WORLD TRADE ORGANIZATION

WT/DS518/R/Add.1

6 November 2018

(18-6911)

Page: 1/75

Original: English

INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS518/R.

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WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 10 October 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Upon indication from either party that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel may, after consultation with the parties, adopt appropriate additional procedures.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Japan requests such a ruling, India shall submit its response to the request in its first written submission. If India requests such a ruling, Japan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation of such exhibits into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant

exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation within a deadline to be determined by the Panel.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided), to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by Japan. If India chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other

participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

18. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements in accordance with the timetable adopted by the Panel. This summary may also cover the responses to questions following the first substantive meeting. Each party shall also submit a separate integrated executive summary of its written rebuttal, second opening and closing oral statements in accordance with timetable adopted by the Panel. This summary may also cover the responses to questions following the second substantive meeting and comments on such responses. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file two paper copies of all documents it submits to the Panel, including of any exhibits submitted to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, including of any exhibits, preferably in Microsoft Word format, either on a CD-ROM, DVD, USB Key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXX@wto.org and XXX@wto.org. If a CD-ROM, DVD or USB Key is provided, it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made a number of editorial changes, some of which were suggested by the parties, to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.[1]

1.2. As a result of the changes that we have made, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Japan's specific requests for review

2.1.1 Paragraph 7.15

2.1. Japan requests that the Panel modify paragraph 7.15 in order to more completely reflect its arguments that the Panel should make findings and recommendations in the present dispute, despite the expiry of the measure at issue. India does not comment on this request.

2.2. We have modified paragraph 7.15 to better reflect Japan's arguments.

2.1.2 Paragraph 7.24

2.3. Japan requests that the Panel add a footnote after the phrase "[a]s indicated above" in the fourth sentence of paragraph 7.24 in order to clarify the relevant paragraph of the Report in which the same issue has been addressed. India does not comment on this request.

2.4. We have modified the fourth sentence of paragraph 7.24 to clarify the Panel's reasoning.

2.1.3 Section 7.4

2.5. Japan refers to the Panel's statement in paragraph 7.30 that both parties agree that the challenged measure is a safeguard within the meaning of Article XIX:1(a) of the GATT 1994 and of the Agreement on Safeguards. Japan requests that the Panel summarize the parties' arguments in this regard and add a reference to the parties' relevant submissions.[2] India does not comment on this request.

2.6. In light of Japan's request, we have added footnote 74 to paragraph 7.30 to refer to the parties' submissions. We note that paragraph 7.30 introduces the question that the Panel addresses in section 7.4, i.e. whether the measure at issue falls within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. We summarize the parties' arguments in the subsequent paragraphs, including paragraphs 7.44, 7.54, and 7.64, in the manner and to the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning. We note that parties are free to reflect their arguments in their executive summaries,

[1] We have corrected typographical and non-substantive errors in paragraphs 7.106, 7.196, 7.227, and 7.246.

[2] In particular, Japan refers to its responses to Panel question Nos. 11 and 14, and its second written submission, paras. 276-279.

annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraphs 40-42, Annex B-2.

2.1.4 Paragraph 7.43

2.7. Japan requests that the Panel modify the penultimate sentence of paragraph 7.43, by adding the word "ordinary" before the phrase "customs duties". India does not comment on this request.

2.8. We have made the requested change to clarify the Panel's reasoning.

2.1.5 Paragraph 7.49

2.9. Japan requests that the Panel delete the phrase "as a matter of fact" in the last sentence of paragraph 7.49. India does not comment on this request.

2.10. We have made the requested change to clarify the Panel's reasoning.

2.1.6 Paragraph 7.62

2.11. Japan requests that the Panel modify paragraph 7.62 to reflect Japan's argument that the fact that imports from Ukraine and China were subject to the measure at issue due to their significant market shares indicated that India selected the sources of imports to be subject to the measure with a view to preventing or remedying serious injury.[3] Japan also requests that the Panel address this argument of Japan. India does not comment on this request.

