imports do not exceed the thresholds set out in Article 9.1 of the *Agreement on Safeguards*. This exemption involves a manifest "suspension" of the Dominican Republic's obligations under Article I:1 of the *GATT 1994*.

9. On the other hand, the European Union does not see merit in the Complainants' allegation that the measures at issue also amount to a suspension of the Dominican Republic's obligations under Article II:1(b) of the *GATT 1994*. Clearly, the intention of the Dominican authorities was to increase the rate of the applicable "ordinary customs duty", rather than applying "other charges or duties" on top of the ordinary customs duty. Contrary to what the Complainants appear to argue, the fact that the measures in dispute apply in place of the pre-existing MFN ordinary duty, rather than cumulatively with that duty, does not support, but rather undermines their claim under Article II:1(b); and the same is true of their argument based on the fact that the measures in dispute are applied in parallel with the pre-existing duty rate, which continues to be applicable to imports originating in developing countries excluded from the scope of the measures in dispute.

II. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

10. Whilst not entering into the reasons provided by the investigating authority to treat both the final product (i.e. polypropylene bags) and the input (i.e. tubular fabric) as one single product under investigation, the European Union considers that Article 4.1(c) of the *Agreement on Safeguards* does not require an assessment of likeness or direct competition when defining the product under investigation.

11. The *Agreement on Safeguards* does not contain a definition of product under investigation or product concerned. It addresses the application of safeguard measures to "a product" in general and "irrespective of its source". The absence of a definition indicates the intention of the negotiators to leave Members with a wide discretion when defining the product concerned.

12. The definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. In this respect, Article 4.1(c) requires that "domestic industry" is composed of producers of the like or directly competitive domestic products. The concept of likeness or direct competition is relevant to maintain the parallelism between the product under investigation and the like or directly competitive domestic products.

13. The European Union considers that in *US – Lamb* the Appellate Body did not conclude that there are limits in the definition of the product concerned. In that case the Appellate Body noted that, under Article 4.1(c) of the *Agreement on Safeguards*, input products can only be included in defining

the "domestic industry" if they are "like or directly competitive" with the end-products. In this respect, the European Union agrees that the parallelism between the product concerned and the like or directly competitive domestic products that conform to the domestic industry is broken if inputs are not like or in direct competition with the product concerned. However, in a case where the product concerned is composed of both inputs and the final product, the European Union does not see any obstacle in the *Agreement on Safeguards* to include both inputs and the final products as the like or directly competitive domestic products for the purpose of defining domestic industry.

14. Consequently, the European Union considers that insofar as the parallelism between the product under investigation (including both inputs and the final product) and the like or directly competitive domestic products (including both inputs and the final product) is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

15. In the present case it would appear that there was no parallelism if the domestic products were limited to tubular fabric and polypropylene bags made out of raw resin, whereas the product under investigation covered tubular fabric and polypropylene bags regardless of whether they were made out of raw resin. Indeed, if the final products are identical or directly competitive regardless of their production process, then producers of those products cannot be excluded from the definition of domestic industry.

16. Moreover, the European Union observes that several domestic producers were excluded from the definition of domestic industry because they were themselves importers of the product under investigation (i.e. the input, tubular fabric). It would appear that under Article 4.1(c) of the *Agreement on Safeguards*, in order to consider whether a company is a "producer" of the like or directly competitive product which should be included in the definition of domestic industry, the focus lies on the essential nature of the business activities of a given enterprise, as manufacturing an article or bringing a thing into existence. If the company concerned is merely an importer of the product under investigation, it would not qualify as a "producer" and then it can be excluded from the definition of domestic industry. In any event, in a situation where the company imports 100 per cent of the input covered by the definition of the product under investigation but then produces the final product covered by the same definition, it would appear difficult to conclude that such a company is *not* a producer of the like or directly competitive product.

III. UNFORESEEN DEVELOPMENTS

17. Contrary to the suggestions made by the Dominican Republic, the Appellate Body has spoken unambiguously on this issue. In both *Argentina – Footwear Safeguard* and *Korea – Dairy Safeguard* the Appellate Body reversed the panel's findings to the effect that the "unforeseen developments" clause in Article XIX:1(a) of the *GATT 1994* imposes no additional obligations upon Members. In *US – Lamb* the Appellate Body confirmed the above findings and went out to rule that that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.

18. The Appellate Body has clarified that, although its reports are not binding, except with respect to resolving the particular dispute between the parties, subsequent panels "are not free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB".

19. The Dominican Republic has not invoked any "cogent reason" why the Panel should depart from the legal interpretations made by the Appellate Body in the reports cited above. Rather, the Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on the allegation that the *Agreement on Safeguard* "constitutes an exhaustive agreement" and does not provide for such an obligation. In view of this, the European Union considers that the Panel need not engage in a detailed examination of this argument, which could be summarily dismissed by referring to the existing case law of the Appellate Body.

20. The European Union notes that one of the "unforeseen developments" now mentioned by the Dominican Republic is the increase in duty free imports under certain FTA agreements with other Central American and North American countries. However, even assuming that such an increase could be regarded as a genuine "unforeseeable development", it is plain that it would not be the "effect" of the obligations incurred by the Dominican Republic under the *GATT 1994*, as required by Article XIX:1(a). Rather, it would be the "effect" of obligations incurred by the Dominican Republic under the FTA agreements in question. Therefore, that development could not provide a basis for the imposition of safeguard measures under Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. Instead, that development should have been addressed by the imposition of bilateral safeguard measures withdrawing the preferential duty-free treatment in accordance with the relevant provisions of each FTA agreement concerned.

IV. CONCLUSIONS

21. While not taking a final position on the merits of the case, the European Union requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

ANNEX C

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

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

1. The Dominican Republic argues that Article XIX of the GATT and the AS are not applicable to the measures at issue since they are applied at a level below the bound tariff for the tariff headings concerned.

2. The Dominican Republic's defence relates only to the provisional and definitive safeguard measures that were imposed. It does not touch on the investigation and the acts preceding application of the measure, nor does it affect the applicability of the AS and of Article XIX to the claims concerning notification, the conduct of consultations and the offer of means of trade compensation, as provided for in Articles 8 and 12 of the AS.

3. The Dominican Republic seeks to ignore the fact that it initiated and carried out an investigation procedure under the AS and Article XIX, as well as under its own domestic legislation on trade remedies, with a view to imposing safeguard measures within the meaning of Article XIX and the AS. This was affirmed by the Dominican Republic itself.[1]

4. The Dominican Republic justified the exclusion of certain imports from the scope of the measure on the basis of Article 9.1 of the AS; it notified the WTO Committee on Safeguards of the opening of the investigation, the adoption of the provisional measure and the adoption of the definitive measure and ordered notification of the first stage in the phasing out of the measure; it replied to Colombia that the investigation and the measures at issue were subject to the provisions of Article XIX and the AS; and lastly, by means of a press release it publicly explained that the investigation and the imposition of provisional and definitive measures were carried out on the basis of the AS and Article XIX, as well as domestic legislation on trade remedies.[2]

5. Although the measures at issue do not exceed the bound tariff of 40 per cent *ad valorem*, they consist of duties and charges other than ordinary customs duties and they are applied in a discriminatory manner on imports of certain Members. The safeguard measures therefore effectively suspend the Dominican Republic's obligations under Articles II:1(a) and II:1(b), second sentence, as well as under Article I:1 of the GATT regarding the MFN principle, respectively.[3]

6. Any measure that exceeds what is "necessary", in magnitude or time-scale, stands in violation of Articles 5.1 and 7.1 of the AS, even if the measures are not inconsistent with general obligations under the GATT or are higher or lower than the bound tariff. Otherwise, if this level of "proportionality" between serious injury and the trade remedy were not maintained, "legitimate" trade

[1] Initial report, pages 4 and 5; preliminary report, pages 5 and 6.
[2] Exhibits CEGH-17, 18, 32, RDO-1 and CEGH 24 and 25, respectively.
[3] Reply of Costa Rica, El Salvador, Guatemala and Honduras to the request for a preliminary ruling of the Dominican Republic, submitted on 3 May 2011, paragraphs 109-111.

would be affected and "competition in international markets" would be limited rather than enhanced, which is in all respects at variance with the object and purpose of the AS.[4]

7. The action taken by other panels and by the Appellate Body in two safeguard disputes, *Argentina – Footwear* and *Korea – Dairy*, implicitly confirms that the applicability of Article XIX and of the AS does not depend on whether the safeguards are higher or lower than the respective bound tariffs.

II. PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE

8. Set out below are our replies to the objections to the complaints relating to Articles I:1, II:1(a) and II:1(b) of the GATT. Our second written submission will give a detailed reply to the other preliminary objections.

(i) Alleged withdrawal of certain complaints

9. The Dominican Republic contends that the complaining parties have decided to withdraw various complaints, including those relating to Article I:1 of the GATT and Articles II:1(a) and II:1(b) of the GATT, since, in its opinion, these were not developed in the first submission of the complainants.[5]

10. The Dominican Republic's request is invalid since the complaints it challenges were set out in our first written submission and they were subsequently developed in greater detail in our reply to the Dominican Republic's request for a preliminary ruling. The Appellate Body has indicated that there is no obligation to set out all claims in the first written submission to the Panel.[6]

(ii) Objection concerning complaints not contained in the request for consultations

11. The Dominican Republic also argues that certain complaints contained in our request for the establishment of a Panel should remain outside the terms of reference of the Panel, being "new complaints" because they are not included in the request for consultations.[7]

12. The Appellate Body has firmly upheld the view that the legal basis for the request for consultations and the basis of the panel request should not necessarily be identical, provided that the latter can reasonably be inferred from the basis for the request for consultations.[8] The Panel in *China – Audiovisual Products* concluded that it is important to analyse the relationship between the obligations imposed by the provisions cited in the request for consultations and those cited in the panel request.[9]

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[4] Preamble of the AS, third paragraph.

[5] First written submission of the Dominican Republic, paragraph 86.

[6] Appellate Body Report, *EC – Bananas*, paragraph 145; see also Panel Report, *China – Audiovisual Products*.

[7] First written submission of the Dominican Republic, paragraphs 87-89.

[8] Appellate Body Report, *Mexico – Rice*, paragraph 138; Appellate Body Report, *Brazil – Aircraft*, paragraph 132; Appellate Body Report, *US – Cotton*, paragraph 293; Panel Report, *China – Audiovisual Products*, paragraph 7.121; Panel Report, *US – Poultry*, paragraph 7.46; Panel Report, *EC – Fasteners*, paragraph 7.24.

[9] Panel Report, *China – Audiovisual Products*, paragraph 7.121.

13. In view of the possibility that the Dominican Republic might seek to argue in its defence that the measure is not a safeguard measure, the complainants made clear in their request for consultations their intention to reserve the right to raise other claims under the GATT. This emerges from the penultimate paragraph of the request for consultations.[10] It is appropriate to point out that, during the consultations, there was an exchange of information on the discriminatory exclusion of certain imports from the scope of application of the measures, as well as on the nature of the measures in the context of the legal system in force in the Dominican Republic.

14. The complaint relating to the most-favoured-nation obligation is based on Article I:1 of the GATT, which is closely linked to Article 2.2 of the AS inasmuch as both articles deal with the most-favoured-nation principle. Article 2.2 of the AS is expressly included in the request for consultations.[11] The complaints concerning the nature of the duties adopted as import charges are based on Articles II:1(a) and II:1(b) of the GATT, which are linked to Article XIX itself of the GATT. The tariff concessions referred to in Article XIX are subject "to the obligations contained in Article II of the GATT 1994".[12]

15. In addition, the precedent from *US – Poultry* is applicable[13], given that, inasmuch as the request for consultations contains a clear reservation regarding the right to raise other matters under the GATT 1994 and on the basis of the discussions held during the consultations, the complainants reworded their complaints and included in their panel request arguments under Articles I and II of the GATT.

16. By reason of the foregoing, this Panel should conclude that the complaints under Articles I:1, II:1(a) and II:1(b) of the GATT fall within the terms of reference of this dispute.

III. CLAIM RELATING TO UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT

17. The Dominican Republic failed to issue adequate or reasoned findings, conclusions or explanations to demonstrate unforeseen developments.[14] In response to this claim, the Dominican Republic questions the binding nature of Article XIX:1(a) with regard to unforeseen developments.

18. The obligation to consider unforeseen developments is an issue that was decided by the Appellate Body, in conclusive and unequivocal terms, in 1999 in the *Argentina – Footwear* and *Korea – Dairy* disputes. The Dominican Republic has presented no compelling reason to justify deviating from the Appellate Body's viewpoint.[15]

19. The Dominican Republic's investigating authority itself, in its technical reports, stated that it agreed with the Appellate Body's jurisprudence on this specific legal point.[16] More important is the recognition of the mandatory nature of the unforeseen developments criterion, which is set out in the Dominican Republic's legislation, and more specifically in Articles 239 and 247 of the Regulation to Law No. 1-02.

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[10] Documents WT/DS415/1, WT/DS416/1, WT/DS417/1, WT/DS418/1.
[11] See paragraph "(g)" of the legal basis of the request for consultations.
[12] Appellate Body Report, *Argentina – Footwear*, paragraph 91.
[13] Panel Report, *US – Poultry*, paragraph 7.46.
[14] First written submission of the complainants, paragraphs 207 to 226.
[15] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 160.
[16] Final Report, page 65; Preliminary Report, page 69.

20. In its first written submission, the Dominican Republic cites various passages from the preliminary and final technical reports which allegedly contain the Commission's conclusions on unforeseen developments.[17] However, these passages merely constitute *references* to the arguments of FERSAN on events that *could* constitute unforeseen developments. They are not reasoned and adequate conclusions issued by the investigating authority. In addition, the explanations put forward by the Dominican Republic in its first written submission are clearly *ex post* explanations which cannot cure the lack of findings in the corresponding determinations or reports.[18]

IV. CLAIM RELATING TO THE DOMESTIC INDUSTRY

21. In its submission, the Dominican Republic confined itself to confirming that there were various questions concerning the consideration of fabric and bags as the same product, and that it even had doubts itself on that subject and addressed a letter to Customs, and the latter confirmed that they are two different products. However, it misrepresents our claim and argues that there is no substantive obligation governing the definition of the product under investigation.

22. What we have claimed in the context of the definition of the domestic industry is that no paragraph in the reports or resolutions reflects the adequate and reasoned findings and conclusions required under Articles 3.1 and 4.2(c) on a subject as fundamental, important and relevant as the definition of the product under investigation for purposes of defining the domestic industry, in the light of the various factual questions raised in the investigation, which were even taken up by the DEI and the Commission in the public reports.

23. The Dominican Republic arbitrarily defined like or directly competitive domestic products as products produced *from resin*, without giving an objective reason for so doing. However, the *product under investigation* included fabric and bags, irrespective of the way in which they were produced, whether from resin or from fabric or from some other phase of the production process. Nor is there any justification for excluding domestic producers of the like or directly competitive domestic product, such as the firms FIDECA and TITAN.

24. In short, the domestic industry was defined in a manner such as to be adapted solely and exclusively to the profile of the applicant, FERSAN, so that the latter is the only enterprise constituting the domestic industry. This was done through the use of arbitrary or inadequate definitions and criteria which do not conform to the requirements of Articles 2.1, 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

V. CLAIM RELATING TO THE ALLEGED INCREASE IN IMPORTS

25. The Dominican Republic acknowledges that there was no finding with regard to a relative increase in imports compared with domestic production, despite the fact that the final resolution determined that imports had increased "in absolute and relative terms".[19]

26. Regarding the absolute increase in imports, the complainants note that the Dominican Republic's defence, which seeks to play down the importance of the drop in imports towards the end of the period of investigation, applies only to the final determination, but not to the

[17] First written submission of the Dominican Republic, paragraphs 285-295.
[18] Panel Report, *Chile – Price Bands*, paragraph 7.147 and footnote 705. Appellate Body Report, *US – Lamb*, paragraph 72.
[19] Definitive resolution, first article.

preliminary determination. The Dominican Republic cannot, therefore, argue that this alleged increase was taken into consideration in order to justify the conclusion concerning increased imports in the preliminary determination.

27. As regards the final determination, the Dominican Republic claims that it explained that the decrease in imports towards the end of the period of investigation was transitory and incidental. The Dominican Republic acknowledges that the decrease towards the end of the period of investigation would have been due to the overall slowdown in the Dominican economy.[20] However, it does not follow from this assertion that the decrease in imports was characterized as transitory and incidental or that there was an explanation of the reasons for considering that the decrease in imports had those characteristics, as is now argued *ex post*.

28. Finally, the Dominican Republic acknowledges that the evaluation of the rate of increase in imports consisted of an "end to end" analysis of the period of investigation, and was based on figures showing the percentage variation of imports from year to year.[21] As can be seen from the determinations, there are no findings regarding the rate of imports. The "rate" is a specific requirement of Article 4.2(a) of the AS.

VI. CLAIM RELATING TO THE ALLEGED SERIOUS INJURY

29. The preliminary and final determinations of serious injury go beyond the definitions and basic criteria contained in Article XIX and the AS. Leaving aside the erroneous definition of the domestic industry, there are fundamental errors of methodology.

30. For example, the determinations are based on information about "the volumes of production of the product investigated, assuming it to be a single product, i.e. finished bags".[22] Despite the fact that the like or directly competitive product was defined as tubular fabric and polypropylene bags, the Dominican Republic evaluated only production performance for finished bags, and no analogous evaluation was carried out on production performance, in volume terms, in the other segment making up the domestic industry, i.e. the production of tubular fabric.

31. There are two different segments: production of tubular fabric and production of polypropylene bags. The evidence shows that not all tubular fabric production was destined for the production of finished bags. Although part of this production was "assumed" to be an input for finished bags, another part was destined for the commercial market (e.g. sales to FIDECA) and a further part went into increasing FERSAN's stocks. The production outcomes for one or the other product are not therefore necessarily the same.

32. The Dominican Republic presents evidence to establish that it conducted a joint analysis of the indicators relating to tubular fabric and polypropylene bags because it evaluated aggregate information from the *Bags Division* of FERSAN.[23] However, the information from the Bags Division includes the production of other products which are not like or directly competitive products (bags made of netting, rope or string), and which are destined for both the domestic and the international market.[24] Moreover, with regard to stocks, the information covers raw material and inputs which do

[20] First written submission of the Dominican Republic, paragraph 318.
[21] First written submission of the Dominican Republic, paragraph 328.
[22] Initial report, page 14.
[23] First written submission of the Dominican Republic, paragraph 358.
[24] Exhibits RDO-13, RDO-14, RDO-15.

not form part of the like or directly competitive product. This erroneous methodological basis invalidates the evaluation that was made of earnings and losses, stocks, cash flows and production value.

33. As regards the discrepancy between the factual findings relating to production and the conclusions of the DEI and the Commission, the Dominican Republic provides an *ex post* explanation of the way in which the fall in production is to be understood.

VI. CLAIM RELATING TO THE ALLEGED CAUSAL LINK

34. Causation: The complainants contend that the Commission determined the causal link between imports and serious injury to the domestic industry inconsistently with Article 4.2(b), among other provisions of the AS, and Article XIX:1(a) of the GATT.[25]

35. The replies provided by the Dominican Republic in its first written submission indicate, in summary, that the causation analysis is composed of two elements: (i) two paragraphs of the final resolution (more specifically, paragraphs 37 and 38)[26]; and (ii) the serious injury analyses contained in the preliminary and definitive technical reports.[27]

36. Regarding the first element, the two paragraphs of the final resolution are not sufficient to establish a causal relationship, since they consist of new assertions lacking analytical substantiation in the technical reports.[28] Regarding the second element, the existence of serious injury is only a necessary premise for the causation analysis, but it is not sufficient to establish a causal link.

37. Non-attribution: The complainants also contend that the Dominican Republic failed to carry out the non-attribution analysis required by Article 4.2(b) of the AS, which consists in separating the harmful effects of factors other than increased inputs which are the cause of serious injury.[29]

38. In reply, the Dominican Republic puts forward *ex post* explanations and offers arguments regarding those factors other than increased imports which, in the complainants' opinion, should have been taken into account on examining the causes of financial losses, increased stocks and reduced cash flows, as well as the injury caused by domestic competitors. Even these *ex post* arguments are insufficient to justify the lack of a non-attribution analysis.

VII. CLAIM RELATING TO THE LACK OF PARALLELISM

39. The Dominican Republic failed to respect the requirement of parallelism since, despite having excluded imports from certain countries from the application of the measures, those imports were in fact included in the evaluation of increased imports, serious injury and causation.[30]

40. The Dominican Republic states that the exclusion of imports from Mexico, Panama, Colombia and Indonesia from the application of the measures was in conformity with Article 9.1 of the AS, which permits the exclusion of developing countries with less than 3 per cent import share.[31]

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[25] First written submission of the complainants, paragraphs 380-404.
[26] First written submission of the Dominican Republic, paragraph 441.
[27] First written submission of the Dominican Republic, paragraphs 439 and 442 and footnote 341.
[28] First written submission of the complainants, paragraph 395.
[29] First written submission of the complainants, paragraphs 410-433.
[30] First written submission of the complainants, paragraphs 436-450.
[31] First written submission of the Dominican Republic, paragraphs 472-474.

The parallelism obligation is enforceable *irrespective* of the reasons why the Member applying the safeguard has decided to exclude such imports. The Dominican Republic also submits that "[e]ven if an investigation excluding imports from Mexico, Panama, Columbia and Indonesia were conducted, the conclusions concerning increased imports would not change, given the negligible share of 1.2 per cent [of those imports] during the period of investigation".[32] This line of argument has already been presented and rejected in *US – Steel*.[33]

VIII. INCONSISTENCY WITH ARTICLES XIX:2 OF THE GATT AND ARTICLES 8.1 AND 12.3 OF THE AS

41. The Dominican Republic accepts that its notification was in fact made three days after the *adoption* of the measure[34] and seeks to justify this action by referring to the English and French versions of the GATT, which indicate that the notification must be made prior to the *application* of the measure, and not prior to its *adoption*, as stated in the Spanish version. We observe, however, that the explanatory note contained in paragraph 2(c)(i) of the GATT 1994 explicitly provides that "[t]he text of GATT 1994 shall be authentic in English, French and Spanish".

42. Even on the interpretation of the Dominican Republic regarding the obligation under Article XIX:2 of the GATT, the complainants submit that the Dominican Republic acted inconsistently with that provision, since the WTO Members were notified on 18 October 2010, i.e. on *the same day* as the entry into force of the measure. Moreover, the Dominican Republic claims to treat (i) the participation of the complaining countries as interested parties in the context of the safeguard investigation under the national jurisdiction of the Dominican Republic on the same basis as (ii) the conduct of multilateral consultations as provided for by Article 12.3 of the AS.

