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**1 ARTICLE XIX**

**1.1 Text of Article XIX**

**Article XIX**

*Emergency Action on Imports of Particular Products*

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

## 1.2 General

### 1.2.1 Application of Article XIX

1. In *Argentina – Footwear (EC)* and *Korea – Dairy*<sup>1</sup>, the Appellate Body held that "any safeguard measure<sup>2</sup> imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994".<sup>3</sup>

2. In *Korea – Dairy*, the Appellate Body concluded that safeguard measures were "intended by the drafters of the GATT to be matters out of the ordinary, and to be matters of urgency, to be, in short, 'emergency actions'".<sup>4</sup>

3. The Appellate Body in *Argentina – Footwear (EC)* noted that the remedy provided by Article XIX is of an emergency character and is to be "invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation":

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<sup>1</sup> Both Reports were adopted on the same date, 12 July 2000.

<sup>2</sup> (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

<sup>3</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 84 and Appellate Body Report, *Korea – Dairy*, paras. 76-77.

<sup>4</sup> Appellate Body Report, *Korea – Dairy*, para. 86.

"As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products*'. The words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers*'. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions.' And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy."<sup>5</sup>

4. After finding support for its approach in the context of the relevant provisions, the Appellate Body in *Argentina – Footwear (EC)* held that the object and purpose of Article XIX also confirmed its interpretation:

"This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."<sup>6</sup>

5. In *US – Line Pipe*, the Appellate Body emphasized that the balance struck by WTO Members in reconciling the natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*. The Appellate Body further articulated on this tension:

"[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily*.<sup>7</sup> (emphasis added)

There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing

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<sup>5</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 93. See also Appellate Body Report, *Korea – Dairy*, para. 86.

<sup>6</sup> Appellate Body Report in *Argentina – Footwear (EC)*, para. 94. See also Appellate Body Report, *Korea – Dairy*, para. 87.

<sup>7</sup> Appellate Body Report, *US – Line Pipe*, para 82.

trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards.*" (emphasis added)<sup>8</sup>

### 1.2.2 Standard of review

6. In *US – Steel Safeguards*, the Panel, in a finding upheld by the Appellate Body<sup>9</sup>, recalled the standard of review for claims of violation of the unforeseen developments requirement of Article XIX of the GATT 1994 was that provided for in Article 11 of the DSU. The Panel articulated the standard in the following terms:

"[T]he role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, *through a reasoned and adequate explanation*, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers."<sup>10</sup>

7. The Appellate Body in *US – Steel Safeguards* rejected the United States argument that Article 11 of the DSU was not applicable to claims of violation of Article XIX of the GATT 1994 and added:

"We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'. More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a '*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports'. Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the *GATT 1994*."<sup>11</sup>

8. The Appellate Body in *US – Steel Safeguards* emphasized that "to the extent that the Panel looked for a 'reasoned and adequate explanation' that was 'explicit' in the sense that it was 'clear and unambiguous' and 'did not merely imply or suggest an explanation', the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance with Article XIX of the *GATT 1994* and the *Agreement on Safeguards*."<sup>12</sup>

## 1.3 Article XIX:1: "as a result of unforeseen developments"

### 1.3.1 Concept of unforeseen developments

9. In *Argentina – Footwear (EC)*, the Appellate Body interpreted the meaning of the phrase "as a result of unforeseen developments" which, although not included in the Agreement on Safeguards, is set forth in Article XIX:1(a). The Appellate Body held that "the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected':"

"To determine the meaning of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the

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<sup>8</sup> Appellate Body Report, *US – Line Pipe*, para. 83.

<sup>9</sup> Appellate Body Report, *US – Steel Safeguards*, para. 280.

<sup>10</sup> Panel Report, *US – Steel Safeguards*, para. 10.38.

<sup>11</sup> Appellate Body Report, *US – Steel Safeguards*, para. 276.

<sup>12</sup> Appellate Body Report, *US – Steel Safeguards*, para. 297.

object and purpose of Article XIX. We look first to the ordinary meaning of these words. As to the meaning of 'unforeseen developments', we note that the dictionary definition of 'unforeseen', particularly as it relates to the word 'developments', is synonymous with 'unexpected'. 'Unforeseeable', on the other hand, is defined in the dictionaries as meaning 'unpredictable' or 'incapable of being foreseen, foretold or anticipated'. Thus, it seems to us that the ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'.<sup>13</sup>

10. The Panel in *Argentina – Preserved Peaches* emphasized that increased quantities of imports should not be equated with unforeseen developments.<sup>14</sup> The Panel considered that the competent authority had indicated that "the entry of the imports, or the way in which they were being imported, was unforeseen, but there is no mention that the alleged developments themselves were unforeseen." Therefore, the Panel concluded 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*."<sup>15</sup>

11. Similarly, the Panel in *Ukraine – Passenger Cars* held that:

"Furthermore, as elaborated above, there is a clear distinction between the circumstances contained in the first clause of Article XIX:1(a) and the conditions contained in the second clause. Increased imports are one of these conditions. Were we to accept that increased imports may be at the same time a relevant circumstance and a condition, we would disregard the distinction between the two and conflate two distinct legal requirements under Article XIX:1(a).

Therefore, we find that Ukraine has failed to make a proper determination on unforeseen developments, because the competent authorities in their published report identified the relative increase in imports as the unforeseen development rather than identifying and explaining any unforeseen developments that resulted in that relative increase in imports. Having failed to make a proper determination in respect of one of the relevant circumstances, we conclude that Ukraine has, to that extent, acted inconsistently with Article XIX:1(a)."<sup>16</sup>

12. The Panel in *EU – Safeguard Measures on Steel (Turkey)*, in considering whether certain identified developments amounted to "unforeseen developments", explained that the fact that the WTO Agreements contained references to certain circumstances did not preclude those circumstances from being "unforeseen":

"We do not consider that the fact that the WTO Agreement may contemplate particular events or circumstances establishes that they cannot constitute an unforeseen development. By way of illustration, we note that while the GATT 1994 refers to 'action ... taken in time of war', this statement, standing alone, does not

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<sup>13</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report, *Korea – Dairy*, para. 84.