2.12. In light of Japan's request, we have added a new paragraph 7.60 to reflect Japan's argument on this issue and added footnote 118 to refer to Japan's submissions. The Panel's reasoning in paragraph 7.62 reflects its considerations of the arguments made by both parties in light of the evidence on the record. Therefore, there is no need to make any further changes in paragraph 7.62.

2.1.7 Paragraph 7.74

2.13. Japan suggests that the Panel use the term "measures at issue" in the first sentence of paragraph 7.74 in singular form in order to ensure consistency with the rest of the Report. India does not comment on this request.

2.14. We have made the requested correction.

2.1.8 Paragraph 7.95

2.15. Japan requests that the Panel modify paragraph 7.95 in order to more completely reflect its arguments. India made no comment on this request.

2.16. We have modified paragraph 7.95 to better reflect Japan's arguments.

2.1.9 Paragraphs 7.101 and 7.102

2.17. Japan requests that the Panel modify paragraphs 7.101 and 7.102 in order to more accurately reflect its arguments. India made no comment on this request.

2.18. We have modified paragraphs 7.101 and 7.102 to better reflect Japan's arguments.

2.1.10 Paragraph 7.117

2.19. Japan requests that the Panel modify the last sentence of paragraph 7.117 in order to more accurately reflect Japan's arguments. India does not comment on this request.

[3] In particular, Japan refers to its second written submission, para. 285; and response to Panel question No. 11, para. 5.

2.20. We have modified the last sentence of paragraph 7.117 to better reflect Japan's arguments.

2.1.11 Section 7.6

2.21. Japan suggests that the Panel refer to paragraph (a) of Article 4.2 of the Agreement on Safeguards in the title of section 7.6. India does not comment on this request.

2.22. We have made the requested correction.

2.1.12 Paragraph 7.147

2.23. Japan requests that the Panel modify paragraph 7.147 in order to more completely reflect its arguments. India does not comment on this request.

2.24. We have modified paragraph 7.147 to better reflect Japan's arguments.

2.1.13 Paragraph 7.153

2.25. Japan suggests that the Panel use the word "determine" instead of the word "define", when summarizing Japan's arguments in the first sentence of paragraph 7.153, and add a footnote after this sentence to refer to Japan's submissions. India does not comment on this request.

2.26. We have made the requested correction.

2.1.14 Paragraphs 7.159 and 7.163

2.27. Japan requests that the Panel modify paragraphs 7.159 and 7.163 in order to more completely reflect its arguments with respect to the determination of the domestic industry. Japan also requests that the Panel include data on sales, market share, and production of the domestic industry as compared to the producers outside the domestic industry. India does not comment on this request.

2.28. We have modified paragraphs 7.159 and 7.163, and added footnote 273 to better reflect Japan's arguments. We have also added footnotes 274 and 275, and modified footnote 276 to reflect the data on sales, market share, and production of the domestic industry and the producers outside the domestic industry.

2.1.15 Paragraph 7.164

2.29. Japan refers to the Panel's statement in paragraph 7.164 that Article 4.1(c) does not require a competent authority to examine the domestic producers' market share and sales in order to define the domestic industry. Japan submits that the Panel has not addressed Japan's argument relating to differences in production trends of the domestic industry and producers outside the domestic industry. Japan requests that the Panel address this argument in the Report. India does not comment on this request.

2.30. In light of Japan's request, we have modified paragraph 7.165 to clarify the Panel's findings.

2.1.16 Paragraph 7.180

2.31. Japan requests that the Panel modify paragraph 7.180 to more completely reflect Japan's arguments regarding the Indian competent authority's evaluation of the share of the domestic market taken by increased imports. India does not comment on this request.