IX. CLAIMS UNDER THE GATT

43. In the event that it is determined that the provisional and definitive measures are not subject to Article XIX and to the AS, the Panel should find that the provisional and definitive measures are border measures subject to the basic disciplines of Articles I:1, II:1(a) and II:2(b) of the GATT, and that they are inconsistent with those provisions.

44. Claims under Article I:1 of the GATT: According to the most-favoured-nation clause, any measure that qualifies as an advantage, favour, privilege or immunity granted to imports of specific origin shall also be granted to imports of like products from the other WTO Members. In this case, the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of application of the measures constitutes an advantage, favour, privilege or immunity granted to imports of those origins.

45. The criterion for the granting of this advantage, favour, privilege or immunity is also discriminatory, even where there is compliance with the criterion that imports should not exceed 3 per cent, by individual origin, of total imports and nine per cent collectively of that total, in the

[32] First written submission of the Dominican Republic, paragraph 479.
[33] Panel report, *US – Steel*, paragraph 10.607.
[34] First written submission of the Dominican Republic, paragraphs 493 and 495.

period of investigation.[35] For example, that criterion was not applied for the purpose of excluding imports from Thailand, which are less than three per cent.[36]

46. Claims under Articles II:1(a) and II:1(b), second sentence, of the GATT: the provisional and definitive measures consist of duties or charges other than ordinary customs duties that are applied to imports of polypropylene fabric and bags.

47. Article II:1(b) prohibits the imposition of import duties and charges other than ordinary customs duties. Pursuant to the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, a surcharge other than an ordinary customs duty shall be inconsistent with Article II:1(b), second sentence, of the GATT unless that surcharge had been recorded by 15 April 1994 at the latest.

48. In the preliminary and final reports, the DEI undertook an evaluation of the most effective alternatives for the imposition of the measure at issue, in which the DEI explicitly affirmed that the purpose was to establish a "second tariff" in addition to the applicable tariff.[37] This intention to establish a duty different and distinguishable from the ordinary customs duty was confirmed at the time of establishment of the measures and their time-frame. In the final resolution, the Commission stated that, for those countries subject to "an MFN tariff higher than the percentage of the definitive safeguard measure … the said MFN tariff shall apply". The MFN tariff in the Dominican Republic is the ordinary customs duty applicable to imports that do not benefit from tariff preferences[38], while under the final resolution, the surcharge constitutes an alternative duty to the MFN tariff, and either the surcharge or the ordinary customs duty is applied, whichever is higher. As can be seen from the Customs Tariff of the Dominican Republic, that country does not maintain an ordinary customs duty possessing the modal quality of an alternative duty. It follows from this that the provisional and definitive measures impose a duty of a nature distinct from the ordinary customs duty applicable in the Dominican Republic.[39]

49. Pursuant to Articles 5, 6 and 7 of Tariff Reform Law No. 146-00 (which governs the application of tariffs in the Dominican Republic), ordinary customs duties or tariffs can only be modified by a legislative act, but not by administrative means.[40] Inasmuch as the provisional and definitive measures were not imposed in accordance with the procedure provided for in Dominican legislation for the imposition of ordinary customs duties, the provisional and definitive measures do not qualify as ordinary customs duties.

50. For all of the above reasons, the provisional and definitive measures qualify as other duties or charges within the meaning of Article II:1(b), second sentence, of the GATT. It should be mentioned additionally that the Dominican Republic did not record in its Schedule of Concessions the possibility of applying measures of this nature. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and, by implication, with Article II:1(a) of the GATT.

[35] Preliminary Resolution, paragraphs 50 and 51; Final Resolution, paragraphs 42 and 43.
[36] Preliminary Report, Annex I; Final Report, Annex I.
[37] Final Technical Report, page 97.
[38] Customs Tariff of the Dominican Republic, Exhibit CEGH-27.
[39] Preliminary Report, page 93; Final Report, page 97.
[40] Tariff Reform Law No. 146-00, Exhibit CEGH-22.

X. CONCLUSIONS AND REQUEST FOR RECOMMENDATIONS AND SUGGESTIONS

51. In addition to the request for findings and rulings contained in our first written submission[41], the complainants request the Panel to issue the following findings and rulings:

- The application of the provisional and definitive measures excluding imports from specific origins is inconsistent with Article I:1 of the GATT.

- The provisional and definitive measures constitute other duties and charges distinct from ordinary customs duties within the meaning of Article II:1(b), second sentence, of the GATT and grant less favourable treatment than that provided for in the Dominican Republic's Schedule of Concessions within the meaning of Article II:1(a) of the GATT, for which reason both measures are inconsistent with the provisions of the GATT.

52. Despite the fact that the complaints concerning Articles I and II of the GATT have been submitted as alternatives, the applicants request the Panel to rule on them even if it concludes that the measures at issue *are* safeguard measures. This is important given the possibility of an appeal for which the Appellate Body would need to have factual findings for the purpose of completing the legal analysis relevant to the case.

[41] First written submission of the complainants, paragraph 477.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the AS, in other words, all the rules duly cited by the complainants in the request to hold consultations[1], in the request for the establishment of a panel[2] and in their first written submission, do not apply to the measures at issue. This makes it impossible to evaluate the consistency of the measures contested with the disciplines cited.

2. The Dominican Republic wishes to reaffirm the reasons why the rules cited by the complainants do not apply on the basis of five arguments. Firstly, the applicability of Article XIX of the GATT and the AS depends on objective criteria that cannot be replaced by statements made by the Dominican authorities. Secondly, the measures at issue are not covered by the objective applicability criteria in Article XIX of the GATT and the AS. Thirdly, Article 11.1(a) of the AS does not cover action prior to the adoption of the measures contested. Fourthly, the measures at issue did not lead to suspension of Article 1:1. Fifthly, the measures at issue do not constitute suspension of the second sentence of Article II:1(b) of the GATT.

1. The applicability of Article XIX of the GATT and the AS is not defined on the basis of statements by Members

3. A large part of the arguments put forward by the complainants concerning the applicability of Article XIX of the GATT and the AS consisted of indicating that the measures at issue are the result of an investigation initiated, conducted and concluded by the Dominican Republic on the basis of Law No. 1-02[3] with the Dominican authorities having cited Article XIX of the GATT and several provisions of the AS.[4] The complaining parties also attach considerable weight to notifications to the WTO Committee on Safeguards.[5]

4. Nevertheless, as stated by the Appellate Body, an examination of applicability is an objective analysis of the content of the measures at issue, rather than on the basis of nominal aspects such as the statements made by the Dominican authorities.[6] If it is considered that the classification of a measure in national law or the intention of the authorities are decisive for the purposes of classifying a measure, as underlined by the European Union, this would mean that WTO Members could impose measures that comply with their obligations by describing them in a particular way.[7]

5. The legal basis for the measures at issue, Law No.1-02, provides in Article 73 that safeguard measures may consist of an increase in tariffs, in tariff quotas or maximum rates[8], making

[1] WT/DS415/1, WT/DS416/1, WT/DS417/1 and WT/DS418/1.
[2] WT/DS415/7, WT/DS416/7, WT/DS417/7 and WT/DS418/7.
[3] Exhibit RDO-11.
[4] *Idem*. paragraphs 43-74.
[5] *Idem*. paragraphs 75-82.
[6] Appellate Body Report, *US – Shrimp (Thailand)*, paragraph 241; Appellate Body Report, *US – Softwood Lumber IV*, paragraph 65; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87 to paragraph 87.
[7] See paragraph 10 of the Third Party Written Submission of the European Union.
[8] Above, note 23.

no reference to a suspension of obligations or the withdrawal or modification of concessions, which are the objective criteria for application of Article XIX of the GATT and the AS. Consequently, a safeguard adopted under Law No. 1-02 does not necessarily constitute a safeguard in terms of the GATT or the AS.

6. In the present case, as the Dominican Republic granted a tariff concession of 40 per cent for the products in question, it is free to impose a lower tariff, pursuant to Article II:1(a) of the GATT, as confirmed by the Appellate Body.[9] By adopting a safeguard measure pursuant to Law No. 1-02 that increased the tariff to 38 per cent, in GATT terms the measure consisted of an increase in the MFN tariff to below the bound level, a measure which the Dominican Republic was free to adopt. In definitive, the fact that the Dominican Republic's authorities adapted their conduct to the AS and to Article XIX of the GATT does not imply that the complainants can call the measures at issue into question in the light of those provisions.

7. Essentially, the Dominican Republic complied with a more onerous procedure than that imposed by the GATT. The complainants were aware of the nature of the measures and expressed doubts about the applicability of Article XIX of the GATT prior to the adoption of the provisional measure.[10] Nevertheless, they insisted on questioning the measures in the light of Article XIX of the GATT and the AS.

2. The measures issue do not fall within the scope of Article XIX of the GATT and the AS

8. The scope of the AS is defined in Article 1 thereof, which provides that this Agreement establishes rules for the application of safeguard measures "which shall be understood to mean those measures provided for in Article XIX of GATT …".[11] The material scope of Article XIX of the GATT is set out in paragraph 1(a) thereof.[12] The form of this paragraph is conditional, the first part describing a series of conditions that must be verified to enable the WTO Member in question to make use of the authorization defined in the last part of the paragraph, which provides that the Member *"shall be free, …, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession"*. If the course of action defined in the last part of Article XIX:1 of the GATT is not followed, there is no need to meet the conditions set out at the beginning of this provision, or to comply with the disciplines and procedural requirements in the remainder of Article XIX of the GATT.[13]

9. Article XIX:1(a) of the GATT may authorize the total or partial suspension of an obligation undertaken or the withdrawal or modification of a concession. The measures contested are based on Law No. 1-02 and consist of an increase in the MFN tariff up to a level lower than that bound. In other words, there was no suspension of any obligation or withdrawal or modification of any concession, so Article XIX of the GATT and the AS do not apply.

10. The context of Article XIX confirms the statement above. The Dominican Republic was entitled to adopt the measures at issue pursuant to Article II:1(a) of the GATT, so no obligation was suspended and there was no withdrawal or modification of any concession. If it is found that there

[9] Appellate Body Report, *Argentina – Textiles and Apparel*, paragraph 46.
[10] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, page 85. Exhibit RDO-9.
[11] AS, Article 1.
[12] Request by the Dominican Republic for a preliminary ruling, paragraph 37.
[13] *Idem*. paragraph 38.

must be compliance with the provisions in Article XIX of the GATT and the AS even if no concession is withdrawn or modified, and no obligation is suspended, Article XIX of the GATT and the AS would be distinct from the series of rights and disciplines laid down in the WTO Agreement, contrary to the criteria determined by the Appellate Body.[14] Considering a tariff increase up to a level that does not exceed the bound level to be a safeguard measure would make the GATT provisions that serve as basis meaningless.

11. Another relevant provision in this regard, Article 11.1(c) of the AS, provides that the Agreement does not apply to measures which a Member seeks to adopt, adopts or maintains in accordance with other provisions in the GATT 1994, other than Article XIX, and the multilateral trade agreements contained in Annex 1A, other than the AS, or in conformity with protocols, agreements or conventions concluded within the framework of the GATT 1994. This provision reaffirms the non-applicability of Article XIX of the GATT and the AS to the measures at issue, which are in accordance with Article II:1(a) of the GATT.

12. Moreover, Article 8.1 of the AS provides the following:

> *"A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure [...] to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 […]. To achieve this objective, the Members concerned may agree on adequate means of trade compensation ...".*

13. If no agreement is reached, Article 8.2 of the AS allows the exporting Members affected to suspend the application of concessions or other equivalent obligations under the GATT to the trade of the Member applying the safeguard. This once again confirms that only a measure that involves withdrawal, modification or suspension of an obligation or concession must comply with the disciplines imposed by Article XIX of the GATT and the AS. If this is not the case, WTO Members may have the right to compensation for action that may be freely adopted.

14. The object and purpose of Article XIX of the GATT and the AS, which have been described by the Appellate Body as "to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members"[15], also confirm this interpretation. The object and purpose have been confirmed by the history of the Uruguay Round negotiations, where the function of safeguard clauses was described as "*offering certain possibilities for easing contracted obligations, they encourage importing countries to enter into commitments which would otherwise be of unconditional rigidity*".[16]

15. The history of negotiations reaffirms the interpretation described. For illustrative purposes, statements such as the following can be taken into account: "*GATT safeguard clauses permit the application […] of measures not otherwise permitted under the rules*"[17] or "*the scope of the issue to be negotiated in the Negotiating Group on Safeguards […] should be confined to the rules and disciplines applicable for the withdrawal of GATT concessions*" and "*Since safeguard measures*

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[14] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 81.
[15] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 94.
[16] Submission by Switzerland to the Negotiating Group on Safeguards, 14 July 1988, MTN/GNG/NG9/W/20.
[17] Note by the Secretariat of the Negotiating Group on Safeguards, 7 April 1987, MTN/GNG/NG9/W/1.

invariably imply the withdrawal of GATT concessions ...".[18] Moreover, the Secretariat, when explaining the history behind the drafting of Article XIX and its role in the GATT, indicated that "*Article XIX is one of a number of safeguard provisions in the General Agreement which permit contracting parties, subject to specific conditions, to re-impose trade barriers otherwise prohibited by the Agreement. It permits the imposition of tariffs and quantitative restrictions otherwise prohibited by the provisions of Articles II and XI …*".[19]

16. In the light of the above, the Dominican Republic also expresses its disagreement with the complainants' argument that the use of the word "*podrá*" in the Spanish text of Article XIX:1(a) of the GATT ("shall be free" in the English text) implies that in the terms of the GATT or the AS a safeguard measure may consist of a measure that does not suspend a concession or obligation.[20] In addition to contradicting the context, object and purpose and the history of the negotiations and drafting of Article XIX of the GATT and the AS, it also relies on an incorrect reading of the text, ignoring the conditional structure of Article XIX:1(a) of the GATT, making the disciplines and conditions set out therein subject to the adoption of a measure consisting of a suspension, modification or withdrawal of an obligation or concession.

17. This can be confirmed in the light of the Panel Report in *Chile – Price Band System*. The measures at issue were specific duties which, depending on the circumstances, exceeded Chile's bound tariff. Chile claimed that, as the price band system exceeded the bound tariff, it constituted a safeguard. Consequently, the duty applied was considered to be a safeguard in the terms of Article XIX of the GATT solely to the extent that it exceeded the bound rate.[21]

3. The applicability of Article XIX of the GATT and the AS to the investigation prior to the adoption of the measures at issue

18. According to the complainants, the formula "*tratar de adoptar medidas*" in the Spanish text of Article 11.1(a) of the AS ("seek any … action" in the English text) includes the intention or the steps taken towards the specific act of adopting measures such as those in Article XIX of the GATT. The investigation prior to the adoption of the provisional and definitive measures would constitute such an act and therefore Article XIX of the GATT and the AS would be applicable.[22]

19. The complainants propose applying the AS to an investigation, even when the ensuing measures do not fall within the scope of these provisions, without making this possibility subject to any criterion. A more logical interpretation would be to limit the time-frame for application of Article 11.1(a) and not to apply it when it is clear that the Member concerned did not adopt or seek to adopt a safeguard measure in accordance with Article XIX of the GATT. In fact, although it might be considered that in the first stages of the investigation the Dominican Republic *sought* to adopt a safeguard measure in accordance with the provisions in Article XIX of the GATT, such a statement is no longer possible after the adoption of the definitive measure in October 2010.

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[18] Communication by the Nordic Countries to the Negotiating Group on Safeguards, 30 May 1988, MTN/GNG/NG9/W/16.

[19] Background note by the Secretariat of the Negotiating Group on Safeguards, 16 September 1987, MTN/GNG/NG9/W/17.

[20] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 95.

[21] Panel Report, *Chile – Price Band System*, paragraph 7.109.

[22] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraphs 86-91.

20. Furthermore, Article 11.1(a) of the AS has to be read in conjunction with Article 11.1(c), whose relevant text provides that: "*This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX* …". The use of the conjunction "or" means the AS does not apply to measures adopted pursuant to another provision of the GATT, namely, Article II:1(a).

21. If the line of reasoning put forward by the complainants is followed, the only plausible interpretation in order to avoid the contradictions that arise from removing from the investigation the measures adopted as a result of it, would be to identify the obligations in the AS which specifically apply to the investigation. The complainants, however, have not indicated what these obligations are, which they cite with reference to the stage of the investigation, and have simply indicated that they "also question the way in which the notification and consultation procedure were conducted …".[23]

4. The alleged suspension of Article II:1(b) of the GATT

22. The complainants contend that the measures suspend the second sentence of Article II:1(b) of the GATT as the tariff constitutes a duty other than ordinary customs duty. The measures would therefore result in a safeguard measure within the meaning of Article XIX of the GATT.[24] According to Dominican legislation, however, a safeguard may be in the form of three possible measures: an increase in tariffs, tariff quotas, or maximum rates.[25] By providing for an *increase* in already-existing tariffs, the measure constitutes an increase in ordinary customs duty and not a separate duty.

23. Furthermore, the measures at issue replace the MFN tariff normally applicable. If the duty was distinct from ordinary customs duty, there would be no such replacement but, as is the case for anti-dumping duties or countervailing measures, it would be applied in addition to the duty normally applicable. The following statement by the Appellate Body in *India – Additional Import Duties* is relevant: "*Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates*".[26] (emphasis added)

5. The alleged suspension of Article I:1 of the GATT

24. The complainants stated that the exclusion of Mexico, Panama, Colombia and Indonesia from the measures at issue represents suspension of Article I:1 of the GATT, which the Dominican Republic justified by citing Article 9:1 of the AS.[27] This would mean that the measures at issue constitute safeguards in terms of Article XIX of the GATT and the AS.

25. This argument has two flaws. Firstly, safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT. This can be confirmed by Article 2.2 of the AS. The history of negotiations contradicts the interpretation that a safeguard measure may

[23] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 91.
[24] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 111.
[25] Law No. 1-02 on Unfair Trade Practices and Safeguard Measures, Article 73.
[26] Appellate Body Report, *India – Additional Import Duties*, paragraph 159.
[27] Response by Costa Rica, El Salvador, Guatemala and Honduras to the request by the Dominican Republic for a preliminary ruling, 3 May 2011, paragraph 110.

consist of the suspension of Article I:1 of the GATT. During the Uruguay Round, it was decided to incorporate Article 2.2 in order to prevent the selective application of safeguards.[28]

26. Secondly, Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure as an exception to Article 2.2 of the AS. An exception to Article 2:2 of the AS can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists, which is not the case.

[28] See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991, section M, paragraphs 5 and 9.

ANNEX C-3

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Members of the Panel, members of the Secretariat, representatives of the Dominican Republic:

1. Our closing statement will be very brief. Our complaints and arguments are clear, and we merely wish to make four very specific comments on subjects that were addressed during the last two days of our discussions.

2. Firstly, on the issue of the interpretation of the "obligations" in Article XIX:1(a) of the GATT, it is important to note that the last phrase draws a distinction between "to suspend the obligation in whole or in part" in respect of such product, and "to withdraw or modify the concession". The term "obligation" clearly means something different from "concession", and consequently, the Dominican Republic's argument that the "obligation" involves only that relating to "tariff concessions" is without foundation. In fact, the Dominican Republic's interpretation would render the term "obligation" as it appears in the last phrase of Article XIX:1(a) of the GATT redundant and meaningless. Our understanding, which is shared by some of the third parties to this dispute, is that the scope of the term obligation goes beyond the concept of "concession". Furthermore, the Dominican Republic's interpretation is contrary to the principle of effectiveness in the interpretation of treaties.

3. Secondly, the complainants would also like to make it clear that they are not claiming violation of any regional trade agreement. As indicated in our request for the establishment of a panel, our complaints concern only violations of covered agreements.

4. As we have stated since the beginning of this dispute and as understood by the Dominican Republic up until it submitted its statement of preliminary objections, our position has been, and continues to be, that the measures at issue are safeguard measures within the meaning of Article XIX of the GATT and the AS.

5. Thirdly, the Dominican Republic stated yesterday that the measures at issue were simply a "tariff increase". It also stated that its authorities had taken the more difficult path in adopting the alleged tariff increase, since they could have done so without conducting an investigation. The truth, as we see it, is that the only reasonable explanation why the Dominican Republic decided, at the time, to apply safeguard measures under Article XIX of the GATT and the AS rather than a simple tariff increase, was that a simple tariff increase would not have enabled it to exclude the Central American countries from the scope of application of those measures in view of the existence of bilateral preferential obligations. We trust that this clarification will dispel any doubt with respect to the Dominican Republic.

6. Although the Dominican Republic could have adopted a tariff increase without conducting a safeguard investigation, the fact remains that this is not the option that it chose. Instead, it took the decision to initiate an investigation and adopt safeguard measures. The Dominican Republic cannot rid itself of the general obligations laid down in the AS and Article XIX while at the same time using Article 9.1 of the AS to justify the discriminatory application of those safeguards.

7. Indeed, if the Dominican Republic had opted for a simple tariff increase that did not exceed the WTO bound rate, we would not be here today in these WTO dispute settlement proceedings. As

we have repeatedly argued, the Dominican Republic is denying the obvious: that it conducted a safeguard investigation, following which it imposed a safeguard measure. To accept that a Member can impose safeguard measures and then describe them as something different for the purposes of a dispute settlement procedure would have serious systemic implications for the WTO. This is yet another reason why the Dominican Republic cannot be allowed at this point to deny its obligations under Article XIX and the AS.

8. Finally, we would like to note that in paragraph 47 of its First Oral Statement, the Dominican Republic confirmed that the safeguard measure was a measure other than ordinary customs duties: "as long as the increased tariff is in force, the MFN tariff *normally applied* is not in force" (emphasis added). To quote a legal proverb, "Where the party confesses, no proof is needed".

Thank you.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chair, members of the Panel:

1. The Dominican Republic welcomes your efforts and questions yesterday and today at this first substantive meeting, in the hope that they will lead to a positive settlement of this dispute.

2. The Dominican Republic wishes to take the opportunity of this meeting to clarify certain aspects of the safeguard measures adopted on the basis of Law No. 1-02, as a consequence of previous exchanges of views.

3. The Dominican Republic's tariffs are defined in Law No. 146-00, which specifies that tariffs may only be determined through legislative channels. The measures that are the subject of this dispute were adopted on the basis of Law No. 1-02 on Unfair Trade Practices and Safeguard Measures.[1] In Title IV on "Safeguard measures", this Law defines safeguard measures in Article 57 as "those intended to regulate imports temporarily … [with] the objective of preventing or remedying serious injury to a domestic industry and facilitating adjustment for domestic producers". Pursuant to Article 73, the measures in question may consist of a temporary increase in tariffs.

