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**1 ARTICLE 3**

**1.1 Text of Article 3**

**Article 3**

*Investigation*

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries

thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

## 1.2 General

1. The Panel in *Korea – Dairy* observed that the absence of a claim under Article 3 concerning the requirement to publish a report on a safeguard investigation did not preclude the possibility of claims relating to other aspects of an injury determination or safeguard measure:

"[T]he absence of a claim under Article 3 of the Agreement on Safeguards means at most that the European Communities agrees that the report is WTO compatible for the purpose of Article 3.1 of the Agreement on Safeguards. The European Communities has the right to raise more specific claims under Article 4 of the Agreement on Safeguards and has done so. We consider that if a Member wants to challenge the WTO compatibility of the manner in which an 'injury' determination was performed, or the choice of an appropriate measure to be imposed, this Member does not have to challenge the publication of the final report as such."<sup>1</sup>

2. In *US – Steel Safeguards*, the Panel recalled a finding by the Appellate Body<sup>2</sup> that the Agreement on Safeguards is not concerned with the manner in which determinations are made:

"There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged *prima facie* before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified."<sup>3</sup>

## 1.3 Article 3.1

### 1.3.1 The investigation

#### 1.3.1.1 "investigation"

3. In *US – Wheat Gluten*, the Appellate Body referred to Article 3.1 as part of the context for the interpretation of the requirement of Article 4.2(a) to evaluate "all relevant factors". The Appellate Body addressed the question whether, and to what extent, national authorities must, in their investigation, seek out pertinent information on possible injury factors other than those explicitly raised as relevant by the parties to the national investigation. In the course of its discussion, the Appellate Body further considered the meaning, nature and focus of an investigation:

"The ordinary meaning of the word 'investigation' suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study ... must actively seek out pertinent information.

The nature of the 'investigation' required by the *Agreement on Safeguards* is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities 'shall include' in order to seek out pertinent information. ... The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties',

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<sup>1</sup> Panel Report, *Korea – Dairy*, para. 7.22.

<sup>2</sup> See Appellate Body Report, *US – Line Pipe*, paras. 158 and 234.

<sup>3</sup> Panel Reports, *US – Steel Safeguards*, para. 10.17.

who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."<sup>4</sup>

4. In *US – Steel Safeguards*, the Panel concluded that the findings of three Commissioners were not based on an identically defined like product, and that this rendered the findings of the three Commissioners "irreconcilable". On the basis of this conclusion, the Panel found that these findings could not provide a reasoned and adequate explanation for the competent authority's single determination. The Appellate Body noted that "the Panel did not examine the substance of the findings of the three Commissioners".<sup>5</sup> The Appellate Body proceeded to reverse the Panel's finding, noting the following reservations:

"First, as a preliminary matter, we are not persuaded that the findings of the three Commissioners 'cannot be reconciled'. We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive. It may be that they are irreconcilable, but that will depend on the facts of the case. Here, the Panel did not inquire into the details of the findings as they related to increased imports and, hence, was not adequately informed as to whether the three findings were reconcilable or not.

Secondly, in any event, we note that Article 3.1 of the Agreement on Safeguards requires the competent authority, *inter alia*, to 'publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law'. We do not read Article 3.1 as necessarily precluding the possibility of providing multiple findings instead of a single finding in order to support a determination under Articles 2.1 and 4 of the *Agreement on Safeguards*. Nor does any other provision of the *Agreement on Safeguards* expressly preclude such a possibility. The *Agreement on Safeguards*, therefore, in our view, does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority. This discretion reflects the fact that, as we stated in *US – Line Pipe*, 'the *Agreement on Safeguards* does not prescribe the internal decision-making process for making [ ] a determination [in a domestic safeguard investigation]'.<sup>6</sup>

### 1.3.1.2 "reasonable public notice"

5. The Panel in *Ukraine – Passenger Cars* described the duty to give reasonable public notice as follows:

"The Panel notes that while the parties disagree whether Ukraine gave reasonable public notice to all interested parties, neither party has been specific about what constitutes reasonable public notice within the meaning of Article 3.1. In our view, in interpreting the phrase 'reasonable public notice', it is necessary to bear in mind that interested parties play a central role in safeguard investigations and that they are a primary source of information for the competent authorities. In the light of this, we consider that the competent authorities must certainly notify interested parties of a decision or action, such as the initiation of an investigation, that impacts on whether or how interested parties can discharge their role as providers of evidence and views. As we mentioned above, the Appellate Body in *US – Wheat Gluten* also stated that interested parties must be notified of an investigation.