2.32. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.1.17 Paragraphs 7.187 and 7.191

2.33. Japan requests that the Panel elaborate further on its analysis of Japan's argument that the Indian competent authority focused its analysis on the non-captive segment of the domestic

industry. Japan repeats its argument that the market share of the domestic industry presented in the Final Findings (45% in 2013-2014 and 37% in 2015-2016 (annualized)) refers only to the market share of the non-captive segment.

2.34. India opposes Japan's request. India submits that the Panel's conclusion in paragraphs 7.187 and 7.191 is not based solely on the excerpts from the Final Findings quoted by the Panel in paragraph 7.186, but also on its analysis in the preceding paragraphs. In particular, India notes that Table 3 in paragraph 7.183 of the Report shows that the Indian competent authority's analysis of the changes in the market share was based upon the examination of both captive and non-captive segments of the market.

2.35. We have decided not to grant Japan's request. As explained in paragraph 7.181 of the Report, Article 4.2(a) of the Agreement on Safeguards requires a competent authority to evaluate "the share of the domestic market taken by increased imports", which is distinct from the language in the Anti-Dumping Agreement that refers to a "decline" in the domestic industry's market share. The Panel observes in paragraph 7.188 that the domestic industry lost sales and market share in the non-captive segment, while it was able to maintain its market share represented by the captive market. Paragraph 49(b) of the Final Findings (represented in Table 3, paragraph 7.183, of the Report) shows that the Indian competent authority considered both captive and non-captive segments of the market when examining sales of different market participants and share of the domestic market taken by imports.

2.1.18 Paragraph 7.188, footnote 306

2.36. Japan requests that the Panel add a reference to paragraph 288 of Japan's first written submission in footnote 306. India does not comment on this request.

2.37. We have decided not to grant Japan's request. Footnote 306 refers to the table presented on page 82 of Japan's first written submission (which corresponds to Table 4 of the Panel Report). In any event, in light of Japan's request, we have modified footnote 306 to refer to Table 4 of the Report.

2.1.19 Paragraph 7.189

2.38. Japan requests that the Panel reflect and address its argument that in the domestic investigation some interested parties mentioned the possibility that the domestic industry was not able to meet the increasing demand due to reasons other than increased imports, such as the fact that the increase in demand was for products that were not produced by the domestic industry. India does not comment on this request.

2.39. In light of Japan's request, we have added a footnote to paragraph 7.189 to clarify the Panel's reasoning.

2.1.20 Paragraph 7.216

2.40. Japan suggests that the Panel modify paragraph 7.216, by adding a sentence describing Japan's argument that the figures of inventories, production, and sales for a given year of the POI do not match. India does not comment on this request.

2.41. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 349. We see no reason to make the change requested by Japan.

2.1.21 Paragraph 7.221

2.42. Japan requests that the Panel modify paragraph 7.221 in order to fully and accurately reflect Japan's arguments regarding the Indian competent authority's alleged determination of threat of serious injury. Japan also requests that that the Panel modify footnote 351 to provide more complete references to Japan's submissions. India does not comment on Japan's request.

2.43. We have modified paragraph 7.221 and added footnote 352 to better reflect Japan's arguments. We have also modified footnote 351.

2.1.22 Paragraph 7.228

2.44. Japan requests that the Panel modify footnote 367 in order to note that the domestic industry submitted the post POI data after the public hearings. India does not comment on this request.

2.45. We have decided not to grant Japan's request. The proposed change is unnecessary and Japan has not explained why the additional language is relevant to the analysis in paragraph 7.228.

2.1.23 Paragraph 7.232, footnote 369

2.46. Japan requests that the Panel modify the reference to its second written submission in footnote 369. India does not comment on Japan's request.

2.47. We have made the requested change.

2.1.24 Paragraph 7.240, footnote 384

2.48. Japan requests that the Panel add a reference to its second written submission in footnote 384. India does not comment on Japan's request.