<sup>14</sup> Panel Report, *Argentina – Preserved Peaches*, para. 7.18.

<sup>15</sup> Panel Report, *Argentina – Preserved Peaches*, para. 7.24. In addition the Panel did not agree with "the statement by the Appellate Body in *Argentina – Footwear (EC)* that 'the increased quantities of imports should have been 'unforeseen' or 'unexpected'.' (See original footnote 484). The Panel was of view that "the text of Article XIX:1(a), together with the Appellate Body's own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a) – including unforeseen developments – and the conditions in the second clause – including an increase in imports – show that this is not a requirement for the imposition of a safeguard measure." See Panel Report, *Argentina – Preserved Peaches*, para. 7.24. However, it should be noted here that in *US – Steel Safeguards*, the Appellate Body reaffirmed its statement and concluded that "because the 'increased imports' must be 'as a result' of an event that was 'unforeseen' or 'unexpected', it follows that the increased imports must also be 'unforeseen' or 'unexpected'." See Appellate Body Report, *US – Steel Safeguards*, para. 350.

<sup>16</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.83-7.84.

necessarily preclude actions taken in time of war from constituting an unforeseen development."<sup>17</sup>

13. The Panel in *EU – Safeguard Measures on Steel (Turkey)* did not agree with Türkiye's argument that increases in the use of trade defence measures could not be said to be unexpected because there are cycles in the use of such measures:

"The fact that the use of trade defence measures may 'follow cycles', or fluctuate, does not mean that an increased use of such measures cannot ever constitute an unforeseen development. The European Commission found that in the particular circumstances before it, the increase in trade defence measures together with the other developments was unforeseen within the meaning of Article XIX:1(a), and we consider that the fact that the use of trade defence measures may fluctuate does not call into question that assessment."<sup>18</sup>

14. The Panel in *EU – Safeguard Measures on Steel (Turkey)* also rejected Türkiye's argument that measures which were provided for in the domestic legislation of a Member could not constitute an unforeseen development:

"The fact that existing legislation of a Member may authorize that Member to adopt a particular measure does not in itself establish that all measures that may be applied by virtue of that legislation are foreseen. By way of illustration, a Member's legislation may establish certain rules regarding military conflict, but that does not mean that any military conflict engaged in by that Member cannot be 'unforeseen' within the meaning of Article XIX:1(a)."<sup>19</sup>

### **1.3.2 Requirement to demonstrate "unforeseen developments"**

#### **1.3.2.1 General**

15. In *Argentina – Footwear (EC)* and *Korea – Dairy*, one of the issues considered by the Panel was the omission of the criterion of "unforeseen developments", an element of Article XIX:1(a) of GATT 1994, from the Agreement on Safeguards, most notably from Article 2.1. The Panel in *Argentina – Footwear (EC)* found that "the *express omission* of the criterion of unforeseen developments in the [Agreement on Safeguards], (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT), must ... have meaning".<sup>20</sup> The Panel, in a finding rejected by the Appellate Body, concluded that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT."<sup>21</sup> The Panel in *Korea – Dairy* reached the same conclusion.<sup>22</sup> The Appellate Body held that the Panel's view was inconsistent with the principles of effective treaty interpretation and with the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards. See paragraph 62 below.

16. In *EU – Safeguard Measures on Steel (Turkey)*, in reviewing whether the European Union had identified "unforeseen developments" in its provisional and definitive injury determinations, the Panel disagreed with Türkiye's argument that "the European Commission did not identify any unforeseen development [based] on the fact that both determinations refer to unforeseen developments that 'found their source in a number of factors'".<sup>23</sup> The Panel found that "[t]he developments in question [were] listed and discussed in a section clearly entitled 'unforeseen developments'; they are referred to interchangeably not only as 'factors' but also as 'unforeseen developments'".<sup>24</sup> On this basis, the Panel concluded that the fact "that the European Commission referred at times to the unforeseen developments as 'factors' that were a 'source' of unforeseen

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<sup>17</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.108.

<sup>18</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.110.

<sup>19</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.116.

<sup>20</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.58.

<sup>21</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.69.

<sup>22</sup> Panel Report, *Korea – Dairy*, para. 7.48.

<sup>23</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.93.

<sup>24</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.93.

developments does not negate the fact that it identified the developments at issue as unforeseen developments."<sup>25</sup> In this regard, the Panel also pointed out that "[a] Member is not necessarily required to use the exact wording of the World Trade Organization (WTO) Agreement in its domestic determinations."<sup>26</sup>

17. In *US – Lamb*, the Appellate Body ruled that the existence of "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1 of the Agreement on Safeguards, and "it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments"<sup>27</sup>:

"[W]e observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report. As Article XIX:1(a) of the GATT 1994 requires that 'unforeseen developments' must be demonstrated' as a matter of fact' for a safeguard measure to be applied' the existence of 'unforeseen developments' is, in our view, a 'pertinent issue[] of fact and law', under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments.'"<sup>28</sup>

18. In *Chile – Price Band System*, the Panel referred to the Appellate Body's conclusions in *US – Lamb* that "unforeseen developments" is a circumstance whose existence must be demonstrated as a matter of fact and must feature in the published report of the investigating authorities.<sup>29</sup> The Panel also ruled that an *ex post facto* explanation cannot cure the importing Member's failure to meet the requirement of demonstrating "unforeseen developments".<sup>30</sup>

19. In *Argentina – Preserved Peaches*, the Panel concluded that in order to satisfy the requirement to demonstrate "unforeseen developments", "as a minimum, some discussion should be done by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred 'as a result' of circumstances in the first clause."<sup>31</sup>

20. In *Argentina – Preserved Peaches*, the competent investigating authority had referred to unforeseen developments only in its final conclusion, the Panel held that this was insufficient:

"A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase."<sup>32</sup>

21. The Panel in *Ukraine – Passenger Cars* refused to consider the unforeseen development alleged by the complainant during the Panel proceedings, on the grounds that it constituted an *ex post facto* explanation:

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

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<sup>25</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.93.