Furthermore, absent further elaboration in Article 3.1, we consider that the adjective 'reasonable' when used in conjunction with 'public notice' is susceptible of being interpreted to relate to several relevant aspects, including the timing of the public

<sup>4</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 53-54.

<sup>5</sup> Appellate Body Reports, *US – Steel Safeguards*, para. 412.

<sup>6</sup> Appellate Body Reports, *US – Steel Safeguards*, paras. 413-414.

notice, the manner of publication of the notice, and its content. Here as well, a determination of whether public notice is 'reasonable' in terms of its timing, manner of publication and content may, in our view, affect the ability of interested parties to perform their role in the investigative process."<sup>7</sup>

### 1.3.1.3 "public hearings or other appropriate means" to present evidence

6. In *US – Steel Safeguards*, several complainants argued that, because the issue of unforeseen developments was only discussed in the report that came out after the conclusion of the investigation, the interested parties were not given an opportunity to comment on the discussion. The Panel found that:

"By inviting comments in response to the questionnaires, and addressing the issue during its public hearings, the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide 'appropriate means in which importers, exporters and other interested parties [can] present evidence and their views'.

The European Communities complains that 'there was no provisional reasoning on or explanation of unforeseen developments on which interested parties could comment'. The Panel does not believe that Article 3 of the Agreement on Safeguards requires the competent authority to send to interested parties 'draft findings' of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's report."<sup>8</sup>

7. The Panel in *Ukraine – Passenger Cars* rejected Japan's argument that Ukraine had acted inconsistently with the obligation set forth in the second sentence of Article 3.1 by failing to provide certain information to interested parties:

"[T]he second sentence of Article 3.1 requires that the competent authorities hold public hearings 'or' provide other appropriate means for interested parties to present evidence and views, including responses to presentations of other parties. The word 'or' makes clear that when public hearings are held, there is no obligation to provide, in addition, any 'other appropriate means' of giving input.

As regards access to substantive information on the investigation at issue, nothing in the text of the second sentence of Article 3.1, or any other provision of the Agreement on Safeguards cited by Japan, indicates that the importing Member must provide substantive information in advance of any public hearings to the interested parties. While Article 3.1 refers to an opportunity to 'respond' to presentations of other parties, this is in the context of the public hearings or other appropriate means which must be provided for all interested parties to present evidence and their views."<sup>9</sup>

8. The Panel noted Japan's argument that it had received little substantive information from the authorities, but found that Japan had made no inquiries with the Ukrainian authorities despite the fact that Ukraine's Safeguards Law afforded to interested parties the right to request access to all information on the file. On this basis, the Panel found that Ukraine had not acted inconsistently with Article 3.1 of the Agreement on Safeguards:

"Japan further maintains that it received few submissions made by other parties, and that the competent authorities failed to ensure that interested parties had an opportunity to respond to the presentations of other parties. We have already observed that, first, Article 3.1, second sentence, requires public hearings 'or' other appropriate means in which interested parties could present evidence, views, and responses to others' evidence and views, and that, secondly, in the investigation at issue there was an opportunity for interested parties to make their own presentations in the course of the public hearing and to respond to other parties' presentations during the public hearing. As identified above, Ukraine's Safeguards Law provides additional opportunities for participation, including the opportunity to submit written comments within 45 days

<sup>7</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.409-7.410.

<sup>8</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.64-65.

<sup>9</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.422-7.423.

after publication of the Notice. Japan asserts that, despite what is provided for in the Safeguards Law, it did not receive all written submissions directly from the other parties. We note, however, that Article 9.5 of the Safeguards Law affords the possibility to interested parties to request access to all information submitted to the competent authorities by another interested party. There is no evidence on record to show that Japan made inquiries with the competent authorities to satisfy itself that it had received all submissions of other parties. Ukraine has stated that it received no such request from Japan. Having opted for the public hearings route to provide opportunities for participation, we do not agree that Ukraine was required under Article 3.1 to do more than it did to ensure access to such written submissions."<sup>10</sup>