2.49. We have made the requested change.

2.1.25 Paragraph 7.241

2.50. Japan requests that the Panel modify paragraph 7.241 to more completely reflect Japan's arguments regarding the causal link analysis. Japan also requests that the Panel add a reference to its second written submission in footnote 385. India does not comment on Japan's request.

2.51. We have modified paragraph 7.241 and added footnotes 388-390 and 410 to better reflect Japan's arguments and to clarify the Panel's reasoning. We have also added a reference to Japan's second written submission in footnote 385.

2.1.26 Paragraph 7.258, footnote 411

2.52. Japan requests that the Panel modify the reference to its second written submission in footnote 411. India does not comment on Japan's request.

2.53. We have made the requested change.

2.1.27 Paragraph 7.259

2.54. Japan requests that the Panel modify paragraph 7.259 to add a reference to its argument that the Indian competent authority failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the GATT obligations from the impact caused by other reasons. India does not comment on Japan's request.

2.55. We have decided not to grant Japan's request, since this argument is noted by the Panel in footnote 440. We see no reason to make the change requested by Japan.

2.1.28 Paragraph 7.260

2.56. Japan requests that the Panel add a new paragraph between paragraphs 7.260 and 7.261 in order to reflect its arguments made in response to India's argument that the obligation to conduct a non-attribution analysis pursuant to the second sentence of Article 4.2(b) of the Agreement on Safeguards only arises when a competent authority has determined that a specific factor is "relevant" under Article 4.2(a). India does not comment on Japan's request.

2.57. We have decided not to grant Japan's request. We summarize the parties' arguments in paragraphs 7.259 and 7.260 in the manner and to the extent necessary and appropriate to capture

our understanding for the purposes of our own assessment and reasoning. We note that the parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, in a way they consider appropriate. Japan's arguments on this issue are reflected in its second executive summary, paragraph 27, Annex B-2.

2.1.29 Paragraph 7.272

2.58. Japan requests that the Panel reflect in paragraph 7.272 that more detailed explanations of the interested parties' arguments summarized in the Final Findings were provided in the submissions of the interested parties to the Indian competent authority. India does not comment on Japan's request.

2.59. We have decided not to grant Japan's request. We see no reason to make the requested change, since Japan does not refer to any specific submission by interested parties on the record of the Panel that the Indian competent authority failed to consider.

2.1.30 Paragraph 7.280, footnote 443

2.60. Japan requests that the Panel add a reference to its second written submission in footnote 443. India does not comment on Japan's request.

2.61. We have made the requested change.

2.1.31 Paragraph 7.308

2.62. Japan requests that the Panel modify paragraph 7.308 in order to more completely reflect Japan's arguments in relation to its claim under Article 12.1 (a) of the Agreement on Safeguards. India does not comment on this request.

2.63. We have modified paragraph 7.308 and added footnote 467 to better reflect Japan's arguments.

2.1.32 Paragraph 7.379

2.64. Japan suggests that the Panel delete the words "the month" in paragraph 7.379, because they are used twice. India does not comment on this request.

2.65. The third sentence of paragraph 7.379 refers to "the precise day of the month" and "the month, and the year", which is consistent with the definition of the word "date" provided in the first sentence of paragraph 7.378. Therefore, we reject Japan's request.

2.2 India's specific requests for review

2.2.1 Section 7.3 (paragraphs 7.11-7.28)

2.66. India requests that the Panel review paragraphs 7.11-7.28 of the Report with respect to the continued effects of the measure at issue, and refrain from making any recommendations for the following reasons. India submits that the Panel has not fully evaluated India's arguments that the Panel's recommendation would be outside its mandate, retrospective in nature and in effect. India notes that it has clarified that the measure at issue does not have lingering effects. India argues that Japan failed to submit any evidence or documents to prove its contention that the measure at issue would have an effect after its expiry. India submits that Section 28 of the Indian Customs Act, 1962 is not designed for the imposition of duties, but only for the collection of duties, which were not levied, *inter alia*, due to the reason of collusion, wilful misstatement, or suppression of facts. India contends that Japan cannot refer to the collection mechanism to argue that the measure at issue still has an effect. India also notes that the Panel's recommendations discriminate against the product concerned that had been imported before the measure at issue expired and on which duties had been collected. In addition, India considers that the Panel's approaches in paragraphs 7.11-7.28 and paragraph 7.72 of the Report are contradictory, because in the latter the Panel considered that there must be a real demonstration of the conduct by the regional or local