<sup>26</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.93.

<sup>27</sup> Appellate Body Report, *US – Lamb*, para. 76.

<sup>28</sup> Appellate Body Report, *US – Lamb*, para. 76. See also Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.141.

<sup>29</sup> Panel Report, *Chile – Price Band System*, para. 7.134.

<sup>30</sup> Panel Report, *Chile – Price Band System*, para. 7.139.

<sup>31</sup> Panel Report, *Argentina – Preserved Peaches*, para. 7.23.

<sup>32</sup> Panel Report, *Argentina – Preserved Peaches*, para. 7.33.

including, the global financial and economic crisis, and the actual text of the Notice of 14 March 2013, which identifies only the relative increase in imports as an unforeseen development.

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

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

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

In the light of the foregoing, we find that owing to the absence of any reference in the Notice of 14 March 2013 to developments other than the relative increase in imports, the additional developments, or combinations of developments, identified by Ukraine before the Panel constitute *ex post facto* explanations regarding what the unforeseen developments were. As such, and for purposes of our review, they need not be taken into account."<sup>33</sup>

22. The Appellate Body in *US – Lamb* found that the demonstration regarding unforeseen developments has to be made before the application of the safeguard measure:

"In conducting such an examination now, we note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. We find instructive guidance for where and when the 'demonstration' should occur in the 'logical connection' that we observed previously between the two clauses of Article XIX:1(a)."<sup>34</sup>

23. Taking into account the Appellate Body's finding that an investigating authority has to demonstrate the existence of unforeseen developments before the measure is applied, the Panel in *Ukraine – Passenger Cars* further found that:

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<sup>33</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.78-7.82.

<sup>34</sup> Appellate Body Report, *US – Lamb*, para. 72.



"The Appellate Body concluded that the circumstances in question must be demonstrated *before* a safeguard measure is imposed. In our view, this implies that any demonstration of the existence of these circumstances that is provided *after* imposition of a safeguard measure will not be sufficient to comply with the requirements of Article XIX:1(a). In this context, we observe that the Appellate Body has already had occasion to address this issue and concluded that the analysis of the pertinent issues of fact and law referred to in Article 3.1, and to be set out in the competent authorities' published report, cannot be supplemented by the Member concerned during the course of WTO dispute settlement procedures or in a document other than the competent authorities' report (e.g. an unpublished report). Therefore, it is clear to us that any *ex post facto* explanation purporting to demonstrate the existence of the circumstances required by the first clause of Article XIX:1(a) cannot cure the lack of such demonstration in the competent authorities' published report."<sup>35</sup>

24. The Appellate Body in *US – Steel Safeguards* pointed out that the competent authority must provide a "reasoned and adequate explanation" of how the facts support its determination for those prerequisites, including 'unforeseen developments' under Article XIX:1(a):

"We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on 'unforeseen developments'. Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a 'reasoned and adequate explanation' of how the facts support its determination for those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994."<sup>36</sup>

25. The Appellate Body in *US – Steel Safeguards* upheld the Panel's finding that each challenged measure must have been the object of a specific unforeseen development demonstration and also that the factual demonstration of unforeseen developments must also relate to the specific product(s) covered by the specific measure(s) at issue:

"To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* ('such product') that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged 'unforeseen developments' *result* in increased imports of that *specific product* ('such product'). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the 'unforeseen developments identified ... have resulted in increased imports [of the specific products subject to] ... each safeguard measure at issue."<sup>37</sup>

"For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for *each* product subject to a safeguard measure."<sup>38</sup>

26. In *US – Steel Safeguards*, the Appellate Body agreed with the Panel that "with respect to the specific products subject to the respective determinations, the competent authorities are

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<sup>35</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.55.

<sup>36</sup> Appellate Body Report, *US – Steel Safeguards*, para. 279.

<sup>37</sup> Appellate Body Report, *US – Steel Safeguards*, para. 316.

<sup>38</sup> Appellate Body Report, *US – Steel Safeguards*, para. 319.

required by Article XIX:1(a) of the GATT 1994 to demonstrate that the 'unforeseen developments identified ... have resulted in increased imports [of the specific products subject to] ... each safeguard measure at issue."<sup>39</sup> The Appellate Body further concluded:

"[W]hen an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for *each* product subject to a safeguard measure. (Emphasis original)"<sup>40</sup>

27. In *US – Steel Safeguards*, the Appellate Body was of view that it was for competent authorities not for panels to provide a "reasoned conclusion" on "unforeseen developments":

"A 'reasoned conclusion' is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, 'Article 3.1 thus assigns the competent authorities—not the panel—the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law.'" A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report."<sup>41</sup>

28. Following the Appellate Body's findings in *US – Steel Safeguards*, the Panel in *Ukraine – Passenger Cars* pointed out that, like unforeseen developments, "the effect of GATT 1994 obligations is similarly a 'pertinent issue of fact and law' within the meaning of Article 3.1, and the competent authority must similarly provide reasoned and adequate explanations regarding it in their published report."<sup>42</sup>

1.1. The Panel in *US – Safeguard Measure on PV Products* recalled earlier panel and Appellate Body findings indicating that the phrase "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1(a) contains three main elements, namely, (i) the existence of unforeseen developments, (ii) that imports increase *as a result of* unforeseen developments, and (iii) that imports increase "as a result ... of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions".<sup>43</sup> The Panel agreed with this reasoning and addressed the complainant's claims accordingly.<sup>44</sup>