#### 1.3.1.4 "interested parties"

9. The Panel in *Ukraine – Passenger Cars* stated that the term "interested parties" in Article 3.1 of the Agreement on Safeguards includes WTO Members:

"We note that Article 3, second sentence, does not define the term 'interested parties'. Nevertheless, it makes clear that the term 'interested parties' at a minimum includes importers and exporters. In addition, it refers to 'other interested parties', without qualification. In our view, therefore, the term 'interested parties' also includes Members such as Japan whose interest in the proceeding is self-evident, as its exporters would be affected by the imposition of a safeguard measure. We find relevant in this regard that the importing Member must, under Article 12.1 of the Agreement on Safeguards, notify the WTO Committee on Safeguards immediately on initiating a safeguard investigation. One of the reasons why Article 12.1 requires immediate notification in our view is to ensure that potentially affected exporting Members do not miss the opportunity to present their views to the competent authorities as interested parties."<sup>11</sup>

#### 1.3.2 The published report

##### 1.3.2.1 "publish"

10. In *Chile – Price Band System*, in the context of similar obligations under the SCM and Anti-Dumping Agreements, the Panel distinguished between "publish" and "make publicly available":

"[W]e note that the Minutes of the relevant CDC sessions have not been 'published' through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of 'whoever wishes to consult them at the library of the Central Bank of Chile'. In order to determine whether it is sufficient under Article 3.1 of the Agreement on Safeguards to make the investigating authorities' report 'available to the public' in such a manner, we first refer to the dictionary meaning of 'to publish'. The term can mean 'to make generally known', 'to make generally accessible', or 'to make generally available through [a] medium'. We therefore turn to the context of Article 3.1 provided by similar publication requirements in the AD and SCM Agreements. We note that both Article 22 of the SCM Agreement ('public notice and explanation of determinations') and Article 12 of the AD Agreement ('public notice and explanation of determination') distinguish between giving 'public notice' and 'making otherwise available through a separate report', which must be 'readily available to the public'. In addition, we also note that various 'transparency' provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the TRIPS Agreement, and Article 2.11 of the TBT Agreement all distinguish between 'to publish' and 'to make publicly available'. In the light of these considerations, we find that the verb 'to publish' in Article 3.1 of the Agreement on Safeguards must be interpreted as meaning 'to make generally available through an appropriate medium', rather than simply 'making publicly available'. As regards the minutes of the relevant CDC sessions, we therefore find that they have not been generally made available through an appropriate medium so as to

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<sup>10</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.429.

<sup>11</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.403.

constitute a 'published' report within the meaning of Article 3.1 of the Agreement on Safeguards."<sup>12</sup>

### 1.3.2.2 "reasoned conclusions"

11. In *US – Steel Safeguards*, the Appellate Body stated that, since the report must contain "reasoned conclusions", such report must include an explanation of the rationale for the determinations from the facts and data contained in the report of the competent authority:

"[W]e note that the definition of 'conclusion' is 'the result of a discussion or an examination of an issue' or a 'judgement or statement arrived at by reasoning: an inference; a deduction'. Thus, the 'conclusion' required by Article 3.1 is a 'judgement or statement arrived at by reasoning'. We further note that the word 'reasoned', which the United States defines in terms of the verb 'to reason', is, in fact, used in Article 3.1, last sentence, as an adjective to qualify the term 'conclusion'. The relevant definition of the intransitive verb 'to reason' is 'to think in a connected or logical manner; use one's reason in forming conclusions'. The definition of the transitive verb 'to reason' is 'to arrange the thought of in a logical manner, embody reason in; express in a logical form'. Thus, to be a 'reasoned' conclusion, the 'judgement or statement' must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must 'set forth' the 'reasoned conclusion' in their report. The definition of the phrase 'set forth' is 'give an account of, esp. in order, distinctly, or in detail; expound, relate, narrate, state, describe'. Thus, the competent authorities are required by Article 3.1, last sentence, to 'give an account of' a 'judgement or statement which is reached in a connected or logical manner or expressed in a logical form', 'distinctly, or in detail.'

Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to 'set forth' 'findings and reasoned conclusions' for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to 'deduce for themselves' from the report of that competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority.' We agree."<sup>13</sup>

12. The Appellate Body in *US – Steel Safeguards* elaborated that the role of the panel is to assess the adequacy of the competent authority's reasoning:

"The issue in this case is not whether certain data referred to in the USITC report had, in fact, been 'considered' by the USITC. The USITC may indeed have 'considered' all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how 'unforeseen developments' resulted in increased imports. Rather, as the Panel found, 'the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came.' Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a 'reasoned conclusion', as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide 'reasoned conclusions'. It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was 'required' to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that 'unforeseen developments' had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect."<sup>14</sup>

<sup>12</sup> Panel Report, *Chile – Price Band System*, para. 7.128.

<sup>13</sup> Appellate Body Reports, *US – Steel Safeguards*, paras. 287-288.

<sup>14</sup> Appellate Body Report, *US – Steel Safeguards*, para. 329.

### 1.3.2.3 "on all pertinent issues of law and fact"

13. In *US – Lamb*, the Appellate Body stated that a published report within the meaning of Article 3.1. must also contain a finding on the existence of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994:

"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>15</sup>

14. The Panel in *Ukraine – Passenger Cars* rejected Japan's contention that Ukraine had violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards by failing to provide a timetable for the progressive liberalization of the safeguard measure at issue because the Panel found "no basis for interpreting Article 3.1, last sentence, or Article 4.2(c), as requiring that the published report, or analysis and demonstration, contain a timetable for the progressive liberalization of the measure at regular intervals".<sup>16</sup>

### 1.3.2.4 Format and timing of the report

15. The Panel in *US – Steel Safeguards*, in a finding upheld by the Appellate Body, concluded that the competent authority's report may be presented in different parts or in any other format:

"The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes 'the report of the competent authority' is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measures satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner."<sup>17</sup>

16. 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>18</sup> The Panel considered this

<sup>15</sup> Appellate Body Report, *US – Lamb*, para. 76.

<sup>16</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.390.

<sup>17</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.49-10.50.

<sup>18</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.19.

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 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>19</sup>

17. The Panel in *US – Steel Safeguards* explained that the timing of the explanation is a factor that can affect the reasonableness and adequacy of the explanation:

"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 [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."<sup>20</sup>

18. In *Ukraine – Passenger Cars*, the Panel rejected Japan's contention that Article 3.1 of the Agreement on Safeguards required that the competent authorities' report be published "promptly":

"We therefore turn to the second basis asserted by Japan in support of its claims, namely Japan's contention that Ukraine has failed to publish its report and its detailed analysis 'promptly'. We begin our analysis by noting that Article 3.1, last sentence, refers to a requirement to 'publish' a report setting forth the competent authorities' findings and reasoned conclusions. But it establishes no requirements with respect to the timing of such publication. In contrast, Article 4.2(c) contains an express requirement to 'publish promptly', 'in accordance with the provisions of Article 3', a 'detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined'. Also, whereas Article 4.2(c) thus includes an explicit cross-reference to Article 3, the converse is not true. In our view, the cross-reference in Article 4.2(c) to Article 3 makes it clear that the analysis and demonstration to be promptly published under Article 4.2(c) are to be published in the form of a report, as contemplated by Article 3.1. Thus, we conclude that Article 4.2(c) requires 'prompt' publication of the report required by Article 3.1.

Article 3.1 does not explicitly require the competent authorities to publish their report 'promptly'. As the wording of Article 4.2(c) is different from that of Article 3.1 also in other respects, it is reasonable to assume that the difference in the wording of Article 4.2(c) was intended to produce at least some different effects, including with regard to certain aspects of the publication requirement.<sup>21</sup> It therefore strikes us as improper to read a word – 'promptly' – into the text of Article 3.1 that would add to, and amplify, the basic publication requirement that is imposed in Article 3.1. As emphasized by the Appellate Body in *India – Patents (US)*, the principles of treaty interpretation 'neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended'. We, thus, do not agree with Japan that Article 3.1 imposes an obligation on competent authorities to publish their report 'promptly'. Accordingly, we conclude that Japan has failed to establish that

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<sup>19</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.20.

<sup>20</sup> Panel Reports, *US – Steel Safeguards*, para. 10.115.

<sup>21</sup> (*footnote original*) We consider that this view that Article 4.2(c) adds to rather than simply restates Article 3.1, last sentence, is consistent with the statement of the Appellate Body to the effect that Article 4.2(c) is an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report. See Appellate Body Report, *US – Steel Safeguards*, para. 289.