4. From the foregoing statement, it follows that, on the one hand, tariffs must have a legal basis in a law, in this particular case Law No. 146-00. On the other hand, Law No. 1-02 allows a temporary increase in the tariffs determined therein subject to the adoption of a safeguard measure, as defined in the Law.

5. In Dominican law, therefore, the same rules apply to any tariff increase resulting from a procedure conducted pursuant to Law No. 1-02. In other words, there is no distinction between the way in which a domestic safeguard measure that does not lower the bound tariff is adopted and the adoption of a measure that exceeds this tariff and can be considered a safeguard in terms of Article XIX of the GATT and the Agreement on Safeguards.

6. The fact of following the procedure defined in Law No. 1-02 and citing the provisions of the Agreement on Safeguards in no way implies any intention on the Dominican Republic's part to make measures that do not lower the bound tariff subject to Article XIX of the GATT and the Agreement on Safeguards. In fact, it would be unnecessarily complicated to follow different procedures depending on the type of safeguard in question.

7. The measures at issue consist of the adoption of a safeguard pursuant to Law No. 1-02. As this measure does not consist of an increase above the Dominican Republic's bound tariff in the WTO however, as has been shown, the measure does not suspend any obligation, or modify or withdraw any concession in terms of Article XIX. Certainly, according to WTO law, the Dominican Republic could have adopted the measures at issue without complying with the onerous obligations imposed by the Agreement on Safeguards. But by adopting the measures at issue pursuant to Law No. 1-02 and as this domestic Law reflects the Agreement on Safeguards, the adoption procedure followed the Agreement on Safeguards. As the Dominican Republic has already stated, this does not imply that

[1] Exhibit RDO-11.

the domestic safeguard measures are subject to the disciplines of Article XIX of the GATT and the Agreement on Safeguards.

8. To summarize, the complainants contend that, solely for the reason that the measures at issue have the title "safeguard" and that the procedure in Law No. 1-02 was followed, they can question these safeguard measures before the WTO Dispute Settlement Body.

9. This position is not acceptable. The Dominican Republic notes that many free trade agreements have ad hoc safeguard mechanisms. The complainants' position would mean that any bilateral safeguard would be subject to examination by the WTO Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards.

10. To give just one example, the second paragraph of Article 8.02(2) of the Dominican Republic-Central America Free Trade Agreement provides that:

> *For the application of bilateral safeguard measures, the competent authorities shall conform to the provisions in this chapter and, supplementarily, to Article XIX of the GATT 1994, the Agreement on Safeguards of the World Trade Organization and the respective domestic legislation.*

11. How can it be found, in the light of this provision, that any bilateral safeguard adopted pursuant to the Dominican Republic-Central America Free Trade Agreement would be subject to examination by the Dispute Settlement Body in the light of Article XIX of the GATT and the Agreement on Safeguards? A reply in the affirmative would be absurd. Nevertheless, this is the conclusion reached using the logic put forward by the complainants in their response to the request by the Dominican Republic for a preliminary ruling and in their oral statement made at this first substantive meeting.

12. The complainants have indicated that adopting a safeguard measure under Law No. 1-02 when such a measure does not lower the tariff in the WTO schedule of bindings would be contrary to the principle of good faith and could have harmful systemic implications.

13. The Dominican Republic does not understand why the complainants consider it reprehensible to increase a tariff temporarily under a safeguard procedure in its domestic law when the same increase could be effected under a simpler procedure and with fewer guarantees for the parties involved. The guarantees afforded are obvious from the broad participation of the complainants in the procedure prior to the adoption of the measure, when they were informed in detail of all aspects of the proposed measure, including the fact that it did not exceed the bound tariff. It cannot, therefore, be considered that the Dominican Republic's conduct was unexpected or inconsistent with the principle of good faith.

14. The Dominican Republic thinks it relevant to refer to the record of the hearing held at the headquarters of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures on 12 May 2010. At this hearing, the representative of the Government of Honduras took the floor to indicate that:

> *"[T]he amount of the provisional measure adopted is 38.5 per cent ad valorem, while the Dominican Republic's bound rate for the products in question is 40 per cent*

> *ad valorem, so it cannot be claimed that there is any reason to turn to a safeguard measure …"*[2] (emphasis added)

15. This observation was preceded by other comments prior to the adoption of the provisional measure.[3] In other words, not only were the complainants informed that the measure would not exceed the bound tariff, but the complainants themselves in their statements expressed serious doubts about the applicability of Article XIX of the GATT. Today, however, the complainants insist on a point of view that is contrary to these statements made throughout the procedure for adoption of the measures which they are now questioning in the light of rules which they themselves declared to be irrelevant.

16. With regard to the question of whether a safeguard measure in terms of Article XIX of the GATT may consist of suspension of Article I:1 of the GATT, the Dominican Republic would like to refer to paragraphs 51 and 52 of its oral statement at the beginning of this first substantive meeting.

> *"51. … [T]he safeguard measures in terms of Article XIX of the GATT do not allow suspension of Article I:1 of the GATT can be confirmed by Article 2.2 of the Agreement on Safeguards, which provides: 'Safeguard measures shall be applied to a product being imported irrespective of its source.'.*
>
> *52. … Article 9.1 does not constitute a generic exception clause to Article I:1 of the GATT but provides a discipline for the application of a safeguard measure. More accurately, it constitutes an exception to Article 2.2 of the Agreement on Safeguards. An exception to Article 2.2 of the Agreement on Safeguards can only logically be cited when a safeguard measure in terms of Article 1 of this Agreement actually exists …"*

17. Mr Chair, members of the Panel, before concluding this oral statement, the Dominican Republic would like to refer to one aspect that has arisen during this substantive meeting. Article 72 of Law No. 1-02 provides for the exemption of developing countries from safeguard measures adopted pursuant to the Law, thereby reflecting the provision in Article 9.1 of the Agreement on Safeguards. As has become apparent during this meeting, however, the definition in Article XIX of the GATT does not correspond to the possible forms which a safeguard measure may take in the light of Article 73 of Law No. 1-02. It is thus possible that situations may arise in which certain WTO Members are exempt from a safeguard measure adopted pursuant to Law No. 1-02, even though such exemption may not be based on Article 9.1 of the Agreement on Safeguards because the safeguard measure is not one of the measures covered by Article XIX of the GATT. The Dominican Republic is aware that exempting developing countries from a domestic safeguard measure may be problematic in specific cases in which the measure adopted does not constitute a safeguard measure in the terms of Article XIX of the GATT.

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[2] Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Final Technical Report, Exhibit RDO-10, page 179.

[3] See, for example, Regulatory Commission on Unfair Trade Practices and Safeguard Measures, Preliminary Technical Report, Exhibit RDO-9, page 85.

18. In this connection, it might be desirable to do away with the granting of an exemption when the domestic safeguard measure is not covered by Article XIX of the GATT. This is not a question that can be resolved in the present dispute, however, inasmuch as Article I:1 of the GATT is not part of the Panel's terms of reference.

19. Mr Chair, members of the Panel, I thus conclude my oral statement. The Dominican Republic remains at your disposal to respond to any questions that might arise.

ANNEX D

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

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF COLOMBIA

I. THE DETERMINATION OF THE IMPORTED PRODUCT AND THE DOMESTIC PRODUCT IN THE AGREEMENT ON SAFEGUARDS

1. The present case has given rise to a discussion of the rules that should be applied in determining the product investigated in a safeguard process, taking into account the relevance of that determination to the national authority's analysis, under the Agreement on Safeguards, of the similarity between the imported product and the like or directly competitive product manufactured by the domestic industry.

2. In its first written submission, the complainant argues that the Dominican Republic: (i) failed to determine correctly that the imported products and the domestic products were like or directly competitive[1]; and (ii) wrongly interpreted the concept of "producers" in the Agreement on Safeguards, leading to the exclusion of domestic producers of directly competitive products.[2] Thus, the complainant concludes that the concept of "domestic industry" in Article 4.1(c) of the Agreement on Safeguards was not properly established.

3. Colombia proposes to comment on the discussion concerning whether the inclusion of tubular fabric and polypropylene bags in a single category of products under investigation is consistent with the obligations of the Dominican Republic under the Agreement on Safeguards, especially with respect to the concept of "domestic industry" and the means of identifying it.

4. Colombia agrees with the statement by the Dominican Republic that there are no precedents in panel or Appellate Body proceedings concerning how the product under investigation in a safeguards investigation should be defined and that there are no express rules relating to this matter. However, it does not agree that this is a question unrelated to the provisions of the Agreement on Safeguards and that, consequently, there are no clear criteria for determining how this finding should be made.

5. The determination of the product under consideration or investigation is a fundamental part of the process of properly identifying the domestic industry in a safeguards investigation. This decision establishes the context for determining where the "like or directly competitive products" are to be situated, while forming the basis of the analysis for identifying the domestic producers that make up the domestic industry and the data that will be needed for the analysis of injury.

6. Colombia proposes that, despite the term "product investigated" not being used in the Agreement on Safeguards, a systematic interpretation of the Agreement under Article 31 of the Vienna Convention yields sufficient evidence to establish what product under investigation should be taken to mean and how that product should be identified in a safeguards investigation.

7. In this respect, an exegetical reading of the second paragraph of the preamble and Article 2.1 of the Agreement on Safeguards, consistent with Article 31 of the Vienna Convention, would suggest

[1] First written submission of the complainants, paragraphs 77-80.
[2] First written submission of the complainants, paragraphs 160-163.

that an investigation can only be conducted into "a product" and not several. However, Colombia believes that it can be argued that the product under investigation may be composed of several products, provided that it can be shown that they are like or directly competitive. This conclusion follows from the provisions of Article 4.1(c) of the Agreement on Safeguards.

8. Article 4.1(c) of the Agreement on Safeguards, which defines domestic industry, reads as follows:

> "[…] a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". (emphasis added)

9. Although the Article in question relates to the determination of the domestic industry and to how the imported products should be compared *vis-à-vis* the domestic products, for Colombia this rule also applies to the determination of the product under investigation, because of the close relationship between the definition of domestic industry and the product investigated. If it is not accepted that the products investigated should be, at least, like or directly competitive, this finding could not be made with respect to domestic products, since it would be impossible to compare dissimilar categories of products.

10. Insofar as the standard of Article 4.1(c) of the Agreement on Safeguards requires that the domestic and imported products be like or directly competitive, if the "product investigated" contained products which in themselves were not, or was composed of several individual products which needed to be considered individually, it would be impossible to prove that there was a parameter for defining such likeness or direct competitiveness. Thus, if the definition of the product investigated grouped together products which were not like or directly competitive, it would not be possible to determine the domestic industry within the investigation.

11. A similar argument was upheld in an analogous situation by the Panel in *United States – Steel Safeguards*, when the relationship between a suitable definition of the imported products and the causal link envisaged in Article 4.2(b) of the Agreement on Safeguards was analysed. In this connection, the panel stated that:

> "In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken."[3]

12. Colombia considers that this reasoning is also applicable to Article 4.1(c) of the Agreement on Safeguards inasmuch as the definition of the product investigated could prevent the proper identification of the domestic industry, a situation which would necessarily lead to a violation of the above-mentioned Article.

13. For this reason, the criterion for establishing whether two different products can be regarded as a single product investigated means that there must, at least, be a relationship of likeness or direct

[3] Panel Report in *United States – Steel Safeguards*, paragraph 10.416.

competitiveness between them. Otherwise it would be impossible to comply with the requirement for the determination of the domestic industry in Article 4.1(c) of the Agreement on Safeguards.

14. Colombia notes that the Dominican Republic does not mention any criterion for establishing how several products, in this case tubular fabric and polypropylene bags, could be included in a single category. Apparently, this finding was based solely on considerations of a customs nature, which, in Colombia's opinion, is not a reasonable and sufficient basis for making such a determination. In the words of the last sentence of Article 3.1 of the Agreement on Safeguards, the identification of the product investigated by the Dominican Republic would not be a finding or reasoned conclusion.

15. To accept that products investigated can be grouped together without any justification of their likeness or competitiveness would be contrary to the principle of effectiveness in the interpretation of treaties derived from Article 31 of the Vienna Convention[4], insofar as it would allow virtually any kind of products to be included as a single whole in a safeguard investigation, regardless of the relationship between them. Under this interpretation, products as different as alcoholic beverages and dairy products could be included in a single investigation since, according to the Dominican Republic, there are no rules applicable to this situation, a conclusion that is manifestly absurd and contrary to the Agreement on Safeguards.

16. Colombia therefore concludes that the grouping of tubular fabric and polypropylene bags in a single category of products under investigation is inconsistent with the obligations under Articles 4.1(c), 3.1, last sentence, and 4.2(c) of the AS.

II. THE REQUIREMENT OF "UNFORESEEN DEVELOPMENTS" UNDER ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

17. On this point, the complainants allege that the Dominican Republic has not demonstrated the existence of unforeseen developments insofar as it has not given a reasonable explanation of how (i) the entry into force of DR-CAFTA, (ii) the global financial crisis and (iii) China's accession to the WTO constitute unforeseen developments that would justify the imposition of a safeguard. For the complainants, the reasons given by the Dominican Republic's authorities for treating these events as unforeseen developments are inadequate.

18. In Colombia's opinion, the Panel should take into account the fact that, although there are certain requirements that every Member of the WTO must meet to prove this element, the standard cannot be construed in such a way as to make it de facto impossible to recognize these developments, by laying down requirements that are difficult to meet in practice.

19. Colombia agrees with the statement by the Dominican Republic to the effect that the rule for the application of the concept of "unforeseeability" is not clear and, on the contrary, makes it difficult for any Member of the WTO to use the safeguard measures for which the Agreement on Safeguards provides. In *Argentina – Footwear*, the Appellate Body defined the concept of unforeseen developments as "unexpected" or "unforeseeable".[5] Likewise, the Panel in *Argentina – Preserved Peaches* stated that: "*The text of Article XIX:1(a) cannot support an interpretation that would equate*

[4] In the following cases the Appellate Body has referred to the application of the principle of effectiveness in the interpretation of treaties in settling disputes relating to the AS: *Korea – Dairy*, paragraphs 80-82, and *Argentina – Footwear*, paragraph 81.

[5] Appellate Body Report in *Argentina – Footwear*, paragraph 91.

increased quantities of imports with unforeseen developments."[6] However, later in its report the same Panel considered that "*a statement that the increase in imports, or the way in which they were being imported, was unforeseen does not constitute a demonstration as a matter of fact of the existence of unforeseen developments*".[7]

20. In recent years, the Appellate Body has ruled on several occasions on how the standard relating to the existence of unforeseen developments should be met. Both these decisions and those already mentioned have created some uncertainty as to how States should demonstrate the existence of this situation.

21. In this connection, Colombia considers it relevant to clarify the concept of unforeseen developments in such a way as to enable it to be applied clearly and effectively, with a view to allowing the application of safeguard measures under the conditions envisaged in Article XIX of the GATT and the Agreement on Safeguards. In Colombia's view, as long as this standard on unforeseen developments perpetuates the uncertainty with regard to its application, it will be very difficult to show that situations such as those submitted by the Dominican Republic can be regarded as meeting the aforementioned requirement.

22. In Colombia's opinion, given the lack of clarity in this respect, the Panel's examination cannot be *de novo* or involve a judgment that goes beyond the elements reasonably available to the Member at the time the disputed measure was applied. Colombia takes the view that there is simply no support in either the Agreement on Safeguards or Article XIX of the GATT for the opposite course of action which, moreover, could potentially infringe essential legal principles of due process and substantive justice.

23. These comments are without prejudice to Colombia's arguments as set out in its submission to the Panel.

[6] Appellate Body Report in *Argentina – Preserved Peaches*, paragraph 7.18.
[7] *Ibid*., paragraph 7.24.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES

1. Mr Chairman and members of the Panel, it is a pleasure to appear before you today to present the views of the United States as a third party in these proceedings. The written submission of the United States addressed the submissions of the complaining parties, and we will not repeat those points here. Today, the United States will address the Dominican Republic's written submissions, including its request for a preliminary ruling as to whether the *Agreement on Safeguards* ("Safeguards Agreement") and Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") apply to the measures at issue in this proceeding.

Whether the Safeguards Agreement Is Applicable

2. The first issue we would like to discuss today is the applicability of the Safeguards Agreement to the measures at issue.

3. Specifically, the Dominican Republic argues that the Safeguards Agreement does not apply because the increased tariff rates associated with the measures do not exceed the relevant tariff bindings of the Dominican Republic for the product or products in question – i.e. polypropylene bags and tubular fabric.[1]

4. Although the United States takes no position on the consistency of the measures at issue with the WTO, it may be relevant to the question of the applicability of the Safeguards Agreement that the Dominican Republic apparently considered that the measures were safeguards when it imposed them, including notifying them as safeguard measures to the Committee on Safeguards.[2] It would also appear as a general matter that it would be relevant as to exactly what the measures at issue entail. For example, the Dominican Republic represented that it relied on at least one of the provisions of the Safeguards Agreement in structuring its measures - it relied on Article 9.1 of the Safeguards Agreement as a basis for not applying the increased duties to certain Members.

5. As a result, the Dominican Republic apparently relied on the measures as safeguards to justify not applying its duties on the products at issue in a most-favoured-nation manner pursuant to Article I:1 of the GATT 1994 when it exempted imports from certain developing countries (i.e. Mexico, Panama, Colombia, and Indonesia) from the application of the measures. As a result, imports of polypropylene bags and tubular fabric from these countries are treated more favourably than imports from other Members.

6. Accordingly, the question of whether the Dominican Republic needed to suspend its tariff concessions on the products at issue in order to impose the measures at issue is only part of the relevant legal analysis.

Definition of "Producers" Under Article 4.1(c) of the Safeguards Agreement

7. In addition, the United States would like to address the Dominican Republic's "reservation" of the "right" to apply a minimum transformation or value-added test (at paragraph 251) to define

[1] Dominican Republic's request for a preliminary ruling (18 April 2011).
[2] G/SG/N/8/DOM/1/Suppl.2, G/SG/N/10/DOM/1, G/SG/N/11/DOM/1/Suppl.1 (18 October 2010).

producers for purposes of Article 4.1(c) of the Safeguards Agreement. According to the Dominican Republic, it reserves the right to exclude entities, such as downstream companies that provide low value-added finishing services, from the universe of producers of like or directly competitive products and, therefore, from the domestic industry.

8. It does not appear that the Dominican Republic applied a minimum transformation or value-added test in determining producers for purposes of the measures at issue in this proceeding. As a legal matter, the Panel should not reach hypothetical issues that do not arise from the actual determination of the competent authority that is at issue in a dispute. Such issues would not form part of the "matter" the Dispute Settlement Body has charged the Panel with examining and would therefore be outside the Panel's terms of reference under Article 7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

9. In any event, the United States notes that there is nothing in the Safeguards Agreement that prohibits the application of a minimum transformation or value-added test for purposes of defining producers under Article 4.1(c) of the Safeguards Agreement.

Conclusion

10. This concludes our statement. Thank you again for this opportunity to express our views.

ANNEX D-3

ORAL STATEMENT OF PANAMA

Mr Chairman, members of the Panel:

1. As a third party, Panama welcomes this opportunity to give the reasons why it considers the safeguard measures adopted by the Dominican Republic, which are the subject of these proceedings, to be inconsistent with GATT Article XIX and the WTO Agreement on Safeguards (AS).

2. Panama is of the view that this Panel will reach the same conclusion when it analyses the Dominican Republic's actions within the context of the national investigation procedure and the multilateral notification and consultation procedures established in Articles 8.1, 12.1 and 12.3 of the AS.

3. Panama believes that the investigation underlying the measures adopted by the Dominican Republic's Investigating Authority was flawed in its determinations with regard to: (i) determination of the domestic industry; (ii) establishment of the existence of unforeseen developments that may have caused injury to the domestic industry; (iii) determination regarding the increase in imports; (iv) determination of injury; and (v) the causal link between imports and injury. These determinations are not based on adequate and reasoned findings or on a detailed analysis of the case, in accordance with Articles 3.1 and 4.2(c) and the substantive rules of the AS.

4. The lack of substantiation for these elements, which are vital for an action under the AS, has been argued extensively in these proceedings by the complaining parties and now by at least one of the third parties. We recall, for instance, the arguments put forward by the complainants in their first written submission (*see paragraphs 73 et seq.*). Therefore, as you requested, Mr Chairman, and to save time, we will refer to only three points concerning the Dominican Republic's violations within the framework of the AS and GATT Article XIX.

5. First, Panama reiterates its view that the Dominican Republic did not give timely notice or hold prior consultations with those Members having a substantial interest in the measure, as provided for in Article 12.3 of the AS and Article XIX:2 of the GATT; nor did it provide opportunities to obtain an adequate means of trade compensation for those Members, as established in Article 8.1 of the AS and Article XIX:2 of the GATT. We elaborate on this point in our first written submission, but feel it is important to reiterate it orally (see *First Submission of Panama, paragraph 14*).

6. Second, the Dominican Republic claims that GATT Article XIX and the AS are not applicable to the provisional and definitive measures adopted (see *First written submission of the Dominican Republic, paragraph 90*). In Panama's view, it is clear that the Investigating Authority of the Dominican Republic conducted the investigation and adopted the measures at issue under Article XIX of the GATT and the AS. This is shown by the fact that, when it excluded imports from Panama from the scope of the measure, the Dominican Republic cited Article 9.1 of the AS (see *Preliminary Resolution, fourth article, as amended by Preliminary Amending Resolution; Final Resolution, fourth article; CEGH-5 and 6*). Panama agrees with the Dominican Republic that Article 9.1 of the AS provides justification under WTO law for having excluded imports from Panama from the application of this measure.

7. Moreover, the Dominican Republic notified the investigation and the provisional and definitive measures to the WTO under Article 12 of the AS. It is therefore Panama's understanding that GATT Article XIX and the AS do indeed apply to the present proceedings, as affirmed by the Dominican Republic in its own statements in support of its action (*see notifications of the measure by the Dominican Republic, CEGH-18 to 21*).

8. Third, and lastly, Panama disagrees with the Dominican Republic's preliminary objection to this Panel's terms of reference. We understand that the Dominican Republic objects to the complainants having questioned the provisional and definitive measures in the light of GATT Article XIX, the AS, GATT Articles I:1 and II:1(a) and the second sentence of GATT Article II:1(b), and other issues relating to the investigation, notification and consultations in respect of the case (*First Written Submission of the Dominican Republic, paragraphs 86 and 87*). Panama participated as an associated third party in the consultation meeting and, while safeguarding the confidentiality of these consultations, believes that all the measures or complaints set forth in the requests for the establishment of the Panel reasonably reflect the requests for consultations and the developments that took place at the consultation meeting.