29. In the investigation at issue in *US – Safeguard Measure on PV Products*, the United States' competent authority, the USITC, had addressed the issue of "unforeseen developments" in its supplemental report prepared in response to a request from the USTR.<sup>45</sup> The Panel considered this supplemental report together with the USITC's main reports, in assessing whether the United States had complied with the requirements in Article XIX:1(a):

"The Agreement on Safeguards does not dictate the precise format of the 'report' that the competent authorities of a Member must publish following their investigation. We therefore consider that the USITC final report and the USITC final staff report, along with the supplemental report, collectively constitute the relevant published 'report' within the meaning of Article 3.1 of the Agreement on Safeguards. Accordingly, in the

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<sup>39</sup> Appellate Body Report, *US – Steel Safeguards*, para. 316.

<sup>40</sup> Appellate Body Report, *US – Steel Safeguards*, para. 319.

<sup>41</sup> Appellate Body Report, *US – Steel Safeguards*, para. 319.

<sup>42</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.56.

<sup>43</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.14-7.17.

<sup>44</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.18.

<sup>45</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.19.

sections that follow, we address whether China has established that this report failed to demonstrate compliance with the requirement in Article XIX:1(a) of the GATT 1994 that imports increased 'as a result of unforeseen developments and of the effect of the obligations incurred' by the United States."<sup>46</sup>

30. The Panel in *US – Safeguard Measure on PV Products* explained that, in the context of the competent authority's determination of a causal link between increased imports and domestic injury, the words "as a result of" in Article XIX:1(a) "may be satisfied where increased imports are an effect or outcome of the 'unforeseen developments'"<sup>47</sup> and that where such unforeseen developments consisted of a series of events, the competent authority was not required to "directly connect each specific development to the increase in imports so long as there was sufficient evidence to find that the 'unforeseen developments', overall, resulted in increased imports."<sup>48</sup>

31. Based on the foregoing, the Panel rejected China's claim that the USTIC's report had failed to appropriately demonstrate that imports increased "as a result of" unforeseen developments, noting that Article XIX:1(a) did not require all of the increased imports to result from the unforeseen developments.<sup>49</sup>

### 1.3.2.2 Unforeseen developments as describing a set of circumstances

32. The Appellate Body, in *Argentina – Footwear (EC)*, then held that the requirement of "unforeseen developments" did not establish a separate "condition" for the imposition of safeguard measures, but described a certain set of "circumstances":

"When we examine this clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – in its immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – 'If, ... , any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products ...'. The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*<sup>50</sup>, are that: (1) a product is being imported 'in such quantities and under such conditions'; (2) 'as to cause'; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – 'as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions ...' – is a dependent clause which, in our view, is linked grammatically to the verb phrase 'is being imported' in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure."<sup>51</sup>

33. The Panel in *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the legal standard used to determine what constitutes an unforeseen development may be both subjective and objective:

<sup>46</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.20.

<sup>47</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.35.

<sup>48</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.36.

<sup>49</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.44-7.45.

<sup>50</sup> (footnote original) We note that the title of Article 2 of the *Agreement on Safeguards* is: "Conditions".

<sup>51</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 92. See also Appellate Body Report, *Korea – Dairy*, para. 85.

"The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures 'are to be invoked only in situations when ... an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when *it* incurred [its] obligation [under GATT 1994].' (emphasis added)

What was 'unforeseen' when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Further, what constitutes 'unforeseen developments' for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development<sup>52</sup> for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as 'developments [...] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated'.<sup>53</sup>

### **1.3.2.3 Confluence of developments to form the basis of an unforeseen development**

34. The Panel in *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the confluence of several events can unite to form the basis of an unforeseen development:

"The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States' market as other markets declined, lead to increased imports.

The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se*; it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

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

To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other developments, be

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<sup>52</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

<sup>53</sup> Panel Report, *US – Steel Safeguards*, paras. 10.41-10.43.

considered part of a 'confluence of unforeseen developments' in 1997 for the purpose of Article XIX of GATT 1994."<sup>54</sup>

28. The Panel in *India – Iron and Steel Products* reiterated the possibility of a confluence of unforeseen developments. The Panel, however, clarified that although the events that form a confluence of developments need not necessarily take place simultaneously, "...[T]here must be a clear temporal connection between the events that constitute a confluence of developments that is in turn connected to the increase in imports".<sup>55</sup>

### **1.3.3 Logical connection between "unforeseen developments" and "the condition for imposition of a safeguard measure"**

#### **1.3.3.1 General**

29. The Panel in *US – Steel Safeguards*, in a finding upheld by the Appellate Body, held that the phrase "as a result of" implies a "logical connection" between "unforeseen developments and the effects of tariffs concessions and obligations" and "the condition for imposition of a safeguard measure":

"The Appellate Body has interpreted the phrase 'as a result of' in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of Article XIX:1(a) – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions' – and the conditions set forth in the second clause of that Article – 'increased imports causing serious injury' – for the imposition of a safeguard measure.

...

The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how 'unforeseen developments' resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate."<sup>56</sup>

30. The Appellate Body in *US – Steel Safeguards* confirmed that the "unforeseen developments" must result in increased imports of the product that is subject to a safeguard measure:

"Turning to the term 'as a result of' that is also found in Article XIX:1(a), we note that the ordinary meaning of 'result' is, as defined in the dictionary, 'an effect, issue, or outcome *from* some action, process or design'. The increased imports to which this provision refers must therefore be an 'effect, or outcome' of the 'unforeseen developments'. Put differently, the 'unforeseen developments' must 'result' in increased imports of the product ('such product') that is subject to a safeguard measure."<sup>57</sup>

31. In *US – Steel Safeguards*, the Appellate Body clarified the relationship between unforeseen developments and increased imports and concluded that in situations of unforeseen developments, the increased imports must also be unforeseen:

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<sup>54</sup> Panel Report, *US – Steel Safeguards*, para. 10.97–10.100.