Ukraine acted inconsistently with its obligations under Article 3.1, last sentence, because its competent authorities did not publish their report 'promptly'.<sup>22</sup>

### 1.3.3 Relationship with other provisions of the Agreement on Safeguards

#### 1.3.3.1 Articles 2 and 4

19. In *US – Steel Safeguards*, the Appellate Body considered whether a failure to comply with the appropriate standard of review constituted a procedural mistake inconsistent with Article 3.1 of the Agreement on Safeguards. In that dispute, the respondent had argued on appeal that a failure to provide a reasoned and adequate explanation demonstrates only a violation of Article 3.1, and not also Articles 2 and 4 of the Agreement on Safeguards.

"We recall again our earlier statements on the appropriate standard of review for panels in disputes that arise under the *Agreement on Safeguards*. When the Panel found that the USITC report failed to provide a 'reasoned and adequate explanation' of certain findings, the Panel was assessing compliance with the obligations contained in Articles 2 and 4 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As we said in *US – Lamb*, '[i]f a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination ... [that] panel has ... reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*.' Thus, we do not agree with the United States that the lack of a reasoned and adequate explanation does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*.

Moreover, we cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC 'did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]'.

As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly."<sup>23</sup>

20. In *US – Steel Safeguards*, the Appellate Body also viewed the final sentence of Article 4.2(c) of the Agreement on Safeguards as an elaboration of the requirement in Article 3.1 to provide a reasoned conclusion in a published report:

"We note further, as context, that Article 4.2(c) of the *Agreement on Safeguards* requires the competent authorities to:

... publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (emphasis added)

We observe that this requirement is expressed as being 'in accordance with' Article 3, and not 'in addition' thereto. Thus, we see Article 4.2(c) as an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report."<sup>24</sup>

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<sup>22</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.439-7.440.

<sup>23</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 302-303.

<sup>24</sup> Appellate Body Report, *US – Steel Safeguards*, para. 289.

### 1.3.4 Relationship with other WTO Agreements

#### 1.3.4.1 Article XIX of the GATT 1994

21. In *US – Steel Safeguards*, the Panel and the Appellate Body discussed the relationship between Article XIX of the GATT 1994 on unforeseen developments and Articles 3.1 and 4.2(c) of the Agreement on Safeguards:

"The United States argued at the oral hearing that 'Article 4.2(c) does not apply to the competent authorities' demonstration of unforeseen developments' under Article XIX:1(a) of the GATT 1994. We disagree. Article 4.2(c) is an elaboration of Article 3; moreover 'unforeseen developments' under Article XIX:1(a) of the GATT 1994 is one of the 'pertinent issues of fact and law' to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of 'unforeseen developments' under Article XIX:1(a)."<sup>25</sup>

#### 1.3.4.2 Article 11 of the DSU

22. In *US – Steel Safeguards*, the Appellate Body reviewed the relationship between Article 11 of the DSU and Articles 3.1 and 4.2 of the Agreement on Safeguards:

"It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a 'reasoned and adequate explanation' of how the facts support its determination of those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.

It is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities. Therefore, the 'reasoned conclusions' and 'detailed analysis' as well as 'a demonstration of the relevance of the factors examined' that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority."<sup>26</sup>

### 1.4 Article 3.2

#### 1.4.1 "confidential information"

23. In examining a claim concerning the omission from the published report of a safeguards investigation of certain information considered to be confidential by the investigating authorities, the Panel in *US – Wheat Gluten* interpreted the requirements of Article 3.2 concerning the treatment to be accorded to such confidential information:

"Article 3.2 [of the *Agreement on Safeguards* ('SA')] places an obligation upon domestic investigating authorities not to disclose – including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is 'by nature confidential or which is provided on a confidential basis' without permission of the party submitting it. Article 3.2 SA does not define the term 'confidential' nor does

<sup>25</sup> Appellate Body Report, *US – Steel Safeguards*, para. 290.

<sup>26</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 298-299.

it contain any examples of the type of information that might qualify as 'by nature confidential' or 'information that is submitted on a confidential basis'.