9. Panama understands that the Members of this Organization have the right to adopt measures to safeguard their domestic industry. These measures must, however, adhere to the legal principles and processes embodied in the agreements signed by the Members, as in the case of the AS, which is our current focus. Panama is concerned that the safeguard measure adopted by the Dominican Republic is inconsistent with the provisions and procedures established in the AS and the GATT. We trust that the Panel will reach the same conclusion, and that it will recommend that the Dominican Republic withdraw the measures immediately.

ANNEX D-4

ORAL STATEMENT OF TURKEY

Mr Chairman and members of the Panel:

1. Turkey welcomes this opportunity to present its views in this proceeding. I will summarize Turkey's position on the subject, to the extent possible, by refraining from repeating details presented in our written submission.

2. Although the dispute covers many issues, Turkey would like to focus on some major subjects and it is not the intention to present an opinion on the specific factual context of this dispute and takes no position whatsoever as to the defence and allegations presented by the parties on whether the specific measure at issue is inconsistent with the subject provisions of the WTO Agreements.

3. Turkey hereby wishes to contribute by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on Safeguards.

4. As it is known, Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a Member to apply a safeguard measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source. In other words, safeguard measures are in principle imposed on an MFN basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

5. On the other hand, Article 9.1 of the Agreement on Safeguards sets forth that the safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. Turkey's "developing country status" has been recognized by Member States, including the Dominican Republic, and export products from Turkey have been excluded from measures in safeguard investigations.

6. Turkey considers that the term "shall" which is enclosed in Article 9.1 of the Agreement on Safeguards provides an obligation for Members to apply the special and differential treatment to all developing countries that meet the conditions.

7. In Turkey's view, in the case where a developing country's export of the product at issue to the country applying the measure is 0 per cent, the applicatory country carries the obligation to include that developing country in the list of countries exempt from the scope of the safeguard measure. In this context, having in mind the fact that Turkey has no share in the Dominican Republic's imports in question; the list of the developing countries, which are exempted from the imposition of the safeguard measure in this case, should include Turkey, as well.

8. Turkey wishes to thank the Panel for this opportunity to submit its views during this hearing. Turkey looks forward to answering any questions that Panel may have.

Thank you, Mr Chairman.

ANNEX D-5

ORAL STATEMENT OF THE EUROPEAN UNION

Mr Chairman, distinguished members of the Panel:

I. INTRODUCTION

1. The EU makes this third party oral statement because of its systemic interest in the correct interpretation of Article XIX of the *GATT 1994* and the *Agreement on Safeguards*. The EU respectfully requests this Panel to take into account the observations already made in our Third Party Written Submission when making findings in this case. Today, while not repeating those observations, the EU will recall some of them and will make some additional remarks in view of the comments made by other third parties.

II. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

2. The first issue the EU would like to recall is the applicability of the *Agreement on Safeguards* in the present case.

3. In the EU's view, Article 1 of the *Agreement on Safeguards* defines its scope by reference to the measures "provided for in Article XIX of the GATT 1994". Article XIX of the *GATT 1994* authorizes WTO Members to suspend the obligations incurred under that agreement provided that certain conditions are met. In this respect, it appears that the nature of a safeguard measure under Article XIX of the *GATT 1994* is of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it will not be considered as a safeguard measure pursuant to Article XIX of the *GATT 1994* and, consequently, will not fall under the *Agreement on Safeguards*.

4. Indeed, the EU observes that several provisions of the *Agreement on Safeguards*[1] make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

5. In any event, as noted in our written submission, this does not necessarily imply that the tariff measure at issue in this dispute falls entirely outside the scope of the *Agreement on Safeguards*. Such a measure also comprises a set of *actions* taken by the Dominican Republic which can be examined in view of the obligations contained in the *Agreement on Safeguards*. In the EU's view, actions when initiating and conducting the investigation are governed by the *Agreement on Safeguards* even if the investigation is terminated and no such measure is eventually imposed as a result of the investigation. Thus, *a fortiori* in cases where the investigation shows that "the extent necessary to prevent or remedy serious injury and … facilitate adjustment"[2] does not require going beyond the tariff binding, the EU

[1] *Agreement on Safeguards*, Articles 7.2, 8.1 and 12.3.
[2] *Agreement on Safeguards*, Article 5.1.

considers that the set of actions taken by the investigating authority should still comply with the *Agreement on Safeguards*.[3]

III. DEFINITIONS OF PRODUCT UNDER CONSIDERATION AND DOMESTIC INDUSTRY

6. The EU would also like to address some of the comments raised by Third Parties as regards the need for an assessment of likeness or direct competition when defining the product under investigation.[4] As explained in our written submission, Article 4.1(c) of the *Agreement on Safeguards* does not require such an assessment. Thus, WTO Members are not limited when determining the product under investigation.

7. However, several obligations follow from that determination. In particular, the definition of the product concerned serves as the basis for determining which products and producers should be taken into account as the relevant output for the purposes of defining the domestic industry. Insofar as the parallelism between the product under investigation and the like or directly competitive domestic products is maintained, the definition of domestic industry will conform to Article 4.1(c) of the *Agreement on Safeguards*, without the need to establish that both inputs and the final product are like or directly competitive products.

8. Furthermore, the EU notes that in *US – Lamb* the Appellate Body did not impose the requirement to *only* include like or directly competitive products in the definition of product under investigation. And certainly it did not say that inputs can *only* be included as part of the same product under investigation if they are like or directly competitive with the finished product. This issue was simply not addressed by the Appellate Body. Rather, in that case the Appellate Body questioned the definition of the domestic industry which included inputs (i.e. live lambs) and the final product (i.e. lamb meat) while the product under investigation was *only* the final product (i.e. lamb meat). In other words, the Appellate Body questioned the lack of parallelism between the product concerned and the like or directly competitive domestic products.

IV. UNFORESEEN DEVELOPMENTS

9. The EU also recalls its position that the demonstration of "unforeseen developments" must be made before imposing the safeguard measures.[5] This has been confirmed by the Appellate Body on numerous occasions. The Dominican Republic bases its contention that the "unforeseen developments" clause is not legally binding on arguments that have been explicitly rejected by the Appellate Body. Thus, the Panel should follow previously adopted Appellate Body reports addressing the same issues.[6] This does not mean that the Panel can disagree with previously adopted Appellate Body reports and state so in its report. However, in order to ensure security and predictability of the system[7], it should not depart from the Appellate Body's consistent interpretation

[3] Colombia's Third Participant Written Submission, paragraphs 18-22; Nicaragua's Third Party Written Submission, paragraphs 5-9.
[4] Colombia's Third Participant Written Submission, paragraphs 25-37.
[5] Colombia's Third Participant Written Submission, paragraphs 47-50.
[6] Appellate Body Report, *US – Stainless Steel (Mexico)*, paragraph 161.
[7] *DSU*, Article 3.7.

of the covered agreements, and thus leave the dissenting WTO Member the possibility of invoking "cogent reasons" before the Appellate Body.[8]

V. PARALLELISM AND ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

10. Finally, the EU would like to add that the exclusion of certain developing countries from the scope of application of the safeguard measure pursuant to the application of Article 9.1 of the *Agreement on Safeguards* does not affect the parallelism under Articles 2.1 and 2.2.[9] Unlike other situations, such as the inclusion of members of a free-trade area[10], the exception of developing countries whose import share collectively does not exceed 9 per cent of the total imports of the product concerned is explicitly provided for in the *Agreement on Safeguards*. Absent any cross-reference to Article 2 or any clarification in Article 9 that those imports should also be excluded for the relevant analysis under Article 2.1, the logical conclusion is that the negotiators did not intend to require parallelism also with respect to an explicit exception to Article 2.2.

VI. CONCLUSIONS

11. To conclude, while not taking a final position on the merits of the case, the EU requests the Panel to carefully review the scope of the claims in light of these observations.

Mr Chairman, distinguished Members of the Panel, thank you for your kind attention.

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[8] Panel Report, *US – Stainless Steel (Mexico)*, paragraph 7.105 as reversed by the Appellate Body in *US – Stainless Steel (Mexico)*, paragraph 162; and Panel Report, *US – Continued Zeroing*, paragraphs 7.181 and 7.182 ("As discussed above, we share a number of concerns raised by the Panel in *US – Stainless Steel (Mexico)*, particularly with regard to the US mathematical equivalence argument. We recognize, however, that the Appellate Body in its report reversed the Panel's findings and this report gained legal effect through adoption by the DSB. We note that this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments. Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case").

[9] US Third Participant Written Submission, paragraphs 14-17; Nicaragua's Third Party Written Submission, paragraphs 10-11.

[10] Appellate Body Report, *US – Line Pipes*, paragraph 197; Appellate Body Report, *US – Wheat Gluten*, paragraph 96; and Appellate Body Report, *US – Steel Safeguards*, paragraph 441.

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE COMPLAINANTS

I. INTRODUCTION

1. In this second written submission, Costa Rica, El Salvador, Guatemala and Honduras ("the complainants") will refute the arguments put forward by the Dominican Republic in the request for a preliminary ruling contained in its first written submission, as well as in its oral statements and its replies to the Panel's questions.

II. THE APPLICABILITY OF ARTICLE XIX OF THE GATT AND THE AS

2. First of all, as is clear from the design, structure and architecture of the provisional and definitive measures[1], the latter impose "other duties or charges" within the meaning of Article II:1(b), second sentence, of the GATT, given the following attributes of an objective nature, which distinguish them from ordinary customs duties: (a) the process of formulation of the measures (administrative process compared with the legislative process which characterizes ordinary customs duties)[2]; (b) the intention of the authority which gave rise to the measure ("second tariff")[3]; (c) its actual wording (alternative duty to the ordinary customs duty)[4]; (d) its actual administration (treatment different from ordinary customs duties)[5]; and (e) the express admission by the Dominican Republic that the measure *replaces* the ordinary customs duty ("as long as the increased tariff applies, the ordinary MFN tariff shall not apply").[6]

3. Secondly, the Dominican Republic argues that Article XIX:1(a) excludes the possibility of imposing safeguard measures that imply a suspension of Article I:1 of the GATT, suggesting that it is not legally feasible to suspend the obligation under this provision in the context of a safeguard action. For that purpose, it cites various views of individuals or relevant historical background concerning Article XIX.[7] However, the underlying issue is the fact that the text of Article XIX:1(a) does not make the distinction referred to by the Dominican Republic. The term "obligation" is not subject to any qualification. As mentioned by the EU, a note to the analogous provision to Article XIX in the Havana Charter (the predecessor to the GATT 1947) imposed the obligation of non-discrimination against imports from any member country. However, that note was deleted and does not appear in the text of the GATT.[8] The negotiating history plays a secondary role in the interpretation of an

[1] Replies of the complainants to questions 26 and 27.
[2] Exhibit CEGH-23. Reply of the Dominican Republic to questions 31 and 32. Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraphs 143 and 144.
[3] Exhibits CEGH-7 (page 93) and CEGH-10 (page 97). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 121.
[4] Exhibit CEGH-9 (pages 8 and 9 - second article). Response to the preliminary request, paragraph 123; opening statement of the complainants, paragraph 142.
[5] Exhibits CEGH-30 and CDGH-31. Reply of the complainants to question 26.
[6] Opening statement of the Dominican Republic, paragraph 47.
[7] Reply of the Dominican Republic to question 60 from the Panel.
[8] Reply of the EU to question 2 from the Panel.

international agreement. The complainants' view that the term "obligation" covers all obligations under the GATT is shared by the United States[9] and the EU.[10]

4. Thirdly, the Dominican Republic argues that the AS covers only measures that involve a suspension of obligations, but no other actions relating to a safeguard investigation, because Article 1 of the AS requires that the AS shall apply only to measures provided for in Article XIX of the GATT. Conversely, if a measure other than one of those provided for in Article XIX of the GATT is taken, it is not applicable.[11] The complainants contend that the measures at issue imply a suspension of obligations under Articles I:1, I:2(a) and II:1(b) of the GATT, for which reason, even under the Dominican Republic's interpretation, these measures are safeguard measures. Notwithstanding, even if it is considered that the measures do not imply a suspension of obligations within the meaning of Article XIX of the GATT, the complainants contend that the measures and all aspects of the investigation are covered by the AS and by Article XIX.

5. In the complainants' view, the reference to "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS does not mean that any safeguard measure necessarily implies the suspension of obligations or the withdrawal or modification of concessions. If that were the case, Article 11.1(a) of the AS would be deprived of any meaning. The approach suggested by the Dominican Republic would imply that a safeguard investigation, including the determination of the right to apply safeguard measures, could not be challenged until the adoption of a measure had been verified.

6. Through its interpretation, the Dominican Republic would appear to be suggesting the introduction of a rule analogous to Article 17.4 of the Anti-Dumping Agreement with regard to the scope of safeguard measures, via the interpretation of the Panel. Article 17.4 of the Anti-Dumping Agreement establishes an effective limit on the right to submit an anti-dumping dispute to a panel, unless an anti-dumping measure at least exists. However, in the matter of safeguards, there is no provision analogous to Article 17.4 of the Anti-Dumping Agreement that could be contained in the AS. Nor is it foreseen in Appendix 2 of the DSU that safeguard disputes should be subject to special or additional provisions as indeed provided for under Article 17.4 in respect of anti-dumping disputes.

7. Accordingly, the complainants consider that the "measures provided for in Article XIX of GATT 1994" in Article 1 of the AS refers to any type of measure available to an importing Member that has established the right to apply a safeguard measure in accordance with the first part of Article XIX:1(a) and the AS; that is to say, a measure responding to the serious injury caused by increased imports as a result of unforeseen developments and the effect of the obligations incurred under the GATT, including tariff concessions.

8. The term "shall be free" in the last part of Article XIX:1(a) of the GATT means that, prior to verification of the circumstances and conditions provided for in the first part of Article XIX:1(a), a Member is entitled to suspend an obligation, or to withdraw or modify concessions. However, this entitlement does not mean that the action taken by the Member in response to the serious injury *should* necessarily involve a suspension of obligations or the withdrawal/modification of a concession. The purpose of the AS and of Article XIX of the GATT is to provide a mechanism to prevent or remedy serious injury to the domestic industry caused by increased imports as a result of unforeseen developments and the effect of obligations under the GATT, and to facilitate adjustment.

[9] Reply of the United States to question 2 from the Panel.
[10] Reply of the EU to question 2 from the Panel.
[11] Reply of the Dominican Republic to questions 62 and 77 from the Panel.

Articles 5 and 7 of the AS require that a safeguard measure be applied solely and exclusively to the extent and during the period "necessary" to prevent or remedy serious injury and to facilitate adjustment. Any measure that goes beyond what is "necessary" either in magnitude or time-scale is in violation of these provisions of the AS, even if the measures fall within the scope of bound measures or are not inconsistent with general GATT obligations.

9. The Dominican Republic's interpretation could lead to a circumvention of other trade policy instruments such as anti-dumping duties and countervailing duties. Under that interpretation, if a Member that initiates and carries forward an anti-dumping investigation (in accordance with Article VI of the GATT and with the Anti-Dumping Agreement) observes flaws in the investigation, that Member could evade questions under those instruments by terminating the investigation in question without applying an anti-dumping duty, and subsequently increase the tariff up to the level that would have corresponded to the anti-dumping duty, but below the bound level in order to be able to affirm that no anti-dumping measure has been imposed and that, at the same time, there is no violation of the bound tariff. Clearly, this interpretation would be contrary to the spirit of the WTO Agreement. The complainants trust that this Panel will not set a precedent that renders inoperative these trade policy instruments which are of fundamental importance in multilateral trade relations.

III. THE PRELIMINARY OBJECTIONS CONCERNING THE TERMS OF REFERENCE OF THE PANEL

10. The Dominican Republic argues that the alleged inconsistency between the request for consultations and the panel request has changed the essence of the complaints.[12] The complainants note that the change in the essence of a complaint is a criterion that has been used in objections to the inclusion of additional *measures* but not in objections to the inclusion of additional *legal bases*[13], which are the kind of objections raised by the Dominican Republic in this dispute. In addition, the essence of the complaints has not changed inasmuch as the measures, the products at issue and the covered agreements relied upon have always been the same.

11. As part of another preliminary objection, the Dominican Republic also states that the complaints under Articles I and II of the GATT are new complaints since they were not included in the request for consultations[14] and "bear no relationship whatsoever to the submissions contained in the request for consultations".[15] As was explained above, these claims come within the Panel's terms of reference by virtue of the express reservation contained in the request for consultations.[16] Contrary to the contention of the Dominican Republic, the reservation in question cannot be characterized as "very full" since it refers only to the right of the complainants to raise additional matters *in accordance with the AS and the GATT 1994*, and in the context of concerns relating to provisional and definitive measures, as well as the related proceedings.

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[12] First written submission of the Dominican Republic, paragraphs 67, 82, 84 and 89. Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, pages 62-65.

[13] Panel Report, *EC – IT Products*, paragraph 7.182; Panel Report, *Dominican Republic – Cigarettes*, paragraph 7.19; Appellate Body Report, *US – Zeroing (EC) (21.5)*, paragraph 383; Appellate Body Report, *Brazil – Aircraft*, paragraph 132.

[14] First written submission of the Dominican Republic, paragraph 89.

[15] Replies of the Dominican Republic to the questions from the Panel, page 64.

[16] Initial oral statement of the complainants at the first substantive meeting, paragraphs 34-45; replies of the complainants to the questions from the Panel at the first substantive meeting, paragraphs 152-160.

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

12. The claim concerning the domestic industry is a compound claim which subsumes various related complaints. The complaint relating to the definition of the imported product under investigation refers to the lack of "adequate and reasoned explanations" in the light of the requirements of Articles 3.1, last sentence, and 4.2(c) of the AS.[17] The complainants observe that in section 4.2.4, the Dominican Republic bases its argument on the mistaken idea that the claims concerning the imported product under investigation refer to the alleged existence of guidelines for their definition; this is not the case, as is clear from the first written submission, the opening statement at the first meeting with the Panel, the replies to the Panel's questions and this second written submission.[18]

13. It is clear that the Dominican Republic failed to demonstrate that its investigating authority had given an adequate and reasoned explanation concerning the various questions and factual information provided by the numerous interested parties which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had provided an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

14. Regarding the Dominican Republic's argument that "there are no Panel or Appellate Body determinations which explicitly interpret the terms "like product" or "directly competitive product" in the context of determinations covered by the AS"[19] the complainants fail to see the significance of that argument and observe that the Dominican Republic ignores the recent settled case law of the Appellate Body in the *EC – Civil Aircraft* case. The absence of determinations explicitly interpreting the terms "like product" and "directly competitive product" does not exempt the investigating authorities from making explicit findings and providing adequate and reasoned explanations in respect of both definitions. Nor does it exempt the investigating authorities from following a mandatory order of analysis in order to define the domestic industry.

15. Consequently, there are no grounds for rejecting the arguments relating to the inconsistency of the determination regarding the imported product under investigation. In particular, it is clear that the Dominican Republic failed to demonstrate that its investigating authority had provided an adequate and reasoned explanation concerning the various questions and factual information submitted by the numerous interested parties, which called into question the definition of the product under investigation, and that it also failed to demonstrate that it had given an adequate and reasoned explanation of the reasons for tariff classification on which it had based its decision to consider tubular fabric and polypropylene bags as a single product under investigation.

[17] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65.

[18] First written submission of the complainants, paragraph 94. Opening oral statement by the complainants, paragraphs 63 to 65. Second written submission of the complainants, paragraph 85.

[19] First written submission of the Dominican Republic, paragraph 191.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

16. The Dominican Republic has explained that the following events were considered as unforeseen developments: (i) China's accession to the WTO; and (ii) the tariff cuts resulting from free trade agreements.[20]

17. As a factual matter, from the beginning of the process of China's accession to the WTO and at the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987. Hence, China's accession to the WTO in 2001 does not constitute a development that was unforeseen or unexpected for the Dominican Republic when the WTO Agreement entered into force in 1995. On the contrary, in 1995 it was foreseen that at some point in the future China would join the WTO once negotiations with the various Members of this Organization were completed.

18. The Dominican Republic also makes the *ex post* argument that the tariff cuts under the Central America-DR Agreement and DR-CAFTA constitute unforeseen developments.[21] The initial provisions of these free trade agreements indicate that both were entered into pursuant to Article XXIV of the GATT, which, following the establishment of the GATT 1947, stipulated the possibility for Members of the GATT/WTO system to form free trade areas or customs unions.[22] Upon joining the WTO, the Dominican Republic assumed the rights and obligations contained in the WTO Agreement, including the provisions of Article XXIV of the GATT.[23] This implies that, for the Dominican Republic as a WTO Member, the possibility of signing free trade agreements under Article XXIV of the GATT was not an *unforeseen* event.

19. Even assuming, *quod non*, that China's accession and the tariff cuts pursuant to the above-mentioned agreements had constituted unforeseen developments for the Dominican Republic and that the latter had made the relevant adequate and reasoned finding in its technical reports (or resolutions), it is clear that no logical connection whatsoever was established between these events and the alleged increase in imports of polypropylene bags and tubular fabric.

VI. THE ALLEGED INCREASE IN IMPORTS

20. In response to question 96, the Dominican Republic acknowledges that the treatment of tubular fabric and polypropylene bags as a single product affected the determination of increased imports, since the data relating to imports of both products were analysed in conjunction.[24] Given this explicit acknowledgement, the complainants consider that, if the Panel finds that there were

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[20] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[21] Replies of the Dominican Republic to the questions from the Panel at the first substantive meeting, page 93.

[22] Central America-DR Agreement, Article 1.01 ("The Parties establish a free trade area in accordance with the provisions of Article XXIV of the General Agreement on Tariffs and Trade 1994 and Article V of the General Agreement on Trade in Services (GATS) of the WTO Agreement"), Exhibit CEGH-37; DR-CAFTA, Article 1.01 ("The Parties to this Agreement, pursuant to the provisions of Article XXIV of the *General Agreement on Tariffs and Trade 1994* and Article V of the *General Agreement on Trade in Services*, establish a free trade area"), Exhibit CEGH-38.

[23] The Enabling Clause is another instrument that provides for the possibility of regional trade arrangements.

[24] Reply of the Dominican Republic to question 96 from the Panel.

no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation, which is not supported by the provisions of the AS. In other words, an element that is inconsistent with the provisions of the AS (in this case the definition of the imported product subject to investigation under Articles 3.1, last sentence, and 4.2(c)) and which is used as a basis for another analysis required by the AS, such as the determination of the increase in imports, cannot lead to an evaluation of that increase that is consistent with the AS. For this reason alone, the determination of increased imports should be declared inconsistent with Article XIX:1(a) and Articles 2.1, 3.1, last sentence, and 4.2(c) of the AS.