<sup>55</sup> Panel Report, *India – Iron and Steel Products*, para. 7.114.

<sup>56</sup> Panel Report, *US – Steel Safeguards*, paras. 10.97–10.104 and 10.110.

<sup>57</sup> Appellate Body Report, *US – Steel Safeguards*, paras 315 and 316.

"In a similar vein, we said in *Argentina – Footwear (EC)* that 'the increased quantities of imports should have been 'unforeseen' or 'unexpected'.' In doing so, we were referring to the fact that the increased imports must, under Article XIX:1(a), result from 'unforeseen developments' in order to justify the application of a safeguard measure. Because the 'increased imports' must be 'as a result' of an event that was 'unforeseen' or 'unexpected', it follows that the increased imports must also be 'unforeseen' or 'unexpected'. Thus, the 'extraordinary nature' of the domestic response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected."<sup>58</sup>

32. The Panel in *Ukraine – Passenger Cars* held that:

"[T]he two elements of the first clause of Article XIX:1(a), 'unforeseen developments' and the effect of GATT 1994 obligations, are *circumstances* that the competent authorities are legally required under Article XIX:1(a) to demonstrate as a matter of fact. They are not *conditions*. The conditions for the application of a safeguard measure are contained in the second clause of Article XIX:1(a) and Article 2. Although different in legal nature, the relevant *conditions* and *circumstances* have in common that: (i) their satisfaction or existence must be demonstrated by the competent authorities, through reasoned and adequate explanations, (ii) in the published report, and (iii) before a safeguard measure is applied."<sup>59</sup>

33. The Panel in *India – Iron and Steel Products*, while examining the effect of a confluence of unforeseen developments occurring in countries other than the ones from which imports increased, found that a logical connection between the two must be expressly demonstrated:

"Article XIX:1(a) does not provide any methodology for examining the relationship between the unforeseen developments and the increase in imports. Even though a competent authority enjoys a certain latitude in choosing the appropriate method, it must provide a reasoned and adequate explanation of its findings. In the underlying investigation, the Indian competent authority relied in its analysis of unforeseen developments on events occurring in specific countries, in particular China, Russia, and Ukraine, while a significant portion of imports during the POI originated from its FTA partners, Korea and Japan. Although we acknowledge that the origin of the unforeseen developments may differ from the origin of the increased imports, the facts before the Indian competent authority warranted an explanation as to why the alleged increase in imports, with a predominant share from Japan and Korea, occurred due to the unforeseen developments of different origins."<sup>60</sup>

### 1.3.3.2 Point in time where the developments were unforeseen

34. The Appellate Body in *Argentina – Footwear (EC)* noted a GATT Panel Report, which confirmed that the development must have been unforeseen at the time of the tariff negotiation:

"In addition, we note that our reading of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved Article XIX, the so-called '*Hatters' Fur*' case.<sup>61</sup> Members of the Working Party in that case, in 1951, stated:

... 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the

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<sup>58</sup> Appellate Body Report, *US – Steel Safeguards*, para. 350. Note that a previous Panel Report, *Argentina – Preserved Peaches*, para. 7.24 had reached the opposite conclusion.

<sup>59</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.57.

<sup>60</sup> Panel Report, *India – Iron and Steel Products*, para. 7.110.

<sup>61</sup> The original footnote refers to *US – Fur Felt Hats*.

negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated." <sup>62</sup>

35. In *Korea – Dairy*, the Appellate Body held that unforeseen developments are developments not foreseen or expected when Members incurred that obligation:

"[S]uch 'emergency actions' [safeguard measures] are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."<sup>63</sup>

36. In *Argentina – Preserved Peaches*, the Panel agreed with the approach advanced by both parties that the developments should have been unforeseen by the negotiators at the time they granted the relevant concession:

"There is the issue of the point in time at which Article XIX:1(a) requires that developments should have been unforeseen. Chile stated that the developments should have been unforeseen by a Member at the time it incurred the relevant obligation. In response to questions posed by the Panel, both parties submitted basically that developments should have been unforeseen by the negotiators at the time at which they granted the relevant concession.

...

We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure."<sup>64</sup>

37. Referring to a finding by the Panel in *US – Safeguard Measure on PV Products (China)*, the Panel in *EU – Safeguard Measures on Steel (Turkey)* recognised that in some cases "demonstrating a coincidence in time between certain unforeseen developments and an increase in imports, and explaining their connection, is sufficient to establish their logical connection for purposes of Article XIX:1(a)."<sup>65</sup>

### 1.3.3.3 Judicial economy

38. In *Argentina – Footwear (EC)*, the European Communities appealed the Panel's finding on judicial economy as regards the absence of findings by the Panel on the European Communities claim on unforeseen developments. The Appellate Body upheld the Panel's findings that the safeguards investigation at issue was inconsistent with the requirements of Articles 2 and 4 of the Agreement on Safeguards and concluded that, since such an inconsistency deprived the measure of legal basis, "there was no need to go further and examine whether, in addition, the measure was also inconsistent with Article XIX:1(a) of GATT 1994".<sup>66</sup> As regards the obligation to apply Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994 cumulatively, including the requirement to demonstrate "unforeseen developments", see paragraph 15 above.

39. In *US – Wheat Gluten*, the Appellate Body reiterated the above conclusion, stating that, given the lack of legal basis of the safeguard measure at issue, the Panel was entitled to decline to examine the claim regarding unforeseen developments.<sup>67</sup>

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<sup>62</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 96. See also Appellate Body Report, *Korea – Dairy*, para. 89.