Article 3.2 SA requires that information that is by nature confidential or which is submitted on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. In the absence of a detailed elaboration or definition of the types of information that must be treated as confidential, we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as 'confidential'. While Article 3.2 does not specifically address the nature of any policies pertaining to the treatment of such 'confidential' information which a Member's investigating authority may or must adopt, that provision does specify that such 'information shall not be disclosed without permission of the party submitting it'. The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties."<sup>27</sup>

24. The Panel in *US – Safeguard Measure on PV Products* stated that "the redaction of confidential information [in the final injury report] does not necessarily establish a failure of the competent authorities to provide findings and reasoned conclusions within the meaning of Article 3.1 of the Agreement on Safeguards."<sup>28</sup>

25. The Panel in *US – Wheat Gluten* addressed the argument that certain aggregate data could not be considered to be "confidential" within the meaning of Article 3.2, and that, even if it was confidential, it could have been presented in percentages and indexes:

"While the United States has described the USITC's efforts to characterize as much confidential information as possible in its Report without compromising the confidential nature of that information, the USITC might ideally have been more creative in trying to provide the essence of the confidential information in its findings in the published USITC Report. We draw attention to the provision in Article 3.2 SA that parties providing confidential information in a domestic safeguard investigation 'may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided...' The language of this provision is hortatory. However, this is one vehicle envisaged by the *Agreement on Safeguards* that may provide a greater degree of transparency while respecting the confidentiality of qualifying information.

Nevertheless, given the small number of firms comprising the United States domestic industry (and the non-US producers and exporters) in this case; the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not 'cause' has been shown for information to be treated as 'confidential'; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information 'which is by nature confidential or which is provided on a confidential basis', including aggregate data."<sup>29</sup>

26. The Panel in *US – Safeguard Measure on PV Products*, while considering a claim concerning the treatment of confidential information by the respondent's competent authority, the USITC, summarised the legal requirements of Article 3 of the Agreement on Safeguards as follows:

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<sup>27</sup> Panel Report, *US – Wheat Gluten*, paras. 8.19-8.20.

<sup>28</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.236.

<sup>29</sup> Panel Report, *US – Wheat Gluten*, paras. 8.23-8.24. See also material on disclosure of confidential data under Article 6.5 of the *Anti-Dumping Agreement*, and the Appellate Body Report, *Thailand – H-Beams*, para. 112.

"Accordingly, Article 3 establishes certain procedural rules that must be followed before applying a safeguard measure. Specifically, Article 3.1, first sentence, establishes that a Member may only apply a safeguard measure following an investigation conducted by the competent authorities of that Member. That investigation must include, according to Article 3.1, second sentence, 'reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views'. Moreover, Article 3.1, third sentence, requires the competent authorities to publish a report that sets forth 'findings and reasoned conclusions reached on all pertinent issues of fact and law'.

Article 3.2 mandates the protection of confidential information received by the competent authorities during the investigation. Article 3.2, third sentence, also permits the competent authorities to request non confidential summaries from the parties providing confidential information."<sup>30</sup>

27. The complainant in *US – Safeguard Measure on PV Products, China*, argued that Article 3 of the Agreement on Safeguards obligated the USITC to publish non-confidential summaries of the confidential data it had relied on in its final report, and further that the USITC was obliged to provide non-confidential summaries of its pre-hearing reports at an earlier stage to enable interested parties to make representations. China also claimed that it was unfair for counsel for the interested parties to be required to destroy or return confidential versions of the final report before interested parties were able to comment on the content.<sup>31</sup> The Panel rejected these arguments and found that Article 3 of the Agreement on Safeguards does not impose an obligation on the competent authorities to publish intermediate decisional documents, and does not create a right for interested parties to comment on the text of the final report:

"First, China's claim concerning the timing of publication of the non-confidential versions of USITC prehearing injury and remedy reports is premised on an obligation for the competent authorities to provide such intermediate decisional documents to interested parties. However, the Agreement on Safeguards does not contain any such obligation. While the third sentence of Article 3.1 envisages the publication of a report, that report need only contain 'findings and reasoned conclusions *reached* on all pertinent issues of fact and law'. There is no requirement to publish a report containing intermediate findings or conclusions. Nor does any other part of Article 3 address this issue. Because Article 3 does not require publication of intermediate decisional documents, we reject China's claim that the timing of the publication of the non-confidential versions of the USITC's prehearing injury and remedy reports was inconsistent with Article 3.