21. With regard to the final determination, specifically, the Dominican Republic uses information from outside the period of investigation in an attempt to explain the decrease in imports up to the end of the period of investigation. As this information lies outside the period of investigation, it is not appropriate to take it into consideration.

VII. THE ALLEGED SERIOUS INJURY

22. The Dominican Republic asserts that there was no need to carry out a separate analysis of certain sectors because it evaluated fabric and polypropylene bags as a whole and did not conduct an analysis by sector or segment.[25] The problem with this assertion is that, in actual fact, the Dominican Republic did conduct an analysis by sector with regard to production by volume - that of finished bags - as was acknowledged by its own investigating authority, since that was the only information which was available on that aspect.[26]

23. Thus, the investigating authority assumed that the finished bags sector comprised the total output of tubular fabric and polypropylene bags. However, the information from the Dominican Republic's own reports also shows that there was production of tubular fabric, beyond that used captively by FERSAN, which was destined for the commercial market (sales of tubular fabric to FIDECA), which could not therefore be considered as being included within the volume production of finished bags.

24. With regard to the market share of imports as a percentage of consumption, the Dominican Republic again puts forward an *ex post* explanation which has no basis in its determinations. This explanation should also be rejected. Nevertheless, even if it were taken into consideration, what the Dominican Republic is asserting is that, on account of the investments undertaken, FERSAN deserved to have a greater share of the market than that which it obtained at the end of the period.[27] The Dominican Republic leaves aside the objective figures which show precisely the opposite: that FERSAN was gaining market share at the expense of imports. Not even on an *ex post* basis does the Dominican Republic provide an explanation as to how investments in technology by FERSAN could justify an "adjustment" of market share beyond the objective figures found in the DEI reports.

25. Concerning the assessment in respect of stocks, the Dominican Republic admits that it made an end-to-end assessment without considering the trends in this indicator.[28] It is clear, therefore, that the evaluation required by Articles 4.2(a), 3.1 and 4.2(c) of the AS was not carried out. This point is

[25] Reply of the Dominican Republic to question 127 from the Panel.
[26] Initial report page 14.
[27] Reply of the Dominican Republic to question 127 from the Panel.
[28] Reply of the Dominican Republic to question 141 from the Panel.

supplementary to the other objections raised with regard to the valuation of inventories, which we have mentioned in our previous written submissions.[29]

26. Regarding the injury evaluation criterion in relation to the preliminary determination, the Dominican Republic presents an interpretation which would have the effect of lowering the standard of proof, by even eliminating the evaluation of the indicators referred to in Article 4.2(a) of the AS for this type of determination. The complainants strongly disagree with this approach. As the complainants mentioned in their reply to question 146, there is no reason to consider that the concept of serious injury or threat of serious injury is different in Articles 4 and 6 of the AS, especially since Article 4.1 defines both concepts "for the purposes" of the AS.

VIII. THE ALLEGED CAUSAL LINK

27. We note that the Dominican Republic has offered no defence arguments in addition to those put forward in its first written submission in connection with our complaints concerning causation and non-attribution. The complainants have already responded to the Dominican Republic's defence concerning these two complaints, as set out in our initial oral statement at the first substantive meeting.[30]

IX. PARALLELISM BETWEEN THE SCOPE OF APPLICATION OF THE MEASURE AND THE SCOPE OF THE INVESTIGATION

28. As was noted previously by the complainants, the obligation with regard to parallelism is enforceable irrespective of the reasons why a Member decides to exclude imports from certain origins from the application of the measure.[31] The complainants do not agree with the Dominican Republic's interpretation to the effect that Article 9.1 of the AS constitutes an exception to the parallelism requirement since: (i) the AS contains no textual basis for such an interpretation; (ii) the parallelism obligation has been defined in general terms by the Appellate Body, without providing for exceptions to its fulfilment.

29. Nor is the parallelism obligation limited to situations of exclusion of imports from countries that are trading partners under an FTA. Although the Appellate Body defined the parallelism obligation when examining safeguard measures that excluded imports from free trade areas, this does not imply that the obligation itself is limited to that context.

X. NOTIFICATION, LACK OF CONSULTATIONS AND OF MEANS OF TRADE COMPENSATION

30. The complainants reiterate their view that the proceedings and hearings carried out in the safeguard investigation under the jurisdiction of the Dominican Republic cannot be treated as equivalent to consultations at *multilateral level* as prescribed by Article 12.3 of the AS. The conduct of an investigation which provides adequate opportunity for the interested parties to put forward their arguments constitutes compliance with the obligation set out in Article 3.1, but no reference is made to the prior consultations provided for in Article 12.3. Accordingly, the Dominican Republic's interpretation would make Article 12.3 redundant, since it would mean that the conduct of the

[29] First written submission of the complainants, paragraphs 218-223; opening statement, paragraphs 89-90.
[30] Initial oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[31] Initial oral statement of the complainants at the first substantive meeting, paragraph 118.

investigation required by Article 3.1 would automatically imply compliance with Article 12.3. This proposition should be rejected as it would be contrary to the principle of effectiveness in the interpretation of treaties.[32]

XI. THE VIOLATIONS OF ARTICLES I:1, II:1(A), AND II:1(B) OF THE GATT

A. COMPLAINTS UNDER ARTICLE I:1 OF THE GATT

31. Both the provisional measure and the definitive measure are inconsistent with Article I:1 of the GATT, inasmuch as the exclusion of imports from Colombia, Indonesia, Mexico and Panama from the scope of those measures constitutes an advantage, favour, privilege or immunity granted to imports from those origins and is not granted "immediately and unconditionally" to any "like product" originating in the territories of all the other WTO Members.

32. Furthermore, the criterion for the granting of such an advantage, favour, privilege or immunity is discriminatory even where there is compliance with the principle that imports should not individually, by origin, exceed 3 per cent of total imports, or collectively account for more than 9 per cent of that total during the period under investigation.[33] For example, that criterion was not applied to exclude imports from Thailand, which are less than 3 per cent.[34]

33. The complainants note that the Dominican Republic shares this view. In its reply to question 2 from the complainants, the Dominican Republic stated that it "understands, as indicated in its final statement at the first substantive meeting of the Panel, that the exclusion of certain countries under this provision raises problems in situations where the safeguard measures adopted in accordance with this law do not constitute safeguard measures under the terms of Article XIX of the GATT and the Agreement on Safeguards".[35]

B. COMPLAINTS UNDER ARTICLE II:1(a) AND II:1(b) OF THE GATT

34. Article II:1(b) prohibits the application of import duties and charges other than ordinary customs duties. By way of exception to this prohibition, a Member may maintain a duty or charge of this nature which existed at "the date" of the GATT [1994] or which was enforceable under mandatory legislation in the territory of the Member before that date. Another exception is where other import duties and charges distinct from ordinary customs duties have been recorded in the Schedule of Concessions of the Member concerned. Both the provisional and the definitive measure imposed by the Dominican Republic are "tariff surcharges" or, in general terms, import charges or duties other than "ordinary customs duties", which are applied to imports of polypropylene fabrics and bags. The Dominican Republic's regulations do not describe them in this way. However, the complainants chose the term "tariff surcharges" because they represent rates different from the "normally applicable MFN tariff"[36]; different, that is, from an ordinary customs duty under Dominican legislation.[37]

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[32] Appellate Body Report, *US – Gasoline*, page 25: see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81-82.

[33] Preliminary resolution, paragraphs 50 and 51; final resolution, paragraphs 42 and 43.

[34] Preliminary report, Annex I; final report, Annex I.

[35] Reply of the Dominican Republic to question 2 from the complainants; final statement of the Dominican Republic at the meeting with the Panel, paragraph 17.

[36] Opening statement of the Dominican Republic, paragraph 47.

[37] Exhibit CEGH-27.

35. It is important to emphasize that the tariff surcharge was designed by the investigating authority of the Dominican Republic as a "second tariff"[38] and that the definitive measure operates as an alternative to the MFN tariff, so that either the surcharge or the ordinary customs duty is applied, whichever is higher.[39] Moreover, in accordance with Tariff Reform Law No. 146-00 of 11 December 2000, ordinary customs duties or tariffs can only be amended by a legislative act.[40]

36. It should also be mentioned that the Dominican Republic failed to record in its Schedule of Concessions the possibility of applying other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of the GATT 1994.[41] This excludes the possibility of justifying the measures at issue under Article II:1(a) of the GATT.

37. Consequently, the provisional and definitive measures are inconsistent with Article II:1(b), second sentence, of the GATT and by implication, with Article II:2(a) of the GATT.

[38] Exhibit CEGH-7, page 93. Exhibit CEGH-10, page 97.
[39] Exhibit CEGH-9, pages 8 and 9, second article.
[40] Articles 5, 6 and 7 of Tariff Reform Law No. 146-00, Exhibit CEGH-22.
[41] See Exhibit CEGH-27.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. The Dominican Republic affirms that Article XIX of the GATT and the Agreement on Safeguards ("AS") do not apply to the measures at issue. This makes it impossible to evaluate the consistency of these measures with the disciplines cited. In addition, the Dominican Republic affirms that, even if these provisions were applicable, the measures at issue are fully consistent with them.

1. ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS DO NOT APPLY TO THE PRESENT DISPUTE

2. The applicability of these provisions depends on objective criteria (namely, the fact that the measures imply the suspension of an obligation or the withdrawal or modification of a concession), without decisive subjective criteria such as statements by the national authorities.

1.1 Even if it is considered that the measures at issue constitute suspension of Article I:1 of the GATT, they do not fall within the scope of Article XIX of the GATT and the Agreement on Safeguards

3. Article I:1 of the GATT is not one of the "obligations" that may be suspended according to Article XIX:1(a). Consequently, even if it is concluded that the measures at issue suspend Article I:1, this does not mean that they constitute safeguards. There are five reasons for this.

4. Firstly, safeguards must be applied without discrimination (according to Article 2.2 of the AS), with Article 9.1 of the AS being an exception to this non-discriminatory application. To consider that Article XIX of the GATT allows the suspension of Article I:1 would amount to a contradiction between the WTO Agreements. Secondly, this is confirmed by the history of the Uruguay Round negotiations, which led to the inclusion of Article 2.2 of the AS. Thirdly, Article I:1 of the GATT is not the obligation whose effect is increased imports that cause serious injury in the terms of the first sentence of Article XIX:1(a) of the GATT and, hence, is not the obligation that can be suspended in the terms of the second sentence of Article XIX:1(a). Fourthly, Article 9.1 of the AS requires the previous existence of a safeguard measure in order to apply, so it is illogical to claim that reference to Article 9.1 of the AS is in itself indicative of the existence of a safeguard in the terms of Article XIX of the GATT. Fifthly, and finally, the Dominican Republic draws attention to the illogical interpretation put forward by the complainants: imposing a safeguard measure (*erga omnes*, as required by Article 2.2 of the AS) consisting of the suspension of Article I:1 of the GATT, which could only result from the exemption provided in Article 9.1 of the AS, would mean that the only content of the safeguard measure would be the exemption of certain countries from its scope; it would be a safeguard measure that would only provide for its non-application.

1.2 The measures at issue do not suspend Article II:1(b) of the Agreement on Safeguards as they cannot be classified as "other duties or charges"

5. The complainants contend that the objective of the measures was to create a "second tariff" to be applied in addition to the common tariff applicable (MFN). These measures, however, in fact replace this tariff, as recognized by the complainants, contradicting themselves, so they constitute

"ordinary customs duties"; if they were other tariffs, they could not replace the tariff previously applicable but only be added to it.

6. Mere modification of the tariff rate is not equivalent to the imposition of "other duties and charges", and this cannot be concluded either from the fact that the tariff was adopted as the result of an investigation initiated at the request of the domestic industry (as the Appellate Body indicated in *Chile – Price Band System*). As the measures did not affect the tariff in any other way, they cannot be termed "other duties or charges", and consequently the tariff resulting from the measures, as indicated in *India – Additional Import Duties*, naturally constitutes an ordinary customs duty.

7. The complainants also contend that, as Law No. 146-00 provides that existing customs duties can only be modified by means of a legislative act, the measures at issue are not ordinary customs duties but "other duties or charges" because they were established by means of an administrative act. This statement overlooks Law No. 1-02, which allows a temporary increase in the tariff determined by means of an administrative act, and also that the type of act created by the Members in the dispute is irrelevant from the point of view of WTO law.

8. Lastly, the fact that the duties applied by a Member do not appear in its schedule does not prevent such duties from being ordinary customs duties. As the measures at issue are not "other duties and charges", they come under the category of "ordinary customs duties" and as they apply at a rate lower than the pre-existing ordinary MFN tariff, they are consistent with the first sentence of Article II:1(b) and do not constitute safeguards.

1.3 The Agreement on Safeguards does not apply to the investigation prior to the adoption of the measures at issue

9. The complainants contend that Article XIX of the GATT and the AS apply to the investigation that preceded the adoption of the measures at issue, even though these do not constitute safeguard measures. The Dominican Republic considers that dissociating the investigation from the measures is an artificial distinction and is meaningless.

10. This is shown by the relevant provisions of the AS. Firstly, according to Article 1, the applicability of AS rules presupposes the application of a safeguard measure. Secondly, Article 3.1 does not impose any investigation obligation prior to the adoption of measures that are not safeguards. Lastly, this is confirmed by Article 11.1(a) because it is when the investigation is concluded that it becomes certain whether or not a safeguard measure is to be adopted, so it makes no sense to subject investigations that do not result in the adoption of such a measure to the disciplines in Article XIX. The contrary interpretation of this Article put forward by the complainants is contradicted by Article 11.1(c), which specifically excludes the application of the AS to measures, such as the measures at issue, that are consistent with the GATT.

11. The Dominican Republic affirms that it is not a question of "seek to adopt" a safeguard measure in the terms of Article 11.1(a) of the AS, as confirmed by the facts: at a very early stage in the investigation it became clear that the measure would not be an increase above the ceiling bound rate, as the complainants themselves mentioned prior to the adoption of the provisional measure. In any event, the investigation is exempt according to Article 11.1(c).

12. Be that as it may, the Panel should abstain from reaching findings regarding the claims concerning the investigation stage, as this is not required in order to ensure a positive settlement of this dispute, in conformity with Article 3.7 of the DSU.

13. The Dominican Republic also notes that the complainants request a recommendation on abstention from applying safeguard measures, whereas such a solution is not a possibility afforded by the WTO dispute settlement mechanism.

2. THE MEASURES AT ISSUE IN THE LIGHT OF ARTICLE XIX OF THE GATT AND THE AGREEMENT ON SAFEGUARDS

2.1 The definition of the domestic industry is fully consistent with the requirements in the Agreement on Safeguards

14. In the first place, the determination of the product under investigation was clear and unequivocal, sufficient and reasoned, consistent with the AS, contrary to what is asserted by the complainants. As the parties agreed that there was no need to prove likeness or a competitive relationship between the articles comprising the product under investigation (as the complainants did not claim this) and having taken into account the questions posed by certain participants, the complainants' assertions regarding this determination do not stand up.

15. Secondly, the determination of the like and directly competitive domestic product was reached by the Commission after extensive consideration, even bearing in mind that it is obvious that the product under investigation and the like domestic product are directly competitive inasmuch as they are identical.

16. Contrary to the complainants' interpretation, the production process was not a decisive factor in defining the like domestic product, but was one of the criteria used to identify the domestic industry.

17. The Dominican Republic emphasizes that the like domestic product does not include flat tubular fabric, contrary to what the complainants appear to contend.[1]

18. Thirdly, in order to determine the domestic industry, it was not necessary to make a determination of likeness or direct competition between the input and the finished product, contrary to what is asserted by the complainants, because the determination of the domestic product used a basis for determining the domestic industry is identical to the product under investigation.

19. Article 4.1 itself of the AS specifically envisages the possibility that the domestic industry does not cover all producers of the like product, as confirmed by WTO case law.[2] In order to define the domestic industry, the Commission considered all the producers mentioned by FERSAN in its domestic producer form[3] and then excluded, by means of reasoned arguments, those producers that showed no interest in taking part in the procedure, those that were not producers (according to Article 4.1(c) of the AS and WTO case law[4]) and Textiles Titán.

20. Textiles Titán was excluded because production of the product under consideration represented only a very small percentage of its activities compared to import and conversion. The

[1] Replies by the complainants to questions by the Panel after the first substantive meeting, paragraphs 222 and 223.

[2] Panel Report, *US – Wheat Gluten*, paragraph 8.54, and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paragraph 7.341.

[3] Final Technical Report, pages 49-52. Exhibit RDO-10.

[4] Panel Report, *EC – Salmon (Norway)*, paragraph 7.115, footnote 289.

omission of such an exclusion possibility in Article 4.1(c) of the AS, unlike the Anti-Dumping Agreement, should not be seen in a dispositive sense. This is reaffirmed by Article 4.2(a) and (b) of the AS, which require an evaluation of injury and causal link based on reliable data that cannot be obtained from the aggregate data for enterprises which both produce and import the product under consideration.

2.2 The Dominican Republic correctly evaluated the increase in imports and made reasoned determinations in this respect

21. Contrary to what is asserted by the complainants, the Dominican Republic made a reasoned and adequate determination of the increase in imports based on data for the investigation period (2006-2009). The decrease in imports in 2009 did not prevent a finding of an increase in imports because it was incidental and cyclical, as stated by the Commission, in accordance with Article 2.1 of the AS.

22. The Commission encountered further support for this position in the data for 2010, but did not base itself on these, contrary to what is claimed by the complainants; this position had already been reached at the preliminary stage when the data for 2010 were not yet available. This quest for further confirmation of the findings using the most recent data is supported by WTO case law.[5]

23. The aforementioned findings sufficed for compliance with Article 2.1 of the AS, contrary to what is claimed by the complainants, not having been substantiated by *ex post* explanations (the 2010 data, according to the complainants); on the one hand, the reference to the 2010 data was included in the final determination (*ex ante*) and, on the other, these data were not used for substantiation purposes but for confirmation.

2.3 The determination of serious injury is consistent with the Dominican Republic's obligations under Article XIX of the GATT and the Agreement on Safeguards

24. Firstly, the complainants' assertion that the Commission based itself solely on the "bags" segment when evaluating the indicators of injury is not substantiated; the evaluation was made in respect of the like domestic product as a whole.[6] Moreover, the Commission was neither obliged to make separate evaluations for each segment of the industry[7], nor to include only identical or similar products in the definition of the product under investigation.[8]

25. Secondly, the Dominican Republic was entitled to base its determination of serious injury on the data concerning the "bags division" in its entirety, which it did because it was the smallest group of products for which there was audited information, and includes the domestic like product. This method is consistent with Article 4.2(a) of the AS, which requires that the factors evaluated be objective and quantifiable, and is envisaged in Article 3.6 of the Anti-Dumping Agreement.

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[5] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160, confirmed by the Appellate Body, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 7.64.

[6] Final Technical Report, page 69. Exhibit RDO-10.

[7] Appellate Body Report, *US – Hot-Rolled Steel*, paragraphs 190 and 204; first written submission of the Dominican Republic, paragraphs 350 to 354.

[8] Panel Report, *US – Softwood Lumber V*, paragraph 7.157; see also Panel Report, *EC – Salmon (Norway)*, paragraphs 7.45 and 7.68.

26. Contrary to what is asserted by the complainants, not only is there no obligation to restrict the evaluation solely to the product intended for the domestic market, excluding the exported product, but such an exclusion is not even permitted.[9]

27. Thirdly, and finally, the depreciation costs were correctly included in the production cost used to evaluate profitability. Although the complainants assert that costs should be ascribed *pro rata*, in accounting (and according to WTO case law[10]) the costs used to evaluate profitability are all those associated with the production and sale of the product in question, not only those of direct benefit. The "bags division's" audited profit and loss statements, on which the Commission based itself when evaluating profitability[11], show that the depreciation costs were correctly ascribed.

2.4 The "parallelism" theory does not apply when imports from developing country Members are excluded, in accordance with Article 9.1 of the Agreement on Safeguards

28. The scope of the "parallelism" theory is limited to the context of customs unions and does not apply in general, as has been attested by WTO case law.[12] Unlike what occurred in previous disputes, the exclusion of imports from application of the safeguard measure is based on Article 9.1 of the AS, an explicit exemption from the scope of *application* of a safeguard measure (Article 2.2 of the AS) but not from the scope of the safeguards *investigation* (Article 2.1 of the AS). Accordingly, the reference to the "product … imported" in Article 2.2 of the AS includes all imports, except those covered by Article 9.1, whereas the "product … imported" in Article 2.1 of the AS does not include exemptions; when the exemption in Article 9.1 of the AS is applied, the requirements concerning the investigation (and all the evaluations and determinations it involves) must be fulfilled for all imports, irrespective of whether or not some of them are subsequently excluded from application of the measure in accordance with Article 9.1 of the AS.

29. This position does not lead to unjustified results, prevented by the *de minimis* thresholds imposed by Article 9.1 of the AS, which require that the impact of the imports exempted may not be significant or distort the determinations of the increase in imports and serious injury.

30. Concerning the non-attribution requirement, which requires that the correct attribution of injury take into account the effects of the increase in imports and not "other factors", the Dominican Republic points out that imports from developing countries are not factors "other than the imports", on the basis of Article 2.1 of the AS, notwithstanding their subsequent exemption from application of the measure.

3. CONCLUSION

31. Based on the foregoing, the Dominican Republic requests the Panel to find that the measures at issue are not covered by the scope of Article XIX of the GATT and the Agreement on Safeguards or, alternatively, that they are consistent with these provisions, and to reject all the claims made by the complainants.

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[9] Appellate Body Report, *US – Hot-Rolled Steel*, paragraph 190.
[10] Panel Report, *EC – Salmon (Norway)*, paragraph 7.483.
[11] Exhibits RDO-13, RDO-14 and RDO-15.
[12] Appellate Body Report, *US – Wheat Gluten*, paragraph 96, and *Argentina – Footwear (EC)*, paragraph 114.

ANNEX F

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

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

I. PRELIMINARY OBJECTIONS TO THE CLAIMS RELATING TO THE NEED FOR THE MEASURES, ARTICLE I.1 OF THE GATT AND ARTICLE II.1 OF THE GATT

1. The Dominican Republic notes that among the claims not covered by the Panel's terms of reference because they were not the subject of consultations are those contained in subparagraphs (i), (l) and (m) of the request for the establishment of a panel.