<sup>63</sup> Appellate Body Report, *Korea – Dairy*, para. 86.

<sup>64</sup> Panel Report, *Argentina – Preserved Peaches*, paras 7.25 - 7.28.

<sup>65</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.133, referring to Panel Report, *US – Safeguard Measure on PV Products (China)*, para. 7.42.

<sup>66</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 182, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 98.

<sup>67</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 181-184.

#### 1.3.4 "as a result ... of the effect of the obligations incurred by a Member"

40. With respect to the clause "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ..." the Appellate Body held in *Argentina – Footwear (EC)*:

"[W]e believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."<sup>68</sup>

41. In *Argentina – Footwear (EC)*, the Appellate Body described the requirement "as a result ... of the effect of the obligations incurred by a Member" as setting forth "certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994". See paragraph 32 above.

42. The Panel in *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, held that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product."<sup>69</sup>

43. The Panel in *US – Safeguard Measure on PV Products*, agreeing with previous DSB reports, stated that the requirement in Article XIX:1(a) that imports must increase "as a result ... of the effect of the obligations incurred" by the Member implementing the safeguard measure, "may be satisfied when the Member implementing the safeguard measure identifies a WTO obligation that would have prevented it from raising tariffs on the product at issue."<sup>70</sup>

44. The Panel in *Dominican Republic – Safeguard Measures* underlined the need for a reasoned and adequate explanation regarding the identification of the obligation incurred by the importing Member:

"It is not clear from this passage that the competent authority considered the tariff concession with respect to the products in question to be the obligation of the Dominican Republic under the GATT 1994 that caused the alleged increase in the imports in question. This passage does not contain any finding in this respect. Consequently, and in the absence of any indication in the resolutions of the Commission, or in any other relevant document, it is not possible to conclude that the report of the competent authority contains a reasoned and adequate explanation of how the Dominican Republic incurred obligations under the GATT with respect to tubular fabric and polypropylene bags, within the meaning of Article XIX:1(a) of the GATT 1994."<sup>71</sup>

45. The Panel in *Ukraine – Passenger Cars* held that "a Member imposing a safeguard measure must demonstrate that a product has been imported in increased quantities as a result of the effect of GATT 1994 obligations of the Member concerned."<sup>72</sup> In this Panel's view:

"[G]iven that there may be several obligations that apply to the product in question, this demonstration necessitates identification of the specific relevant obligation(s), as it is difficult to see how this demonstration could otherwise be made. In addition, it should be remembered that pursuant to Article XIX:1(a) it is not just the obligation per se that is to be identified, but also its effect. This suggests that in the case of tariff concessions, the bound tariff rate applicable to the product is directly relevant, including any different rates applicable to sub-groups of the product. Moreover, it may

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<sup>68</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report, *Korea – Dairy*, para. 84.

<sup>69</sup> Panel Report, *US – Steel Safeguards*, para. 10.140.

<sup>70</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.52.

<sup>71</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.149.

<sup>72</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.96.



be unclear which of several applicable obligations the competent authorities consider to be constraining their freedom of action. It is therefore important for competent authorities to be clear as to which of the applicable obligations they find to have resulted in imports in increased quantities. For these reasons, we are unable to accept Ukraine's argument that just because it is a known or knowable fact that Ukraine made tariff concessions on passenger cars when it joined the WTO, there was no need for the competent authorities to identify adequately the applicable GATT 1994 obligations and their effect."<sup>73</sup>

46. The Panel in *Ukraine – Passenger Cars* also pointed out that, as clarified by the Appellate Body in *US – Steel Safeguards*, the authorities' report has to identify the effect of the relevant GATT obligations, and that "it is not for the Panel to read into the report linkages that the competent authority failed to make."<sup>74</sup>

47. The Panel in *EU – Safeguard Measures on Steel (Turkey)* also pointed out that an investigating authority must identify in its published reports the relevant obligations of the GATT 1994 whose effect resulted in the injurious increase in imports:

"Although the European Union suggests that other Members, on reviewing the safeguard, can understand which obligations of the GATT 1994 the European Union decided to suspend, and therefore which obligations had the effect of stopping the European Union from preventing or remedying serious injury, we do not think that it would be appropriate to require other Members to carry out this interpretive exercise, when the European Union was better positioned to identify, and should have identified, the relevant obligations itself. In this regard, we note that the Member that finds that certain obligations of the GATT 1994 constrain its ability to prevent or remedy injury from an increase in imports, and that suspends those obligations as a result, is best placed to identify with certainty those obligations. Conversely, the Members affected by the suspension should not be required to do so, second-guessing the Member adopting the safeguard.

Given this, we reject the European Union's suggestion that the European Commission's references to a 'free of duty quota' (to which the out-of-quota duty does not apply) in the sections of the definitive determination discussing the form, level, and duration of the measures was sufficient to identify the relevant obligations of the GATT 1994."<sup>75</sup>

48. With respect to the significance of the context and object and purpose of Article XIX for the interpretation of the term "as a result ... of the effect of the obligations incurred by a Member", see paragraph 32. Regarding a GATT Panel Report on this issue, see paragraph 34 above.

49. On whether a measure that does not suspend, withdraw, or modify a GATT obligation or concession constitutes a safeguard measure, see the explanations on Article 1 of the Agreement on Safeguards.

### **1.3.5 "being imported in such increased quantities ..."**

50. See the explanations on Article 2.1 of the Agreement on Safeguards as regards the interpretation of the phrase "in such increased quantities" under that provision.

### **1.3.6 "under such conditions"**

51. See the explanations on Article 2.1 of the Agreement on Safeguards as regards the interpretation of the phrase "under such conditions" under that provision.

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<sup>73</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.96.

<sup>74</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.99.

<sup>75</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, paras. 7.168-7.169.