authorities, while in the former the Panel did not mention any evidence or documents which would compel the Panel to make recommendations.

2.67. Japan opposes India's request. Japan recalls that pursuant to Article 15.2 of the DSU, a party may submit a written request to review "precise aspects" of the report. Japan submits that India refers to section 7.3, i.e. paragraphs 7.11-7.28 of the Report, without referring to specific paragraphs of that section. Japan contends that India resubmits its arguments or submits new arguments as to why the Panel findings in section 7.3 should be modified. Japan submits that the interim review stage of a panel proceeding is not the appropriate time for India to relitigate issues discussed during the panel proceedings. Japan notes that it submitted evidence that, even if the measure at issue expired, it continues to have legal effects and therefore the Panel has no basis to refrain from making a recommendation. Japan also submits that the Panel has examined in detail Section 28 of the Customs Act, 1962 in paragraphs 7.13-7.23 of the Report.

2.68. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel.[4] Section 28 of the Customs Act, 1962 has been addressed by the Panel in paragraphs 7.13-7.27. India's comments would require us to engage in a new analysis of arguments and evidence on the record.

2.2.2 Section 7.4.3.2 (paragraphs 7.54-7.63)

2.69. India requests that the Panel review paragraphs 7.54-7.63 of the Report regarding India's obligations under Article I:1 of the GATT 1994. India disagrees with the Panel's observation that the suspension of India's obligation under Article I:1 was not designed to prevent or remedy serious injury to the domestic industry. India considers that this observation is based on an erroneous premise that Article 9.1 of the Agreement on Safeguards is relevant for determining whether a measure falls within the scope of Article XIX of the GATT 1994. India submits that, because the measure at issue was applied on a selective basis by excluding imports from certain developing countries, India had suspended its MFN obligations under Article I:1 of the GATT 1994.

2.70. Japan replies that India failed to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that although it shares India's view that the challenged measure suspended India's MFN obligation under Article I:1 of the GATT 1994, Japan notes that India failed to indicate any of its submissions to the Panel where the above arguments can be found.

2.71. We have decided not to grant India's request. The Panel addressed India's arguments as to whether India suspended its MFN obligation with the objective of preventing and remedying serious injury in paragraph 7.62 of the Report.

2.2.3 Section 7.4.3.3 and section 7.4.4 (paragraphs 7.64-7.75)

2.72. India requests that the Panel reconsider its decision with respect to the suspension of obligations under Article XXIV of the GATT 1994 in paragraphs 7.64-7.75 of the Report. India submits that the Panel failed to consider the specific arguments raised by India as to why the measure at issue resulted in a suspension of India's obligations under Article XXIV of the GATT 1994. In particular, India submits that, as long as there is an obligation which is incurred by a Member under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX of the GATT 1994 on the ground that it is not a positive obligation. India argues that Article XXIV is permissive only when a Member has the option to enter into an FTA. According to India, Article XXIV becomes a mandatory obligation once the FTA is entered into and a Member has to comply with provisions of Article XXIV. India further argues that since Article XIX does not differentiate between different GATT obligations, the Panel cannot make such differentiation.

2.73. India further notes the Panel's finding that there is no indication that the measure at issue resulted in regional or local authorities engaging in any conduct that was inconsistent with

[4] Panel Report, *EU – Energy Package*, para. 6.18 (referring to Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; *India – Agricultural Products*, para. 6.5; and *Russia – Pigs (EU)*, para. 6.7).