2. With regard to these claims, the complainants contend that the Dominican Republic did not prove that its right of defence was affected.[1] The Dominican Republic points out that the effect on this right is a criterion followed when it is considered that a request for the establishment of a panel may be insufficient, in the light of Article 6.2 of the Dispute Settlement Understanding[2], and that it did not claim that the request for the establishment of a panel was *insufficient* but rather that no consultations on these claims were held pursuant to Article 4 of the Dispute Settlement Understanding. The failure to hold consultations excludes these claims from the Panel's terms of reference, irrespective of whether or not the Dominican Republic's right of defence is affected.[3]

3. Secondly, the complainants assert that the criterion of a change in the essence would not apply to this dispute as it has been used for objections to the inclusion of additional *measures* in the request for the establishment of a panel, but not for objections to the inclusion of additional *legal bases*.[4] Their arguments, however, disregard Appellate Body case law in *Mexico – Anti-Dumping Measures on Rice*[5] and the Panel in *China – Publications and Audiovisual Products*.[6]

4. Thirdly, the claimants contend that, even if the *test* of a change in the essence did apply, it was not used because the claims concerning Articles I.1, II.1(a) and II.1(b) of the GATT and Article 5.2 of the Agreement on Safeguards reasonably arose from the legal bases of the request for the holding of consultations.

5. As to the claim concerning the most-favoured-nation obligation based on Article I.1 of the GATT, the complainants contend that it arises from their claim concerning Article 2.2 of the Agreement on Safeguards, as set out in the claim in subparagraph (g) of the request for consultations.[7] This claim was, however, included solely in case the measures at issue did not constitute safeguard measures according to the terms of Article XIX of the GATT.[8] In fact, the aforementioned

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[1] Second written submission of the complainants, paragraphs 47-50, 64 and 68.

[2] *Ibid*., see footnotes 32 and 33.

[3] First written submission of the Dominican Republic, paragraphs 51-58.

[4] Second written submission of the complainants, paragraph 52.

[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138. The Panel Report on *EC – Fasteners (China)*, paragraphs 7.507 and 7.508, applied this criterion of a change in the essence when considering that Article 6.9 of the Anti-Dumping Agreement was not included in the Panel's terms of reference as it had not been the subject of consultations.

[6] Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.

[7] Replies of the complainants to the questions from the Panel, paragraph 158.

[8] Oral statement of Costa Rica, El Salvador, Guatemala and Honduras at the first substantive meeting of the Panel, paragraph 37.

subparagraph (g) in no way relates to the claim concerning Article I.1 of the GATT in the request for the establishment of a panel but only refers to the non-exemption of certain developing countries pursuant to Article 9.1 of the Agreement on Safeguards.

6. The complainants also argue that the claim relating to Article II.1(a) and II.1(b) of the GATT is based on Article XIX of the GATT because the increase in imports must be a result of the effect of the tariff concessions subject to Article II of the GATT.[9] They do not, however, specifically indicate to which claim in the request for consultations they are referring.[10] Moreover, the complainants have not indicated how this legal basis could arise from Article XIX as the specific legal basis for any claim contained in the request for consultations.

7. It is obvious that the claim concerning the alleged omission of findings and conclusions on the need for measures was not the subject of consultations pursuant to Article 4.4 of the Dispute Settlement Understanding and does not stem from any legal basis contained in the request for consultations. Although Article 5.1 of the Agreement on Safeguards is indeed cited in subparagraph (g) of the request for consultations, the claim only refers to the alleged failure to comply with the "parallelism" requirement.

8. The complainants indicate that the claims concerning Articles I and II of the GATT are based on the reservation clause in the request for consultations.[11] Nevertheless, the fact that the measures at issue do not constitute safeguard measures under Article XIX of the GATT is not information obtained during the consultations, as required by WTO case law[12] and the reservation clause mentioned by the complainants because the latter were already well aware of the nature of the measures in question before the consultations.[13]

9. In the light of the foregoing, the Dominican Republic argues that the claims included in subparagraphs (i), (l) and (m) of the request for the establishment of a panel are not included within the Panel's terms of reference.

II. ADDITIONAL REASONS WHY A SAFEGUARD MEASURE MAY NOT CONSIST OF THE SUSPENSION OF ARTICLE I.1 OF THE GATT

10. In the complainants' view, a safeguard measure could imply the suspension of Article I.1 of the GATT.[14] This statement is not supported by Article 2.2 of the Agreement on Safeguards or any other provision.

11. In addition to the reasons already explained[15], it is relevant to quote the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which provides the following: "*It is understood that any suspension, withdrawal or modification*

[9] *Ibid*., paragraph 159.
[10] *Ibid*., footnote 89.
[11] Second written submission of the complainants, paragraph 58.
[12] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 137 and 138; Panel Report, *China – Publications and Audiovisual Products*, paragraph 7.115.
[13] Oral statement of the Dominican Republic at the first substantive meeting of the Panel, 15 June 2011, paragraph 17; closing statement of the Dominican Republic at the first substantive meeting of the Panel, 16 June 2011, paragraph 16; replies of the Dominican Republic to questions from the Panel, question 51.
[14] Reply of the complainants to the questions from the Panel, paragraph 77.
[15] Second written submission of the Dominican Republic, paragraphs 8-14.

under paragraphs 1 (a), 1(b) and 3(b) must not discriminate against imports from any Member country …".[16]

12. The foregoing logic has applied to Article XIX of the GATT since the very first days it came into force. When addressing Japan's request for accession, the Ad Hoc Committee on Agenda and Intersessional Business rejected the possible extension of this Article to constitute suspension of Article I.1.[17]

13. This was also supported by John H. Jackson already in 1969: "*Although nowhere expressly mentioned in the language, the preparatory work and subsequent GATT practice make it clear that the withdrawal or suspension shall be on a non-discriminatory MFN basis.*"[18]

14. Consequently, Article XIX of the GATT never envisaged the possibility of suspension of Article I.1 of the GATT.

III. THE ALLEGED NATURE OF "OTHER IMPORT DUTIES AND CHARGES" IN THE MEASURES AT ISSUE

15. The complainants use four arguments to claim that the measures at issue are inconsistent with Article II.1(a) and II.1(b) of the GATT as they constitute "other duties and charges" within the meaning of Article II.1(b), second sentence, of the GATT and the Dominican Republic had not included them in the relevant column in its Schedule of Tariff Concessions.

16. First of all, the complainants contend that, as they constitute a tax other than ordinary customs duty, the measures in question are "other duties and charges". This premise does not, however, mean that these are "other duties or charges". Quite the contrary, it indicates that the increased tariff is an ordinary customs duty because it replaces the tariff normally applicable: the only duty paid currently on imports of polypropylene bags and tubular fabric is the 28 per cent duty, in other words, the MFN tariff increased on the basis of the measures at issue.

17. Secondly, the complainants state that the fact that the duty imposed on the basis of the measures at issue applies as an alternative shows that the measures resulted in the application of other duties or charges. On the contrary, as underlined by the European Union in its written submission, the fact that the measures apply *in place of* and not *cumulatively with* the MFN tariff normally applicable is proof that these are not "other duties and charges".[19]

18. Thirdly, the complainants cite the Tariff Reform Law No.146-00, which provides that tariffs can only be amended by means of a legislative act, and from this infer that, as the measures at issue were established through an administrative act, they are "other duties and charges". The complainants disregard Article 73 of Law No.1-02, which allows temporary increases in the tariff established by the law through application of a safeguard measure.[20]

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[16] United Nations Conference on Trade and Employment, held in Havana, Cuba, Final Act and related documents, page 113. http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[17] Ad Hoc Committee on Agenda and Intersessional Business, Report on the Accession of Japan, 13 February 1953, L/76, Exhibit RDO-27, paragraphs 6 and 7.

[18] John H. Jackson, *World Trade and the Law of GATT*, The Michie Company Law Publishers, Charlottesville, Virginia, 1969, page 564. Exhibit RDO-28.

[19] Third party submission by the European Union, 16 May 2011, paragraph 16.

[20] Exhibit RDO-11.

19. Lastly, the complainants cite some communications from which they infer that these are "other duties and charges".[21] These communications do not, however, lead to the conclusion that these are "other duties and charges", and the complainants have not indicated how they reached such a conclusion.

20. It would appear that the complainants are equating the safeguard measures with trade remedies (anti-dumping and countervailing measures). In fact, such a comparison is wrong because safeguard measures suspend obligations and do not lead to the imposition of other additional duties - as is the case for anti-dumping duties or countervailing measures. This emerges clearly from a comparison of Articles VI.2 and XIX.1(a) of the GATT. It is also the reason why safeguards are not listed in Article II.2(b) of the GATT together with anti-dumping and countervailing duties.

IV. CLAIMS RELATING TO THE DEFINITION OF THE DOMESTIC INDUSTRY

21. First of all, the complainants question the explanation of the definition of the product subject to investigation. They do not, however, make any claim regarding the determination of the imported product subject to investigation[22]; that is to say, the determination would be valid but not its explanation. The Dominican Republic would also like to clarify that neither in case law nor in the Agreement on Safeguards are there any grounds supporting the complainants' statement[23] that the Panel should only base itself on the published reports on the case.[24]

22. The Dominican Republic argues that the explanations given by the Commission on determination of the product subject to investigation are sufficient and comply with Articles 3.1 and 4.2(c) of the Agreement on Safeguards, that there are no legal grounds for requiring an "adequate and reasoned explanation of the reasons for the tariff classification"[25], and that the complainants have not explained how such an obligation arises from the aforementioned Articles. Likewise, it is not clear why Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards would require that the proposal by the participating parties not to deal with tubular fabric and polypropylene bags as a single product would have to be addressed.

23. The complainants quote the Appellate Body report in *EC – Civil Aircraft* to claim that the Panel was obliged to review the definition of the product subject to investigation. This finding is not relevant, however, as the Appellate Body differentiated between definitions under Part III of the Agreement on Subsidies and Countervailing Measures and the definition of the product investigated in accordance with Part V of the same Agreement and the Anti-Dumping Agreement. In other words, the case law does not relate to the definition of a product subject to investigation in a national safeguards procedure.[26]

24. Secondly, the complainants allege that determination of the likeness relationship between the domestic product and the imported product subject to investigation was composed of an implicit assertion of such a relationship. The Dominican Republic draws attention to paragraphs 163 to 181 of its first written submission and to the Commission's Preliminary Technical Report, page 58, where the

[21] Second written submission of the complainants, paragraphs 303 and 304.
[22] *Ibid*., paragraphs 85 and 106.
[23] Replies of the complainants to questions from the Panel, paragraph 18.
[24] See the Panel Reports in *US – Wheat Gluten*, paragraphs 8.19 and 8.21; and *Argentina – Preserved Peaches*, paragraph 7.6.
[25] *Ibid*., paragraph 85.
[26] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paragraph 1133.

determination of the like domestic product is reached, *inter alia*, on the basis of physical and chemical characteristics, tariff headings, and the production process.

25. It should be pointed out that the fact that the domestic product was defined as tubular fabric and polypropylene bags manufactured from resin only indicates a physical characteristic that also applies to the product subject to investigation. Although the production process plays an important role in the definition of the domestic industry, it was not preponderant when determining the like domestic product, where it was one of several criteria examined. The fact that the Commission, when defining the domestic industry, based itself on a series of producers that included Textiles Titán S.A., Filamentos del Caribe S.A., Agro-arrocera S.A. and Fibras Dominicanas CxA.[27], shows that the definition of the like domestic product includes bags obtained from tubular fabric.

26. Given the identical scope of the definitions of the product subject to investigation and the like domestic product (tubular fabric and polypropylene bags), the Dominican Republic considers that the fact that they are like products, and so are directly competitive, is obvious.

27. Thirdly, the complainants contend that the Commission failed to follow a logical order of analysis when determining the domestic industry, disregarding Appellate Body case law by claiming that the Agreement on Safeguards does not require any particular order when examining reports.[28] What the Appellate Body stated[29], however, only clarified the logical path to be followed when examining an issue before one, without seeking to stipulate that there is a mandatory order for analysis by national investigating authorities. Furthermore, there is a logical order in the Commission's analysis when defining the product subject to investigation, the like product and the domestic industry.[30]

28. The complainants also question the fact that the Commission considered tubular fabric and polypropylene bags to be part of the same domestic industry without proving that they were effectively competitors[31], basing themselves on the aforementioned Appellate Body Report. Nevertheless, in this Report the Appellate Body did not contend that it had to be proven that the products composing the domestic industry are like products.[32]

29. Fourthly, the complainants claim that certain categories of producers of the directly competitive domestic product were a priori excluded, based on an erroneous interpretation of the word "producers" in Article 4.1(c) of the Agreement on Safeguards.[33] The Dominican Republic recalls that Agroarrocera and Fibras Dominicanas did not take part in the procedure, that FIDECA *did not produce* the like domestic product (given that it only transformed imported or locally purchased tubular fabric bags)[34] and that Textiles Titán mostly transformed imported tubular fabric. It should be pointed out that Textiles Titán was excluded from the definition of the domestic industry using the provision in Article 26 of Law No. 1-02.

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[27] Preliminary Technical Report, page 68. Exhibit RDO-9.
[28] Second written submission of the complainants, paragraph 159.
[29] Appellate Body Report, *US – Lamb*, paragraph 87. See also the reply by the Dominican Republic to question 102 from the Panel.
[30] First written submission of the Dominican Republic, paragraph 210.
[31] Second written submission of the complainants, paragraph 98.
[32] Appellate Body Report, *US – Lamb*, paragraphs 87 and 88.
[33] Second written submission of the complainants, paragraph 85.
[34] Final Technical Report, pages 51 and 52. Exhibit RDO-10.

30. The exclusion of Textiles Titán is justified according to the current meaning of the provisions in Article 4.1(c) of the Agreement on Safeguards and the context and case law in the WTO, which confirm that it is consistent with the Agreement on Safeguards to consider as "domestic industry" a major proportion thereof.[35] Moreover, Article 4.2(a) and (b) provide that investigating authorities must base themselves on reliable data. Where the main activity of an enterprise included in the definition of the domestic industry is to import and resell the product subject to investigation, the investigating authority may find it impossible to separate the data relating to the products produced from those imported when evaluating the indicators of injury or making the determination of the causal link.[36]

V. CLAIMS RELATING TO THE DETERMINATION OF THE INCREASE IN IMPORTS

31. The complainants consider that the Dominican Republic did not prove that there was an increase in imports, as required by Article XIX.1(a) of the GATT and Articles 2.1 and 4.2(c) of the Agreement on Safeguards because "if … there were no adequate and reasoned explanations regarding the definition of the imported product subject to investigation, the analysis of increased imports would also be invalid, since the investigating authority used in that analysis the same definition of the imported product subject to investigation".[37] The complainants did not, however, claim that the determination of the product subject to investigation was inconsistent *per se* and the Dominican Republic considers that it constitutes valid grounds for determining the increase in imports.

32. The statement that the Dominican Republic "failed to demonstrate that there were adequate and reasoned explanations for an increase in imports in absolute terms that was recent, sudden, sharp, and significant"[38] is also wrong inasmuch as the Commission:

- Determined that, despite a 14.6 per cent decrease in 2009, overall during the investigation period imports increased by 50.06 per cent.[39]

- Indicated that the decline in imports in 2009 was explained by the reduced growth in the economy, which led to a 30.3 per cent decrease in imports in comparison with 2008.[40]

- Without extending the investigation period, confirmed the temporary nature of the decline in 2009 in the light of the figures for 2010 in the final report, showing that

[35] Panel Report, *US – Wheat Gluten*, paragraphs 8.54-8.56.
[36] See the reply by the Dominican Republic to question 91 from the Panel.
[37] Second written submission of the complainants, paragraph 203.
[38] *Ibid*., paragraph 210.
[39] Preliminary Technical Report, page 74, Exhibit RDO-9; Final Technical Report, page 58, Exhibit RDO-10.
[40] Preliminary Technical Report, page 80; Final Technical Report, page 68. Also: Central Bank of the Dominican Republic, *Resultados Preliminares de la Economía Dominicana*, January-September 2009, page 12. Exhibit RDO-12.

imports were increasing once again. It should be noted that the use of data not included in the investigation period has been confirmed by case law.[41]

33. The complainants' statement that the Dominican Republic failed to make findings regarding the rate of imports is also wrong as the percentage ratio of growth for each year and for the investigation period can be found in the Preliminary and Final Technical Reports.[42]

[41] Panel Report, *Argentina – Footwear (EC)*, paragraph 8.160; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paragraph 167. Also: second written submission of the Dominican Republic, paragraph 88 to 90.

[42] Preliminary Technical Report, page 74 and Final Technical Report, page 58.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS

I. INTRODUCTION

1. The central tenet of the Dominican Republic's defence is its claim that the provisional and definitive measures are not safeguard measures inasmuch as the 40 per cent tariff was not raised. To us, the reasons why the Dominican Republic adopted these measures and is today following a complex line of argument are quite obvious: the Dominican Republic sought to protect a particular company by means of measures intended to give the appearance of being consistent with (i) its regional free trade agreements (FTAs); and (ii) the WTO disciplines.

2. The only option was to apply a WTO safeguard measure, which is permitted both by the WTO disciplines and the regional agreements.

3. The problem arose when the Dominican Republic decided to state in this dispute that the measures are not safeguard measures but a straightforward tariff increase within the limits bound in the WTO. By closing the door to our complaints under the AS, the Dominican Republic opened up another door with equally serious legal implications. Basically, the statement that the measures contested are not safeguards immediately involves violation of Articles I and II of the GATT. Likewise, if the measures are considered not to be safeguards consistent with the WTO, the Dominican Republic would have to explain on what regional legal basis it applies an alleged 38 per cent tariff *ad valorem* on imports that should be subject to zero tariff under the regional agreements. We are explaining this as background and as evidence of the existence of safeguard measures in the WTO context. As we have explained, this procedure concerns neither violations of FTAs nor safeguards of a regional nature.

II. THE APPLICABILITY OF THE AS AND ARTICLE XIX

4. We do not think that the opinions expressed by the Dominican Republic solely for the purposes of this procedure are supported by the various objective elements indicating that the provisional and definitive measures are safeguard measures such as those provided by Article XIX and the AS: (a) these opinions of the Dominican Republic disregard *the design, structure and architecture of the measures*[1]; (b) they are not consistent either with the prior *actions* of the Dominican Republic; and (c) the Dominican Republic is trying to sidestep the fact that, even according to its restrictive interpretation based on an individualistic reading of Article XIX.1(a), the provisional and definitive measures imply the suspension of obligations under Articles I.1, II.1(a) and II.1(b).

A. SUSPENSION OF ARTICLE I.1 OF THE GATT

5. The Dominican Republic firstly indicates that the suspension itself which constitutes the safeguard measure, and is referred to in Article XIX.1(a) of the GATT, cannot refer to Article I.1 of the GATT.[2] The Dominican Republic does not, however, explain why, if this is the case,

[1] Second written submission of the complainants, paragraphs 14-22.
[2] Second written submission of the Dominican Republic, paragraph 9.

Article XIX.1(a) itself uses the generic term "obligations" and "obligation" and does not explicitly exclude Article I.1 of the GATT from its application. The Dominican Republic's reference to Articles 2.2 and 9.1 of the AS in connection with this discussion is not very clear and does not enable it to be determined what it is claiming.[3] The word "obligation" in Article XIX.1(a) is not qualified by the words *unless otherwise provided in Article I.1 of the GATT*, as the Dominican Republic suggests. To paraphrase the Appellate Body, this interpretation would imply "read[ing] into the text words which are simply not there", which has been prohibited by the Appellate Body.[4] Like the complainants, the European Union[5] and the United States[6] consider that the word "obligation" in Article XIX.1(a) includes the obligation in Article I.1 of the GATT.

6. Secondly, the Dominican Republic's argument is based on semantics when it indicates that the discussion on the possibility of applying a selective safeguard has been concluded.[7] The application of a safeguard measure that excludes imports from particular trading partners is a selective way of applying safeguard measures - the measure is applied to certain origins and not to others. Nevertheless, Members have not been prohibited from making such exemptions, and even the Appellate Body itself has recognized that the possibility of excluding specific imports from the application of a safeguard measure is open so there is no need to issue a ruling.[8]

7. Thirdly, the Dominican Republic argues that the words "obligations" and "obligation" in the first and second part of Article XIX.1(a) refer to the same thing and therefore "this term cannot refer to the most-favoured-nation principle in Article I.1 of the GATT, and cannot be the cause of an increase in imports".[9] The Dominican Republic does not, however, explain why the increase in MFN trade could not involve an increase in imports within the meaning of Article XIX.1(a) of the GATT and Article 2.1 of the AS.

8. Fourthly, the Dominican Republic states that Article 9.1 implies an obligatory exclusion of imports only after a measure has been qualified a safeguard measure. Consequently, in its opinion, a safeguard measure consisting of the suspension of obligations under Article I.1 of the GATT could not exist. It is clear that the obligation to exempt imports from developing countries pursuant to Article 9.1 of the AS does not imply that the word "obligation" in Article XIX of the GATT has to be read in the narrow sense, excluding Article I.1 of the GATT. It appears rather that the Dominican Republic is contradicting its argument that the measures in question are not safeguard measures.

9. Fifthly, the Dominican Republic indicates that suspension of Article I.1, together with application of Article 2.2 and the exemption mandate in Article 9.1, would imply that the only content of a safeguard measure would be the exemption of certain countries from its scope.[10] The obligation in Article 2.2 implies that there can be no discrimination when applying a safeguard measure with regard to all the imports subject to investigation. This provision does not, however, mention the possibility that a safeguard measure allows the exemption of certain imports. The Appellate Body has also deliberately been silent in this regard. Consequently, the Dominican Republic's argument that

[3] *Idem.*
[4] Appellate Body Report, *India – Quantitative Restrictions*, paragraph 94.
[5] Reply by the EU to question 2 from the Panel, paragraphs 9 and 10.
[6] Reply to the United States to question 2 from the Panel, paragraphs 7 to 9.
[7] Second written submission of the Dominican Republic, paragraph 10.
[8] Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 114.
[9] Second written submission of the Dominican Republic, paragraph 11.
[10] *Ibid*., paragraph 12.

Article 2.2 would cease to apply to any safeguard that implies suspension of Article I.1 lacks substance.

B. SUSPENSION OF ARTICLE II.1(a) AND II.1(b), SECOND SENTENCE, OF THE GATT

10. The Dominican Republic now indicates that the provisional and definitive measures replace the pre-existing ordinary MFN tariff; in other words, they replace what in Spanish is called the "*derecho de aduana propiamente dicho*" (in English, the "ordinary customs duty") and the complainants wrongly consider that this is rather a "second tariff".[11] The Dominican Republic has explained that these measures *are not the same and do not have the same characteristics* as the ordinary MFN tariff or ordinary customs duty.