### 1.3.7 "as to cause or threaten serious injury to domestic producers"

52. See the explanations on Articles 2.1, 4.1 and 4.2(a) of the Agreement on Safeguards as regards the interpretation of the phrase "serious injury" under those provisions.

53. As to the causation test to be applied in relating "increased imports" to "serious injury", see the explanations on Articles 2 and 4 of the Agreement on Safeguards.

### 1.3.8 "to suspend the obligation in whole or in part"

54. With regard to the types of obligations that may be suspended for a measure to constitute a safeguard measure, the Panel in *Dominican Republic – Safeguard Measures* noted that "the text of Article XIX:1(a) does not expressly limit the obligations of the GATT 1994 that may be suspended by invoking that provision."<sup>76</sup> Both the provisional and the definitive measure challenged in that dispute were duties imposed on the imports of the subject product at rates below the Dominican Republic's bound rate.<sup>77</sup> Exempted from the scope of both measures were Colombia, Indonesia, Mexico and Panama.<sup>78</sup> The Panel found unusual the fact that the Dominican Republic, defendant in the proceedings:

"[R]efuse[d] that a measure which it has taken be described as a safeguard despite the fact that the measure: (i) was taken by the Member with the stated objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports; (ii) was the result of a procedure based, *inter alia*, on the rules and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards; and (iii) was notified as a safeguard measure by the Member taking it to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards."<sup>79</sup>

55. In *Dominican Republic – Safeguard Measures*, the complainants argued that the measures at issue suspended the Dominican Republic's obligations under Articles I:1 and II:1(b) of the GATT 1994.<sup>80</sup> The Panel noted that this was the first WTO dispute where "the parties alleged that the impugned measures described as safeguards suspended obligations other than those contained in Article II or Article XI of the GATT 1994."<sup>81</sup> Noting that the Dominican Republic had, on the basis of Article 9.1 of the Agreement on Safeguards, exempted certain countries from the measures, the Panel found that the measures did represent a suspension of the Dominican Republic's obligation under Article I:1 of the GATT 1994.<sup>82</sup> Further, the Panel considered that the challenged measures constituted "other duties or charges ... imposed on or in connection with the importation" within the meaning of Article II:1(b) of the GATT 1994. Given this, and the fact that the challenged measures were not recorded in the Dominican Republic's schedule of concessions, the Panel concluded that "the impugned measures ha[d] suspended the obligations of the Dominican Republic under Article II:1(b), second sentence, of the GATT 1994 with respect to the import duties imposed on the imported products concerned."<sup>83</sup> On this basis, the Panel concluded that:

"[T]he complainants have demonstrated that the impugned measures have resulted in a suspension of obligations incurred by the Dominican Republic under the GATT 1994. That being so, and taking into account also that the impugned measures were taken by the Dominican Republic with the objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports, were the result of a procedure based, *inter alia*, on the provisions and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards and were notified by the Dominican Republic as safeguard measures to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel concludes that the provisions of Article XIX of the GATT

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<sup>76</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.64.

<sup>77</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.57.

<sup>78</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.68.

<sup>79</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.56.

<sup>80</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.60.

<sup>81</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.53.

<sup>82</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.68-7.73.

<sup>83</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.88.

1994 and the Agreement on Safeguards are applicable to the examination it has to make of the claims raised in the present dispute."<sup>84</sup>

#### **1.4 Article XIX:2**

##### **1.4.1 General**

56. The Panel in *Dominican Republic – Safeguard Measures* found that the notification obligation laid down in Article XIX:2 of the GATT 1994 pertained to definitive safeguard measures, and pointed to the relationship between this provision and Article 12.1(c) of the Agreement on Safeguards, as follows:

"Consequently, the measure referred to in Article XIX:2 of the GATT 1994 is the measure regulated by Article XIX:1. Reading Article XIX:1 of the GATT 1994 suggests that the measure referred to is the *definitive measure*. In the case of Article 12.1(c) of the Agreement on Safeguards, the measure to be notified is also the definitive measure as the obligation is triggered once the decision to apply or extend *the measure* has been taken.

Furthermore, as the notification under Article XIX:2 of the GATT 1994 concerns the definitive measure, this obligation could not correspond to any of the other notification obligations mentioned in Article 12 of the Agreement on Safeguards. Only the notifications referred to in Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards concern a definitive measure."<sup>85</sup>

57. As for the timing of the notification obligation under Article XIX:2 of the GATT 1994, the Panel in *Dominican Republic – Safeguard Measures* found that:

"Article XIX:2 of the GATT 1994, therefore, read in conjunction with Article 12.1(c) of the Agreement on Safeguards, determines the obligation to notify a definitive measure before it is applied but not necessarily before it is adopted.

...

Taking into account the foregoing, the Panel considers that, as it has been shown that the Dominican Republic notified the definitive measure to the WTO Committee on Safeguards on 8 October 2010, three days after its adoption (5 October 2010), the complainants have not made the case that the Dominican Republic acted inconsistently with its obligations under Articles XIX:2 of the GATT 1994 and 12.1(c) of the Agreement on Safeguards."<sup>86</sup>

##### **1.4.2 "shall give notice in writing to the Contracting Parties as far as in advance as may be practicable"**

58. See the explanations on Article 12 of the Agreement on Safeguards regarding the notification requirements and particularly the interpretation of the phrase "shall immediately notify" under Article 12.1 of that Agreement.

##### **1.4.3 "an opportunity to consult"**

59. See the explanations on Article 12 of the Agreement on Safeguards regarding the interpretation of "opportunity for prior consultations" under Article 12.3 of that Agreement.

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<sup>84</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.89.

<sup>85</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.431-7.432.

<sup>86</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.433 and 7.438.