Second, China's claim concerning the timing of the publication of the non-confidential versions of USITC final report and final staff report is premised on an obligation that the competent authorities provide interested parties with an opportunity to comment on their published report. Again, we do not consider that any such obligation exists. As China clarified, its claim is based on the second sentence of Article 3.1, which provides that interested parties should have an opportunity to present 'evidence' and 'views'. As an initial matter, we note that the structure of Article 3.1 suggests that interested parties should be afforded these procedural rights before publication of the report envisaged in the third sentence of Article 3.1. However, even if this were not the case, Article 3.1, second sentence, requires that the competent authorities hold public hearings 'or' provide other appropriate means for interested parties to present evidence and views. The use of the disjunctive conjunction 'or' signifies that when public hearings are held, as was the case in the USITC's safeguard investigation, there is no obligation to provide 'other appropriate means' for interested parties to provide further input. Accordingly, we reject China's claim that the timing of the publication of the non-confidential versions of the USITC final report and final staff report was inconsistent with Article 3.

Third, China's claim concerning the termination of access to confidential information is similarly flawed as it is premised on the existence of a requirement that the competent authorities must provide interested parties with a right to comment on the final report.

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<sup>30</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.291-7.292.

<sup>31</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.300-7.302.

However, as we have just explained, no such obligation exists. We therefore reject China's argument that the USITC acted inconsistently with Article 3 by requiring APO-authorized counsel to destroy or return confidential information."<sup>32</sup>

28. The Panel also rejected China's argument that Article 3.2 obliged the competent authorities to provide "non-confidential summaries" of the confidential information relied upon in its final reports:

"[W]e recall that Article 3.1 of the Agreement on Safeguards requires that the competent authorities 'publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law'. Moreover, Article 3.2 prohibits the competent authorities from disclosing confidential information submitted by the interested parties without their permission. Article 3.2 also allows – but does not require – the competent authorities to request that the interested parties furnish 'non-confidential summaries' of confidential information. In cases where the competent authorities are required to redact certain confidential information from the non-confidential version of their report to meet their obligations under Article 3.2, they may elect to include 'non-confidential summaries' of the confidential information when presenting their 'findings and reasoned conclusions'. However, the text of Article 3 does not require them to do so. Nor does the mere absence of 'non-confidential summaries' in the report mean that the competent authorities failed to publish a report 'setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law'.

<sup>33</sup>"<sup>34</sup>

29. On the basis of this reasoning, the Panel concluded that the USITC had not acted inconsistently with Article 3 of the Agreement on Safeguards in relation to its treatment of confidential information.<sup>35</sup>

#### **1.4.2 Relationship with other paragraphs of Article 3**

##### **1.4.2.1 Article 3.1**

30. The Panel in *US – Steel Safeguards* addressed the relationship between Article 3.2 and Article 3.1:

"Article 3.1 of the Agreement on Safeguards contains the obligation that competent authorities 'publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.' Article 4.2(c) adds the obligation that competent authorities 'publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined'. On the basis of these obligations and the obligation under Article 2.1, to make a determination, *inter alia*, that imports of the product in question have increased, competent authorities must provide a reasoned and adequate explanation of how the facts support the conclusion. In the view of the Panel, this

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<sup>32</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.308–7.310.

<sup>33</sup> (footnote original) In this context, we do not find China's references to the panel reports in *US – Steel Safeguards* persuasive to the extent they promulgate a general rule that the competent authorities must, to the fullest extent possible, provide non-confidential summaries of all confidential information referenced in their final report. (Panel Reports, *US – Steel Safeguards*, paras. 10.274-10.275). In particular, we do not consider that the text of Article 3.1 supports an affirmative requirement for the competent authorities to explain their findings "to the fullest extent possible without disclosing confidential information" or an affirmative requirement to present confidential data in a modified form (e.g. aggregation or indexing) that protects confidentiality. We similarly do not consider that, in order to withhold (and not summarize or index) confidential data, Article 3.1 affirmatively requires the competent authorities to explain "why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information". (Ibid. para. 10.275 (emphasis original)).

In addition, we do not agree with China to the extent it argues that the panel in *US – Wheat Gluten* interpreted Article 3.1, third sentence, to require that the competent authorities provide a non-confidential summary of confidential information in their report. (China's first written submission, paras. 300-301; second written submission, para. 317; and comments on the United States' response to Panel question No. 30 of the first set, para. 213 (referring to Panel Report, *US – Wheat Gluten*, para. 8.23)).

<sup>34</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.316.