C. THE APPLICABILITY OF THE AS AND ARTICLE XIX TO THE INVESTIGATION AND PRELIMINARY AND DEFINITIVE DETERMINATIONS

11. The Dominican Republic affirms that a safeguards investigation can only be subject to certain requirements if it actually leads to the adoption of a safeguard measure.[12] The Dominican Republic disregards the Appellate Body's statement to the effect that there are two main factors when interpreting the AS: (i) the determination of the right to apply a safeguard measure, and (ii) the way in which the safeguard measure is applied.[13] Failure to impose a safeguard measure does not invalidate the determination a Member may make regarding the right to impose a safeguard measure, which may be exercised at any time.

12. The Dominican Republic contends that it fails to understand how reaching findings regarding the claims related to the investigation that did not lead to the adoption of measures would help in reaching a positive settlement of this dispute.[14] This is a new request by the Dominican Republic, that the Panel should abstain from reaching findings on this matter. We do not consider that such a request is admissible.

13. As found by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, "… any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[15] Accordingly, if the measures in question include the investigation and the specific determinations cited in this Panel's terms of reference, and there are specific claims about the way in which the investigation was conducted and these determinations were reached, there is then no reason why the Panel should abstain from reaching the relevant findings.

III. THE PRELIMINARY OBJECTIONS OF THE DOMINICAN REPUBLIC

14. The complainants responded in full to the preliminary objections at the first substantive meeting[16] and once again in their replies to the questions from the Panel.[17]

15. With regard to the objections against the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT, it is pertinent to repeat that these are not new claims, as argued by the

[11] *Idem.*
[12] *Ibid*., paragraph 27.
[13] Appellate Body Report, *US – Line Pipe*, paragraph 84.
[14] Second written submission of the Dominican Republic, paragraph 44.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paragraph 81.
[16] Opening oral statement by the complainants at the first substantive meeting, paragraphs 29-45.
[17] Replies by the complainants to questions 82, 85 and 86.

Dominican Republic.[18] The complainants included in the request for consultations a reservation that clearly allowed subsequent inclusion in the request for the establishment of a panel of claims relating to the GATT 1994, as was in fact done. Based on this reservation and on the discussions during the consultations, the complainants reformulated their arguments and included in the request for a panel alternative claims in conformity with the GATT 1994 relating to the most-favoured-nation principle and import charges other than customs duty. As confirmed by Panama, the issues relating to Articles I.1, II.1(a) and II.1(b) of the GATT were indeed discussed during the consultations.

16. The Dominican Republic has failed to prove how the alleged procedural defects have affected its right of defence.[19] The complainants have also rebutted the Dominican Republic's statement regarding the supposed change in the essence of the claims caused by the alleged inconsistency between the request for consultations and the request for the establishment of a panel.[20]

IV. THE DEFINITION OF THE DOMESTIC INDUSTRY

17. The Dominican Republic has not so far identified the paragraphs in its resolutions or reports in which the adequate and reasoned findings and conclusions on the definition of the imported product subject to investigation are to be found. On the contrary, it simply falls back on mere statements that do not reflect the reasoning or value judgement on the issue.[21]

18. The Dominican Republic asserts that the production process does not form part of the definition of the like domestic product, but was a decisive criterion when identifying the domestic industry.[22] With this statement, the Dominican Republic is recognizing that when it defined the domestic industry it based itself on criteria other than the nature of the domestic and imported products and the nature of like or directly competitive products. Already in *US – Lamb*, the Appellate Body considered that this criterion was not acceptable when defining the domestic industry.[23]

19. The Dominican Republic also mentions that Article 4.1(c) of the AS provides for the possibility of not taking into account all the domestic producers but only a major proportion.[24] Although Article 4.1(c) does allow for this possibility, what is certain is that in this case the Dominican Republic decided a priori to exclude certain "transformers" which it considered did not produce a domestic product.[25]

20. Moreover, the Dominican Republic excluded a producer which was at the same time an importer, even though Article 4.1(c) does not cover the eventuality of such exemption.[26] As can be seen, the Dominican Republic seeks to read into Article 4.1(c) rights that do not exist. Unlike the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, Article 4.1(c) of the AS does not allow for the possibility of a priori exemption of certain types of producers if these producers produce the like or directly competitive product. Nevertheless, only once

[18] First written submission by the Dominican Republic, paragraph 88.
[19] Second written submission of the complainants, paragraphs 47-50.
[20] *Ibid*., paragraphs 51-60.
[21] Second written submission of the Dominican Republic, paragraphs 58-60.
[22] *Ibid*., paragraphs 62 and 63.
[23] Appellate Body Report, *US – Lamb*, paragraphs 90 and 94.
[24] Second written submission of the Dominican Republic, paragraph 69.
[25] *Ibid*., paragraph 73.
[26] *Ibid*., paragraph 77.

all the producers producing the like or directly competitive product have been taken into consideration does Article 4.1(c) allow consideration of a major proportion rather than all of them.

21. Lastly, the Dominican Republic argues that the context of Article 4.1(c) of the AS endorses the possibility of basing oneself solely on a major proportion of the domestic industry inasmuch as the investigating authority must base itself on reliable data and collecting information from producers involved in other activities such as import and resale would raise problems in separating out the data concerning economic activities that are not related to the products produced by the producers.[27] The Dominican Republic's argument is no justification for excluding certain producers from consideration of the domestic industry. The investigating authority is obliged to process and separate information relevant to the purposes of the investigation. Using the same argument, it could be argued that any enterprise engaged in activities parallel to production of the like or directly competitive product could be excluded from the investigating authority's examination. This interpretation cannot be sustained.

V. UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED UNDER THE GATT

22. The Dominican Republic mentions that the clause on unforeseen developments in Article XIX(a) does not constitute a binding obligation.[28] The complainants have extensively rejected this defence based on Appellate Body case law.[29]

23. As a second line of defence, the Dominican Republic asserts that, even if the unforeseen developments clause is binding, its investigating authority complied with it. The Dominican Republic originally claimed before the Panel that the unforeseen developments comprised four elements: (i) China's accession to the WTO; (ii) tariff cuts resulting from free trade agreements; (iii) the 2008 economic and financial crisis; and (iv) the increase in production costs.[30] In its replies to the questions from the Panel, the Dominican Republic recently confirmed that only the first two of these elements constituted the alleged unforeseen developments.[31]

24. China's accession to the WTO cannot be considered an unforeseen development for the Dominican Republic.[32] At the time when the WTO Agreement entered into force for the Dominican Republic (i.e. on 9 March 1995), the negotiations regarding China's accession were already under way, having begun in 1987.

25. The complainants also explained why the tariff cuts under free trade agreements are not an unforeseen development.[33] As the purpose of free trade areas is to achieve deeper liberalization than that within the WTO framework, it is not acceptable for the Dominican Republic to argue that its voluntary decision to implement tariff cuts under such agreements is an unforeseen development.

[27] *Ibid*., paragraph 79.
[28] First written submission of the Dominican Republic, paragraphs 258-293.
[29] Opening oral statement.
[30] First written submission of the Dominican Republic, paragraphs 287-289.
[31] Reply by the Dominican Republic to question 114 from the Panel.
[32] Second written submission of the complainants, paragraphs 176-184.
[33] *Ibid*., paragraphs 185-190.

26. In addition, in the relevant reports and resolutions there is no mention whatsoever of the *logical connection* which, according to the Appellate Body, must exist between the two events and the alleged increase in imports of polypropylene bags and tubular fabric.[34]

27. The complainants also contend that the Dominican Republic did not identify the relevant obligations incurred under the GATT and did not explain how those obligations resulted in the alleged increase in imports, as required by Article XIX.1(a).[35] In response to a question from the Panel, the Dominican Republic indicated that page 86 of the preliminary report supposedly contained identification of the corresponding tariff concessions.[36] We reiterate that nowhere in this paragraph does the investigating authority explicitly indicate that the alleged increase in imports was the result of obligations incurred under the GATT.[37]

VI. THE ALLEGED INCREASE IN IMPORTS

28. The investigating authority established that there was a "marked decline" in the trend in imports[38], but did not explain sufficiently and adequately why, despite a decline of such magnitude up to the end of the investigation period, here was an increase in imports in the form described by the Appellate Body.

29. The Dominican Republic claims that its conclusion regarding increased imports is valid because its technical reports clarify that the decline in imports was caused by the decrease in the country's total imports during 2009.[39] Subsequently, the Dominican Republic indicated that this decrease in imports was "incidental and temporary".[40]

30. As we have previously stated, the investigating authority's explanation is insufficient and invalid because the overall decline in the Dominican Republic's imports is a macroeconomic occurrence that affected imports in the whole of the tariff universe for goods.[41]

VII. THE ALLEGED SERIOUS INJURY

31. When defining a like or directly competitive product as one product, the investigating authority had to assume all the consequences of such a definition, for example, the need to make a separate analysis for each relevant segment. The Dominican Republic cannot take advantage of a broad definition of the domestic industry and at the same time absolve itself of the responsibilities inherent in opting for this definition.

32. As to the inclusion of information on products that are not those investigated, the Dominican Republic subsequently explains that these products account for around 15 per cent of domestic production.[42] It presents no further substantiation than its mere affirmation. The

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[34] *Ibid*., paragraphs 180-184 and 189. See also the Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 92; Appellate Body Report, *Korea – Dairy*, paragraph 85.

[35] First written submission of the complainants, paragraphs 227-234; opening oral statement by the complainants at the first substantive meeting, paragraph 58.

[36] Reply by the Dominican Republic to question 115 from the Panel.

[37] Second written submission of the complainants, paragraphs 192-194.

[38] Preliminary report, page 68; final report, page 61.

[39] First written submission of the Dominican Republic, paragraphs 313-324.

[40] *Ibid*., paragraph 320.

[41] Reply by the complainants to question 118 from the Panel.

[42] Second written submission of the Dominican Republic, paragraph 99.

Dominican Republic's *ex post* explanation does not indicate whether the figure of 15 per cent of total output refers to the volume or total value of production.

33. Regarding the inclusion of information on export activities, it is meaningless to take into account this type of information for the purposes of the investigation. The purpose of the investigation is to examine the situation of the domestic industry producing the like product or the product directly competing with the imported product, in accordance with Article 4.1(c) of the AS. Obviously, the product intended for export does not compete with the imported product that is the subject of investigation.

34. Concerning depreciation and amortization costs, the Dominican Republic's explanation is *ex post*. The explanation now put forward cannot be found in any part of the technical reports or the resolutions. Furthermore, the Dominican Republic now acknowledges that the production of other products in the bags division accounts for around 15 per cent of domestic production, and that the bags division produces for export. On this basis, it is then necessary to make a *pro rata* calculation at least in proportion to this level of production for the product that is not a like or directly competitive product or is not sold on the Dominican market. As this explanation and *pro rata* calculation do not appear in the investigating authority's technical reports and resolutions, this confirms that the evaluation of losses and gains and cash flows based on the financial statements of the bags division was not a precise, sufficient and appropriate evaluation.

VIII. THE ALLEGED CAUSAL LINK

35. On previous occasions, the complainants fully responded to the Dominican Republic's arguments regarding the shortcomings in the determination of the causal link and the lack of a non-attribution examination.[43] We should like to point out that the Dominican Republic has presented no arguments in defence other than those to be found in its first written submission.

36. Consequently, for the purposes of this statement, the complainants reaffirm the claims mentioned and emphasize that the prima facie case already proven has not been effectively rebutted by the Dominican Republic.

IX. THE LACK OF PARALLELISM

37. The complainants reiterate their position that the parallelism obligation is mandatory irrespective of whether the imports excluded are imported from a free trade area or customs union, or are imports from developing countries under Article 9.1 of the AS.[44]

38. As the imports from Mexico, Panama, Colombia and Indonesia were exempt from application of the safeguard, logically, they should then have been exempt from the investigation. The Dominican Republic, however, did not do this and now argues that this basic concept of symmetry allows exceptions. The complainants reject this interpretation.

39. Precedents in the Panel and the Appellate Body Reports in *US – Wheat Gluten* do not support the Dominican Republic's position. First of all, the Appellate Body clarified that the United States

[43] Opening oral statement of the complainants at the first substantive meeting, paragraphs 99-115.
[44] *Ibid*., paragraph 118; second written submission of the complainants, paragraph 239.

was the one arguing that Article 9.1 is an exception to the parallelism rule.[45] Nevertheless, the Appellate Body never stated that it shared the United States' interpretation. Secondly, the Appellate Body then stated that Article 9.1 "is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members".[46] This statement does not mean that imports from developing countries should be exempt from application of the measure but not the underlying investigation. In mentioning that the exception to Article 9.1 concerns the *general rules* in the AS, the Appellate Body referred to the exceptional circumstance of excluding certain imports from the scope of the measure, hence without prejudice to also excluding these imports from the investigation. In fact, it is precisely the exceptional circumstances such as application of Article 9.1 or the exemption for imports from a free trade area or customs union which give rise to the parallelism obligation.

X. LACK OF NOTIFICATION, CONSULTATIONS AND MEANS OF TRADE COMPENSATION

40. In this connection, the Dominican Republic states that the hearings held during the safeguards investigation conducted by its investigating authority constitute the prior consultations referred to in Article 12.3 of the AS.[47] The Dominican Republic claims that "the consultations referred to in Article 12.3 of the Agreement on Safeguards were held on 12 May on the occasion of the public hearing" in the safeguards investigation.[48]

41. We reiterate that the hearings in the safeguards investigation conducted by the investigating authority cannot be cannot be treated as equivalent to consultations at the multilateral level as prescribed by Article 12.3 of the AS.[49]

42. In essence, the Dominican Republic argues that, by fulfilling Article 3.1 of the AS, there is automatically compliance with Article 12.3 of the AS. This goes against the principle of effectiveness in the interpretation of treaties as the Dominican Republic's interpretation would make Article 12.3 redundant.[50]

XI. VIOLATION OF ARTICLES I.1 AND II.1(A) AND II.1(B) OF THE GATT

43. If this Panel accepts that these measures are not safeguard measures within the meaning of Article XIX and the AS, the provisional and definitive measures are inconsistent with Articles I.1, II.1(a) and II.1(b) of the GATT.

A. VIOLATION OF ARTICLE I.1 OF THE GATT: THE MOST-FAVOURED-NATION PRINCIPLE

44. According to Article I.1 of the GATT, any advantage, favour, privilege or immunity granted to products of a particular country must be accorded immediately and unconditionally to the like

[45] Appellate Body Report, *US – Wheat Gluten*, footnote 96, first sentence ("The United States relies on Article 9.1 of the Agreement on Safeguards in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure.").

[46] *Ibid*., footnote 96, second sentence.

[47] First written submission of the Dominican Republic, paragraphs 502-549.

[48] Reply by the Dominican Republic to question 167 from the Panel.

[49] Second written submission of the complainants, paragraphs 248-251.

[50] Appellate Body Report, *US – Gasoline*, page 25; see also Appellate Body Report, *Japan – Alcoholic Beverages*, page 12; Appellate Body Report, *Korea – Dairy*, paragraphs 81 and 82.

product of other WTO Members. A violation of Article I.1 implies proof of various elements, which were set out in our second written submission[51] and which are summarized below:

- The decision not to apply the tariff surcharge to imports from Mexico, Panama, Colombia and Indonesia constitutes an advantage, favour, privilege or immunity related to import duties;

- this advantage, favour, privilege or immunity granted by the Dominican Republic to Mexico, Panama, Colombia and Indonesia is not extended to other WTO Members, because exemption from the measure only benefits these four countries.

45. The Dominican Republic has acknowledged on a number of occasions that, if the measures contested are not deemed to be safeguards, exempting certain countries from the measure becomes "problematic".[52] The Dominican Republic does not seek to justify this violation under any provision of the GATT. Accordingly, it is obvious that the Dominican Republic acted in a manner inconsistent with Article I.1 of the GATT by not applying the tariff surcharge on a most-favoured-nation basis.

B. VIOLATION OF THE PROHIBITION ON IMPOSING DUTIES AND CHARGES OTHER THAN ORDINARY CUSTOMS DUTY

46. The complainants have also contended throughout the procedure that the provisional and definitive measures are contrary to Article II.1(a) and II.1(b), second sentence, of the GATT. The Dominican Republic has not presented any better defence against these claims than the statement that these measures simply constitute a tariff increase and has put forward this statement only in the context of the applicability of the AS and Article XIX.[53]

47. We have already dealt with these arguments in regard to the applicability of the AS and Article XIX. In our view, the Dominican Republic has not submitted sufficient factual elements to refute those cited by the complainants.[54] We consider that this is the case because it is difficult to explain how a measure whose characteristics are not the same as a tariff, and which even the Dominican Republic recognizes is applied in replacement of the ordinary customs duty, could be termed a tariff. In addition, we reaffirm that the Dominican Republic has not registered any duty or charge other than the ordinary customs duty in its Schedule of Concessions. Consequently, the Panel will have to determine whether the complainants have proved that the provisional and definitive measures constitute duties and charges other than ordinary customs duty and that, accordingly, they are inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

XII. CONCLUSION

48. Based on the foregoing, the complainants request the Panel to confirm that the AS and Article XIX apply to the provisional and definitive measures and to find that the measures, and the investigation and substantive determinations contested, are inconsistent with Article XIX and the

[51] Second written submission of the complainants, paragraphs 256-282.

[52] Closing statement by the Dominican Republic at the first substantive meeting, paragraph 17; reply by the Dominican Republic to question 52 from the Panel; reply by the Dominican Republic to question 2 from the complainants.

[53] Second written submission of the Dominican Republic, paragraphs 15-25.

[54] See the complainants' response to the request for a preliminary resolution, paragraph 123; opening oral statement by the complainants at the first substantive meeting, paragraphs 136-145; reply of the complainants to questions 26 and 27.

various provisions of the AS cited. Likewise, the complainants request the Panel to find that the lack of notification, consultations and adequate means of compensation are inconsistent with Articles 8.1 and 12.3 of the AS and XIX.2 of the GATT.

49. Alternatively, the complainants request the Panel to find that the selective exemption of imports from the provisional and definitive measures is inconsistent with Article I.1 and that both measures are also inconsistent with Article II.1(a) and II.1(b), second sentence, of the GATT.

50. Lastly, in view of the serious and numerous anomalies in the investigation, and in the application of the provisional and definitive measures, the complainants consider that the Panel would be justified in exercising its authority, pursuant to Article 19.1 of the DSU, to make suggestions regarding implementation. In this connection, the complainants request the Panel to suggest that the Dominican Republic withdraw the definitive measure with immediate effect.

ANNEX F-3

CLOSING ORAL STATEMENT OF THE DOMINICAN REPUBLIC

Mr Chairman, members of the Panel:

1. The Dominican Republic thanks you for your efforts and questions yesterday and today at this second substantive meeting of the Panel. As this meeting draws to a close, the Dominican Republic would merely like to make a few general remarks that it would ask the Panel to bear in mind when reaching its conclusions and findings.

2. It has become clear that the measures at issue before the Panel do not suspend any obligations or modify or withdraw a concession within the meaning of Article XIX:1(a) of the GATT. The complainants nevertheless maintain that GATT Article XIX and the Agreement on Safeguards apply to the measures in dispute.

3. To support their arguments, the complainants have resorted to interpretations according to which the essential function of a safeguard measure is to prevent or remedy serious injury to a domestic industry by adopting measures as a "safeguard" duty that is different from a simple MFN tariff increase. According to this interpretation, the idea of suspending an obligation or withdrawing or modifying a concession is not essential to the notion of safeguard in WTO law.[1] According to the complainants, the suspension of an obligation or the modification or withdrawal of a concession would only be necessary when the "safeguard duty" results in an increase that exceeds the bound rate. Thus, an additional duty below the bound level would constitute a "safeguard" duty although it does not involve the suspension, withdrawal or modification of an obligation or concession. This interpretation introduces an artificial distinction between the first and second parts of Article XIX:1(a) of the GATT in which the second part provides for cases in which such a safeguard measure is inconsistent with other GATT obligations.

4. Essentially, it became clear as the proceedings went forward that the complainants were trying to create a sort of *sui generis* trade remedy that is not provided for in the WTO Agreements. This remedy would cover any measure whose function consists of resolving injury or threat of serious injury situations without taking account of the objective conditions that define the notion of safeguard and the scope of application of GATT Article XIX and the Agreement on Safeguards. The Dominican Republic urges the Panel not to adopt this novel interpretation of Article XIX of the GATT, which would be tantamount to creating a new trade remedy and applying disciplines to measures that would otherwise be authorized under the GATT.

5. The interpretation of the complainants should not be adopted lightly: to apply disciplines to certain measures that can normally be freely adopted, as in the case of a tariff increase to a level below the bound rate, would be to undermine the flexibility that is inherent and essential to the WTO's system of tariff concessions, i.e. the margin for manoeuvre represented by the difference between the bound rate and the applied tariff.

6. For WTO Members, this margin of flexibility provided by the difference between the applied tariff and the bound rate is essential. Moreover, several of the complainants joined the Dominican Republic in defending this margin in recent non-agricultural market access negotiations,

[1] Reply of the complainants to question 58 of the Panel.

stressing that "[t]ariffs serve multiple purposes in small, vulnerable economies, the most important of which are to ensure the viability of vulnerable domestic industries …".[2] The Dominican Republic asks the Panel not to create a precedent that would undermine the incentives for Members to apply tariffs at a rate significantly below the bound rate, as this would affect one of the cornerstones of the GATT, namely the system of tariff concessions as a ceiling below which Members are given ample freedom of action.

7. The Dominican Republic trusts that the Panel will not adopt an interpretation that turns the notion of safeguard into a trade defence instrument similar to an anti-dumping procedure. The purpose of imposing a safeguard measure is the suspension, modification or withdrawal of an obligation or concession. This is why Article XIX is known as an escape clause. It would be counter-productive to impose the disciplines of the Safeguards Agreement on tariff increases within the margin of flexibility between the bound rate and the applied tariff. Such an increase does not require recourse to any escape clause, considering that there is no obligation being suspended or concession being modified.

8. Mr Chairman, members of the Panel, I thus conclude my oral statement. The Dominican Republic would like to thank you and the Secretariat once again for your efforts in this dispute.

[2] Market Access for Non-Agricultural Products: Treatment of Small, Vulnerable Economies in the NAMA Negotiations; Communication from Antigua and Barbuda, Barbados, Bolivia, Dominica, Dominican Republic, El Salvador, Fiji, Grenada, Guatemala, Honduras, Mongolia, Nicaragua, Papua New Guinea, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago, 10 November 2005, TN/MA/W/66, paragraph 4.