## 1.5 Relationship with other WTO Agreements

### 1.5.1 Agreement on Safeguards

60. In *Korea – Dairy*, the Appellate Body examined the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards in light of, on the one hand, Article II of the WTO Agreement<sup>87</sup>, and, on the other hand, Articles 1 and 11.1(a) of the Agreement on Safeguards.<sup>88</sup> The Appellate Body concluded that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX and the Agreement on Safeguards:

"The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the WTO Agreement is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

...

Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.' ...The ordinary meaning of the language in Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement' – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure<sup>89</sup> imposed after the entry into force of the WTO Agreement must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994."<sup>90</sup>

61. In *Argentina – Footwear (EC)*, the Appellate Body reversed a conclusion by the Panel that "safeguard investigations and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Safeguards Agreement* satisfy the requirements of Article XIX of GATT."<sup>91</sup> The Appellate Body noted that Articles 1 and 11.1(a) of the Agreement on Safeguards described the precise nature of the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards within the WTO Agreement<sup>92</sup>, and then observed:

"We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994.' ...This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language 'unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*' ...clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard

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<sup>87</sup> For the Appellate Body's analysis under Article II of the *WTO Agreement*, see the explanations under that provision.

<sup>88</sup> The issue of the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards arose in these disputes in connection with claims raised regarding a failure to examine whether the import trends of the products under investigation were the result of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. For the interpretation of the phrase "If, as a result of unforeseen developments ... concessions" in Article XIX:1(a) of the GATT 1994, see under Article XIX of the GATT 1994.

<sup>89</sup> (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

<sup>90</sup> Appellate Body Report, *Korea – Dairy*, paras. 76-77. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 84.

<sup>91</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.69.

<sup>92</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 82.

action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.<sup>93</sup>

62. The Appellate Body in *Argentina – Footwear (EC)* further rejected the conclusion of the Panel that because the clause "[i]f, as a result of unforeseen developments ... concessions" in Article XIX:1(a) had been expressly omitted from Article 2.1 of the *Agreement on Safeguards*, safeguard measures that meet the requirements of the *Agreement on Safeguards* will automatically also satisfy the requirements of Article XIX. The Appellate Body considered this conclusion of the Panel as inconsistent with the principles of effective treaty interpretation and with the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

"[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions ... We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."<sup>94</sup>

63. The Panel in *US – Lamb*, referring to the statements by the Appellate Body in *Argentina – Footwear (EC)* and *Korea – Dairy*, on the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, observed:

"Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the *Safeguards Agreement* could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the *Safeguards Agreement* and GATT Article XIX must be given meaning and effect."<sup>95</sup>

64. The Appellate Body Report in *US – Lamb* reiterated the conclusions drawn by the Appellate Body in *Argentina – Footwear (EC)* and in *Korea – Dairy* on the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994 and observed:

"[A]rticles 1 and 11.1(a) of the *Agreement on Safeguards* express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the *Agreement on Safeguards*."<sup>96</sup>

65. Concerning the possibility of resorting to judicial economy as in respect of claims of unforeseen developments in cases where it has been found that the requirements of Article 2 and 4 of the *Agreement on Safeguards* have not been met, see paragraphs 38-39 above.

66. The Panel in *Indonesia – Iron or Steel Products* found that the specific duty imposed by Indonesia did not constitute a safeguard measure within the meaning of Article 1 of the *Agreement on Safeguards*, and dismissed the entirety of the complainants' claims under that *Agreement* and Article XIX of the GATT 1994. However, the Panel decided to make factual findings about those claims:

"Indonesia submits that the consequence of a finding that the specific duty does not constitute a safeguard measure should be the rejection of the entirety of the complainants' claims under the *Agreement on Safeguards*. The complainants do not refute this implication, but nevertheless ask that the merits of their claims under the *Agreement on Safeguards* be fully resolved in order to "secure a positive solution" to this dispute.

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<sup>93</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 83.

<sup>94</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 89.

<sup>95</sup> Panel Report, *US – Lamb*, para. 7.11.

<sup>96</sup> Appellate Body Report, *US – Lamb*, para. 70.

Having concluded that the specific duty is *not* a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, it is evident to us that there is no legal basis for the complainants' claims under the Agreement on Safeguards (as well as Articles XIX:1(a) and XIX:2 of the GATT 1994). Accordingly, we dismiss the entirety of those claims. In our view, the findings and conclusions we have made in the preceding section of this report are an appropriate and sufficient basis to resolve the matters at issue in this dispute consistent with our terms of reference and Article 11 of the DSU. In this light, we see no need to make any alternative findings on the legal merits of the complainants' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994.

Nevertheless, in the light of the unique circumstances of this case<sup>97</sup>, we have decided to proceed to address the complainants' claims, but only to the extent of identifying facts relevant to an evaluation of the allegations pertaining to KPPI's findings, the conduct of its investigation, and Indonesia's decision to impose the specific duty. Given our conclusions above, we do not go on to consider the legal merits of the complainants' claims. Thus, in the sub-sections that follow, and for each of the sets of issues raised by the complainants, we firstly describe the parties' arguments and summarize the relevant applicable law (without making any findings on questions of legal interpretation arising from those arguments), before turning to identify the relevant facts."<sup>98</sup>

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<sup>97</sup> We recall that: (a) Indonesia conducted the investigation at issue with a view to complying with its obligations under the Agreement on Safeguards and imposed the specific duty in the light of the outcome of that investigation, despite knowing that it was entitled to raise its applied MFN duty rate on imports of galvalume at any time and to any level, given that it has no tariff bindings on that product under Article II of the GATT 1994; and (b) all three parties have consistently argued from the very beginning of this proceeding that the specific duty *is* a safeguard measure. This is the first time that a WTO dispute settlement Panel has been called upon to rule upon the merits of claims of violation of the Agreement on Safeguards in such a situation.

<sup>98</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.45-7.47.