<sup>35</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.318.

requirement can, in an individual case, be limited by the obligation of Article 3.2 to protect confidential data.

However, we believe that Article 3.1 and 3.2 can be interpreted harmoniously. The obligation of Article 3.1 cannot be interpreted so as to imply a violation of Article 3.2. In other words, a competent authority is obliged to provide these explanations to fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality, a competent authority is obliged to resort to these options. Conversely, the provision of no data at all, is permitted only when all these methods fail in a particular case.

The Panel believes that even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation. This obligation could be complied with through the kind of explanation that the USITC has provided on page 215 of its report, i.e. an explanation in words and without numbers. However, this obligation also includes an explanation by the competent authority of why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information. That explanation was not provided in the instant case."<sup>36</sup>

31. In *US – Safeguard Measure on Washers*, the Panel rejected Korea's claim that the USITC violated Articles 4.1(c) and 3.1 of the Agreement on Safeguards by including belt-driven washers within the scope of the domestic industry, even though such washers were expressly excluded from the product under consideration.<sup>37</sup> In so finding, the Panel stated that:

"Article 4.1(c) requires that the domestic industry be defined on the basis of producers of goods that are 'like or directly competitive' with the PUC. To the extent the domestic industry is defined based on the producers of like or directly competitive products, there is no additional requirement under Article 4.1(c) for a 'match' between the PUC and the domestically produced good. Indeed, accepting Korea's position would mean that the investigating authority would have to exclude a producer of like or directly competitive goods from the scope of the domestic industry because the domestic product, while like or directly competitive, is essentially not the same as (or to use Korea's words, does not 'match') the goods included in the PUC. This is at odds with the text of Article 4.1(c). We consider that if Article 4.1(c) were intended to preclude investigating authorities from defining the domestic industry on the basis of goods that are like or directly competitive but not a 'match', the provision would have been drafted differently."<sup>38</sup>

### 1.4.3 Relationship with other WTO Agreements

#### 1.4.3.1 Articles 11 and 13 of the DSU

32. The Panel in *US – Wheat Gluten* commented on the relationship between Article 3.2 of the Agreement on Safeguards and Article 13 of the DSU. This Panel had taken certain steps to have access to certain information that had not been included in the published report of the investigation at issue on account of its confidential nature, but the parties were unable to reach agreement on the procedures proposed by the Panel for viewing this information.<sup>39</sup> In light of this disagreement between the parties, the Panel had decided not to adopt these procedures. The report then commented as follows:

"In our view, the protracted exchange of communications between the parties about the circumstances under which the Panel should view the requested information demonstrates the existence of a serious systemic issue as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member's investigating authorities with respect to confidential information obtained in the course

<sup>36</sup> Panel Report, *US – Steel Safeguards*, paras. 10.272-10.275.

<sup>37</sup> Panel Report, *US – Safeguard Measure on Washers*, paras. 7.48 and 7.53.

<sup>38</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.51.

<sup>39</sup> Panel Report, *US – Wheat Gluten*, paras. 8.7-8.10.

of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU. The Panel's efforts to develop a consensual approach to the conditions under which the Panel might view the requested information were ultimately unsuccessful."<sup>40</sup>

33. Although in *US – Wheat Gluten*, the Panel concluded that the record before it, without the confidential information, provided a sufficient basis for an objective assessment of the facts as required by Article 11 of the DSU, it cautioned that "the WTO dispute settlement system cannot function optimally if relevant information is withheld from a panel."<sup>41</sup> The Appellate Body in *US – Wheat Gluten* endorsed this finding:

"[We agree] with the panel that a 'serious systemic issue' is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be 'confidential'. We believe that these issues need to be addressed."<sup>42</sup>

34. The Appellate Body in *US – Wheat Gluten* also shared the concerns expressed by the Panel related to the proper functioning of the WTO dispute settlement system:

"[T]he refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the 'prompt' and 'satisfactory' resolution of disputes under the procedures 'for which they bargained in concluding the DSU'.<sup>43</sup>

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<sup>40</sup> Panel Report, *US – Wheat Gluten*, para. 8.11.

<sup>41</sup> Panel Report, *US – Wheat Gluten*, para. 8.12.

<sup>42</sup> Appellate Body Report, *US – Wheat Gluten*, para. 170.

<sup>43</sup> Appellate Body Report, *US – Wheat Gluten*, para. 171.