ANNEX F-4

CLOSING ORAL STATEMENT OF THE COMPLAINANTS

Mr Chairman, members of the Panel:

1. In this last statement, the complainants present some reactions to the opening statement by the Dominican Republic yesterday.

2. With regard to the preliminary objections that seek to exclude certain claims from the Panel's terms of reference, during this second hearing we have not heard any additional substantive argument from the Dominican Republic in support of its position. The Dominican Republic still fails to explain how its right of defence was specifically affected. It has not shown either how the alleged inconsistency between the request for consultations and the request for the establishment of a panel changed the essence of the claims.

3. The arguments concerning Articles I.1, II.1(a) and II.1(b) of the GATT fall fully within the terms of reference for this dispute because of the reservation contained in the request for consultations that enabled the complainants to bring up issues in conformity with the GATT during the consultations, and also because of the fact that these issues were in fact discussed during the consultations. Moreover, these arguments are clearly included in the request for the establishment of a panel. The Dominican Republic nevertheless continues to seek ways of depriving these facts of any substance; for example, by stating that the issues concerning Articles I and II of the GATT were not discussed during the consultations. In this connection, we repeat that Panama, being the only country which participated in the consultations as an associate member, clarified that these issues were effectively addressed in the consultations. Consequently, this discussion has already concluded.

4. We also note that the Dominican Republic has not put forward any formal defence concerning the claims relating to Articles I.1, II.1(a) and II.1(b) of the GATT. It simply addressed these issues in connection with the discussion on the applicability of Article XIX and the AS to the provisional and definitive measures.

5. Regarding the applicability of the AS and Article XIX, the Dominican Republic finds it pertinent to cite the interpretative note to Article 40 of the Havana Charter concerning Emergency Action on Imports of Particular Products, which indicates that any suspension, withdrawal or modification under what today would be Article XIX.1(a) must not discriminate against imports from any Member country. It then states that this logic has applied since the very first days Article XIX came into force.[1]

6. The complainants consider that the interpretative note referred to by the Dominican Republic does not form part of the ordinary meaning, context, object and purpose of the GATT, in particular, Article XIX, so it plays no role in the task of interpreting Article XIX.1(a). Article XIX has no interpretative notes and the meaning of the words "obligations" and "obligation" in its context is unequivocal and is not qualified.

[1] Opening oral statement of the Dominican Republic at the second meeting of the Panel, paragraphs 17 and 18.

7. Furthermore, even if this note played any interpretative role, the complainants consider that its import does not support the Dominican Republic's position, but rather supports what the complainants contend to the effect that it indicates that the GATT Contracting Parties decided to exclude this limitation from the scope of Article XIX of the GATT. Accordingly, the Dominican Republic failed to explain what happened to this interpretative note.

8. This interpretative note was included in the text of the Havana Charter in relation to Article 40 (now Article XIX). Unlike other provisions and interpretative notes, however, including Article 40 itself (i.e. Article XIX), it did not survive the transition from the Havana Charter to the GATT 1947 and was not incorporated into the text of the GATT 1947.

9. As can be seen from the document we are attaching as exhibit CEGH-39, the Havana Charter contains several provisions that are today included in the GATT. Article 40 almost literally reflects what we now know as Article XIX of the GATT. Moreover, the Havana Charter included interpretative notes on various of its substantive provisions. Many of these interpretative notes survived the transition from the Havana Charter to the GATT 1947. This was the case, for example, with the note concerning Article 18 of the Havana Charter, which is now the interpretative note to Article III.2 of the GATT concerning internal taxes. Other notes, however, were not incorporated into the GATT. This was the case for the note concerning Article 40 of the Havana Charter, cited by the Dominican Republic in its oral statement yesterday.

10. What does this omission signify? In our view, that the Contracting Parties to the GATT 1947 clearly rejected the limitation on the scope of Article XIX.1(a), which it was sought to establish by means of the interpretative note referred to by the Dominican Republic.

11. It should also be pointed out that the Dominican Republic did not quote the interpretative note to Article 40 of the Havana Charter in full. The text in full reads as follows:

> It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries.[2]

12. It should be noted that the last part of this note qualifies the measure in such a way that the action to be avoided, to the fullest extent possible, is causing injury to other Members suppliers of the product in question. These words cast doubt on the absolute nature of the "non-discrimination" which it is sought to establish in the first part of the interpretative note.

13. Consequently, the Dominican Republic only related part of the story, leaving out a detail which in fact backs up the position of the complainants in the sense that Article XIX.1(a) applies to all the GATT provisions, including Article I.1.

14. This position is supported by another fact that the Dominican Republic also omitted to mention concerning the early days of the GATT 1947. As can be seen from the document attached as Exhibit CEGH-40, page 13, in connection with the revision of the GATT in 1955, there was an attempt on the part of delegations of certain Scandinavian countries to reintroduce the interpretative note to Article 40 of the Havana Charter by means of a new provision. The proposal was submitted to

[2] Exhibit CEGH-39.

the sub-committee revising the GATT, which rejected it. There was no general agreement on it. In the end, it had to be withdrawn.

15. Contrary what is stated by the Dominican Republic, this shows that in the early years of the GATT the interpretative note to the Havana Charter did not have the effect which the Dominican Republic is now seeking to give it. Moreover, it also shows that, since the early days of the GATT 1947, the GATT Contracting Parties were not prepared to accept a limitation on the scope of Article XIX.1(a) of the GATT.

16. In addition, the Dominican Republic cites a report by the Ad Hoc Committee on the accession of Japan to the GATT 1947[3] in support of its statement that Article XIX.1 does not allow suspension of Article I.1 of the GATT. What the Dominican Republic does not indicate is that this report was situated in a context in which several Contracting Parties were concerned about Japan's accession to the GATT and wondered whether it would not perhaps be appropriate to apply a safeguard focusing on Japan with a view to remedying serious injury, not just for a specific producer but for various production sectors.[4]

17. It was in this context that some members of the Committee expressed the view that the measures adopted pursuant to Article XIX could not be discriminatory.[5] This was the limited opinion of some members of the Committee. It did not reflect a consensual or general opinion of the Committee, still less of the Contracting Parties to the GATT 1947. Accordingly, this position of *some parties during negotiations* has to be viewed in the light of its due and limited scope in the context of those negotiations.

18. The Dominican Republic states that in Japan's accession procedure the possible extension of Article XIX also to constitute suspension of Article I.1 was rejected.[6] What was in fact rejected, however, was extension of Article XIX to include conditions in addition to those provided in the first part of Article XIX.1(a) concerning imports from one Contracting Party in particular.[7] Perhaps this rejection was attributable to the opinion mentioned by the Dominican Republic, but it might also be attributable to the view that there was no need to extend Article XIX.1(a), either because the additional conditions sought were already covered by Article XXIII of the GATT[8], or because some of the Committee's members considered that Article XIX.1(a) allowed for the possibility of applying safeguards to imports from specific countries. The report cited by the Dominican Republic does not enable a conclusion to be reached either way, so it does not constitute elucidatory and relevant information.

19. For the foregoing reasons, the complainants do not consider that the additional elements presented by the Dominican Republic provide confirmation that Article XIX.1(a) excludes Article I.1 of the GATT from its application.

20. With regard to the definition of the domestic industry, the Dominican Republic indicates that the complainants argue that the Panel was obliged to revise the definition of the product subject to investigation in the light of the report of the Appellate Body in *EC – Aircraft*. The reason why the

[3] Exhibit RDO-27.
[4] *Ibid*., paragraphs 3-6.
[5] *Ibid*., paragraph 6.
[6] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 18.
[7] Exhibit RDO-27, paragraph 7.
[8] *Idem.*

Dominican Republic considers that this report is irrelevant is that the definition of subsidized product in a complaint of serious injury is submitted by a WTO Member and refers to the relevant market, whereas the definition of the product subject to investigation in a domestic procedure is made by the investigating authority.[9] This reason does not appear valid to us. The fact that the evaluation by a panel (in the case of serious injury) by comparison with a domestic authority (in the case of safeguards) does not have any consequences, it does not lessen the duty of objectiveness, impartiality and neutrality that must be the feature of investigations, whether by a panel or by a domestic investigating authority in the case of safeguards.

21. Moreover, a claim of serious injury concerns trade that is distorted by recurrent or unlawful subsidies, whereas a safeguards investigation concerns trade that is conducted lawfully along the lines to be expected in trade relations among Members. This fundamental distinction indicates even more clearly that the principles which govern determination of the product investigated in a claim of serious injury must be respected in an investigation relating to safeguard measures, and confirm to this Panel that the considerations taken into account by the Dominican Republic in order not to provide adequate and reasoned explanations of the product subject to investigation when defining the domestic industry are insufficient.

22. As to the alleged increase in imports, the Dominican Republic repeats its arguments that "overall during the investigation period imports increased by 50.06 per cent".[10] This spontaneous and abrupt statement by the Dominican Republic reflects its underlying assumption, namely, for it the criterion followed first and foremost to determine the increase in imports was increases at each extremity of the period.

23. Subsequently, concerning the decrease in 2009, the Dominican Republic indicated that this can be explained by the reduced growth in the Dominican economy and that the temporary nature of this decline was confirmed by the import figures for 2010.[11] The complainants ask themselves where, in the respective reports, it is determined that the decline was "incidental" and "temporary" in the light of these considerations? Reading these reports does not lead to such conclusions or to an explanation of how a macroeconomic occurrence that affects the economy in general (and hence questionably "incidental") or an increase based on imports distorted by the conduct of the investigation and the imposition of the provisional measure (and hence questionably proof of their "temporary" nature) can lead to the conclusion that the decline in imports up to the end of the investigation period was irrelevant.

24. Lastly, the complainants would like to emphasize the systematic repercussions of this dispute at three levels: at the level of consideration of safeguards within the WTO, at the level of trade remedies, and at the level of regional and multilateral trade policy.

25. As to the consideration of safeguards within the WTO, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, this would allow investigating authorities to initiate investigation procedures in order to apply safeguard measures, involving several interested parties and governments of exporting countries (with high costs for participation, legal representation, trade uncertainties, and political manoeuvring), and subsequently avoid *multilateral control*. In other words, it would encourage the initiation of supposedly "harmless" investigation procedures and there would be no form of control even if they

[9] Opening statement of the Dominican Republic at the second meeting of the Panel, paragraph 35.
[10] *Ibid*., paragraph 50.
[11] *Idem*.

would undoubtedly have the effect of disguised barriers to trade and international competition. Such an outcome would be directly contrary to the object and purpose of the AS, as set out in its preamble, and would raise serious doubts about the feasibility of contesting such measures through the dispute settlement mechanism.

26. With regard to trade remedies, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, in anti-dumping or countervailing procedures investigating authorities could use this interpretation as a perverse incentive to avoid obligations under the anti-dumping and subsidies and countervailing measures agreements. An investigating authority following this line could then decide to initiate an anti-dumping or countervailing duty investigation into imports from several origins, collect the necessary information, evaluate whether there are "unfair practices", injury and a causal link, and if this evaluation did not yield the expected results, it could terminate the investigation and then impose a "tariff increase", even though this increase might exceed the margin of dumping or subsidization, as may be the case. Even if it was determined that there was an unfair practice, injury and a causal link, an investigating authority might deem it appropriate not to impose an anti-dumping or countervailing duty and *replace it* with a straightforward tariff increase in order to avoid the expiry period of five years applicable to such measures. It would also be a dangerous incentive that could place WTO Members in the situation prior to the existence of the GATT 1947: soon, there could be a proliferation of measures that were not only obstacles to international trade but, quite simply, escaped from any multilateral control.

27. Lastly, as regards regional and multilateral policy, if the Dominican Republic's interpretation that the measures in question are not safeguard measures in the WTO context is accepted, there would be inconsistency between the regional provisions on safeguard measures and the WTO provisions. Many WTO Members have managed to negotiate a harmonious balance between these provisions by retaining the rights and obligations of Article XIX and the AS at the regional level in order to apply the so-called global safeguards. This balance has been reached not only between the Dominican Republic and the complainants in the DR-CAFTA and Central America-DR agreements, it is a common mechanism in several regional agreements and is desirable because it makes safeguards disciplines at the regional level and those envisaged at the multilateral level consistent.

28. This harmonious balance, however, could be distorted if, in order to abstain from compliance with its regional commitments, a party to these regional agreements makes use of and benefits from the WTO provisions and then, when facing questions in the WTO and in order to abstain from compliance with its WTO commitments, this party goes back on itself and contends that the measure from which it benefited is not a safeguard measure in WTO terms. The result of the foregoing would be that, in order to contest the measures in question, a complainant would first have to do so using the dispute settlement mechanism in the regional agreement in question; wait for the argument of the defence that it is a WTO safeguards measure; and only after this has been accepted, may it bring the matter up at the WTO, where the defendant still has the possibility of arguing that it is not a safeguard measure in accordance with the AS because it does not involve suspension of obligations or concessions.

29. In the light of the foregoing, as a matter of trade policy, it would not be acceptable to allow a country to benefit in two ways from acts that are unrelated, particularly if these acts are committed at the expense of the interests and expectations in good faith on the part of other trading partners.

30. For all the reasons explained during this procedure, we hope that the Panel will objectively evaluate this dispute and find that the provisional and definitive measures are inconsistent with Article XIX and the AS (or alternatively with Articles I.1, II.1(a) and II.1(b) of the GATT) and that the other measures at issue are also inconsistent with Article XIX and the AS.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY COSTA RICA

WORLD TRADE ORGANIZATION

WT/DS415/7
22 December 2010

(10-6862)

Original: Spanish

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

Request for the Establishment of a Panel by Costa Rica

The following communication, dated 15 December 2010, from the delegation of Costa Rica to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Costa Rica requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Costa Rica and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Costa Rica requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Costa Rica the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

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[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Costa Rica notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Costa Rica considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Costa Rica considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Costa Rica requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Costa Rica hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY GUATEMALA

WORLD TRADE ORGANIZATION

WT/DS416/7
22 December 2010

(10-6864)

Original: Spanish

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

Request for the Establishment of a Panel by Guatemala

The following communication, dated 15 December 2010, from the delegation of Guatemala to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 15 October 2010, Guatemala requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Guatemala and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Guatemala requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

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[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Guatemala notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Guatemala considers that:

(a) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Guatemala considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Guatemala requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Guatemala hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-3

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY HONDURAS

WORLD TRADE ORGANIZATION

WT/DS417/7
6 January 2011

(11-0013)

Original: Spanish

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

Request for the Establishment of a Panel by Honduras

The following communication, dated 20 December 2010, from the delegation of Honduras to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 18 October 2010, Honduras requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

Honduras and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, Honduras requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application

of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] The duration of the provisional safeguard measure was 200 days. On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4]

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for Honduras, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

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[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

[2] Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

[4] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

[5] Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 ("Final Resolution"); Final Technical Report of the Commission, dated 13 July 2010.

[6] Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, dated 6 October 2010.

B. LEGAL BASIS FOR THE COMPLAINT

Honduras notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, Honduras considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged increase in imports and the serious injury to the domestic industry. In particular,

these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

In any case, Honduras considers that:

(l) The measures at issue are inconsistent with Article I:1 of the GATT 1994 in that they are measures that are not applied to products originating in or consigned from particular origins, and this constitutes an advantage that has not been accorded immediately and unconditionally to other WTO Members.

(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, Honduras requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, Honduras hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX G-4

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY EL SALVADOR

WORLD TRADE ORGANIZATION

WT/DS418/7
6 January 2011

(11-0014)

Original: Spanish

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

Request for the Establishment of a Panel by El Salvador

The following communication, dated 20 December 2010, from the delegation of El Salvador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 October 2010, El Salvador requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards concerning the provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures.

El Salvador and the Dominican Republic held consultations on 16 and 17 November 2010. Unfortunately, these consultations failed to settle the dispute. Accordingly, pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards, El Salvador requests that at its next meeting, scheduled for 25 January 2011, the Dispute Settlement Body establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

A. BACKGROUND AND MEASURES AT ISSUE

The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

1. Initiation of the safeguard investigation

On 15 December 2009, at the request of the company FERSAN S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation with a view to the application of safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").[1] On 17 December 2009, the Commission published a notice of initiation of an investigation.[2]

2. Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic. It was also decided to exclude from the application of the measure imports from Mexico, Panama, Colombia and Indonesia pursuant to Article 9.1 of the Agreement on Safeguards.[3] On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.[4] The duration of the provisional safeguard measure was 200 days.

3. Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.[5] The Commission then issued a notice of application of the definitive measures on imports of polypropylene bags and tubular fabric.[6] In that notice and in the final resolution, the Commission pointed out that pursuant to Article 9.1 of the Agreement on Safeguards, the definitive safeguard measure would not apply to imports from Mexico, Panama, Colombia and Indonesia. The measure is being applied for 18 months starting on 18 October 2010.

Thus, for El Salvador, the measures at issue cover all of the resolutions, technical reports and notices mentioned above as regards the actions and omissions of the authorities of the Dominican Republic during the investigation and imposition of the safeguard measures, including the methodology, calculations, comparisons, determinations, procedures or general practices.

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[1] Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009; initial technical report of the Commission dated 20 November 2009.

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[3] Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 16 March 2010 ("Preliminary Resolution"). Addendum to Resolution CDC-RD-SG-061-2010 dated 16 March 2010 deciding on the application of the provisional measures requested by Fertilizantes Santo Domingo, C. Por A. (FERSAN) in the *Polypropylene Bags and Tubular Fabric* case, dated 30 March 2010; Preliminary Technical Report of the Commission (without date).

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B. LEGAL BASIS FOR THE COMPLAINT

El Salvador notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards. In this connection, El Salvador considers that:

(a) The Commission's preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the various relevant factual and legal aspects of the determinations relating to the product under investigation, the domestic like product, and the domestic industry, and this affects the determinations of increased imports, serious injury and causality that stem from those prior determinations. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(b) The preliminary and final determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) Moreover, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. These omissions are inconsistent with Articles 3.1, 4.2(a), 4.2(b), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(d) Nor do the preliminary and final determinations contain reasoned and adequate findings and conclusions with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions are contrary to Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(e) Furthermore, although the state of the domestic industry was found to be favourable, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions as to the existence of the alleged serious injury, understood as significant overall impairment of the domestic industry. Nor does the preliminary determination contain any reasoned and adequate findings and conclusions with regard to the critical circumstances to justify the provisional measure, or with regard to all of the factors that are required to be examined for the determination of serious injury. These omissions are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(f) Nor, at the same time, do the preliminary and final determinations contain reasoned and adequate findings and conclusions regarding the causal link between the alleged

increase in imports and the serious injury to the domestic industry. In particular, these determinations do not contain the analysis substantiating the causal relationship between the alleged increased imports and the alleged serious injury to the domestic injury. Nor is it explained how the injury to the domestic industry caused by factors other than imports was not attributed to the imports of the products under investigation. These omissions are contrary to Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(g) The measures at issue do not exempt all of the developing countries whose share of imports does not exceed 3 per cent. Moreover, the required parallelism between the substantive evaluation of the determinations of increased imports, serious injury and causal link on the one hand, and the coverage of the measures at issue as regards origin on the other, was not respected. These omissions are inconsistent with Articles 2.1, 2.2, 4.2(a), 4.2(b), 4.2(c), 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.

(h) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the reasons why certain information was considered to be confidential without requiring non-confidential summaries or why that information could not be summarized in a non-confidential manner. These omissions are contrary to Articles 3.1 and 3.2 of the Agreement on Safeguards.

(i) The preliminary and final determinations do not contain any reasoned and adequate findings and conclusions as to the need for the safeguard measure to facilitate adjustment of the domestic industry. This omission is inconsistent with Articles 3.1, 4.2(c), and 5.1 of the Agreement on Safeguards.

(j) The resolutions and reports made public concerning the preliminary and final determinations do not contain the reasoned and adequate findings and conclusions on all issues of fact and law supporting the imposition of the measures in question. This omission is inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

(k) Finally, the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. Nor did the Dominican Republic seek to agree on any adequate means of trade compensation for the adverse effects of the measures on the trade of other Members. This omission is inconsistent with Articles 8.1 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

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(m) Moreover, the measures at issue are duties and charges other than ordinary customs duties that are contrary to Article II:1(a) and the second sentence of Article II:1(b) of the GATT 1994.

In view of the foregoing, El Salvador requests the Dispute Settlement Body to establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU to examine this matter and the above-mentioned claims.

In view of the 18-month period of validity of the definitive safeguard measure and to ensure that the dispute settlement system provides an effective solution to this dispute, El Salvador hopes that the Panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the Panel were agreed upon, as stipulated in Article 12.8 of the DSU.

ANNEX H

COMMUNICATION FROM THE PANEL

ANNEX H

COMMUNICATION FROM THE PANEL IN RESPONSE TO THE REQUEST BY THE DOMINICAN REPUBLIC FOR A PRELIMINARY RULING

(12 May 2011)

On 18 April 2011, the Dominican Republic, as the responding party in the dispute, requested the Panel to issue a preliminary ruling determining that GATT Article XIX and the Agreement on Safeguards were not applicable to the present dispute and that this dispute was therefore devoid of purpose. The Dominican Republic also requested the Panel to suspend the present proceedings until it had issued its preliminary ruling and to postpone the deadlines provided for in the timetable, including the deadline for the Dominican Republic to present its first written submission.

On 21 April 2011, the Panel invited the complaining parties to respond in writing to the Dominican Republic's request and informed the parties that, for the time being, the deadlines provided for in the timetable would be maintained, including those for the Dominican Republic and the third parties to present their written submissions. On 21 April and 3 May 2011, the complaining parties submitted their response to the Dominican Republic's request for a preliminary ruling.

Having considered the written submissions of the Dominican Republic and the complaining parties, the Panel considers it inappropriate to make a preliminary ruling on whether GATT Article XIX and the Agreement on Safeguards are applicable to the present dispute. The Panel thus considers it inappropriate to suspend the proceedings and postpone the deadlines provided for in the timetable.

The Panel also notes the argument put forward by the Dominican Republic concerning the Panel's alleged lack of jurisdiction to rule in a dispute that relates to the violation of concessions granted outside the WTO sphere. The Panel notes the response of the complainants in this respect. Since the Dominican Republic did not request a preliminary ruling on this argument, the Panel considers it unnecessary to refer to it at the present time.

The Panel invites the parties to develop their arguments on the issues raised by the Dominican Republic. It will also consider with interest any arguments put forward by third parties in relation to these issues. The Panel reserves the right to submit questions to the parties and third parties on the issues raised by the Dominican Republic.

The Panel will rule on the issues raised by the Dominican Republic in its final report.