India's obligations under the GATT 1994. India submits that this finding is based on incorrect premise. India argues that the Panel does not need to examine whether the measure has resulted in a *de facto* violation of obligations, rather the nature of the obligation should be a determinative factor while examining the scope of the provision in question. India reiterates that the Panel did not follow a consistent approach when interpreting the scope of Article XXIV:12 of the GATT 1994 and considering Japan's contention that the measure at issue has a continued effect. India submits that the regional or local authorities did not engage in any conduct that was inconsistent with India's obligation under the GATT 1994 in compliance with the obligation under Article XXIV:12.

2.74. Japan opposes India's request. Japan notes that India refers generally to the entire section 7.4.3.3 and section 7.4.4 and fails to identify the "specific aspect" of the Report that it wishes the Panel to review. Japan submits that India reargues the case and resubmits its arguments as to why the Panel should consider that the measure at issue resulted in the suspension of India's obligations under Article XXIV of the GATT 1994. Japan notes that the Panel addressed those arguments in paragraphs 7.70-7.72. Japan reiterates that the purpose of the interim review is not to relitigate the issues that have been discussed during the panel proceedings or to challenge the legal interpretations developed by the Panel.

2.75. We have decided not to grant India's request. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the interim report, and not to reopen arguments and evidence already put before the Panel. India's arguments regarding Article XXIV of the GATT 1994 have been addressed by the Panel in paragraphs 7.64-7.73 of the Report.

2.2.4 Section 7.5.5 (paragraphs 7.100-7.115)

2.76. India takes issue with the Panel's observations in paragraphs 7.108-7.110 of the Report, which address the question of logical connection between unforeseen developments and the increased imports. India submits that the Panel has not indicated the specific obligations which require competent authorities to conduct a country-specific analysis with regard to imports and unforeseen developments. India submits that Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards do not require country-specific analyses. India reiterates that considering the global nature of safeguard measures, there is no need to conduct a country-specific analysis.

2.77. India requests that the Panel modify paragraph 7.112 in order to reflect India's arguments regarding the analysis of unforeseen developments in relation to the product concerned submitted in India's responses to Panel question Nos. 16 and 90.

2.78. India also takes issue with the Panel's statement that the timing of unforeseen developments is a relevant consideration for showing that the unforeseen developments resulted in an increase in imports. India submits that neither Article XIX of the GATT 1994 nor the Agreement on Safeguards require that the unforeseen developments should necessarily coincide in time with the increase in imports. India further submits that the Panel did not reconcile this finding with the statement of the panel in *US – Steel Safeguards* that confluence of events can constitute unforeseen developments. India argues that if the Indian competent authority should elaborate on timing of unforeseen developments, it would mean that there is an obligation to explain each unforeseen development causing the increase in imports. India requests the Panel to review and modify the relevant part of the Report.

2.79. Japan opposes India's request. Japan submits that India repeats its arguments presented during the panel proceedings and challenges the Panel's findings. Japan reiterates that the purpose of the interim review is not to reargue the issues discussed during the panel proceeding or to challenge the legal interpretations developed by a panel. With respect to paragraphs 7.108-7.110, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report. Japan also notes that India fails to make any specific request with regard to changes that the Panel should make to paragraphs 7.108-7.110. With respect to paragraph 7.112, Japan notes that India's arguments in response to Panel question Nos. 16 and 90, namely that "[s]teel production worldwide is measured in terms of the crude capacity" and that "the proportion of the [product under consideration] remains the same *qua* the crude production for which data is available in public domain" have been addressed and rejected by the Panel in paragraphs 7.111 and 7.112 of the Report. With respect to paragraph 7.114, Japan notes that the Panel has accurately reflected India's argument in paragraph 7.104 of the Report.

2.80. We have decided not to grant India's request. In its comments, India repeats arguments submitted during the panel proceeding that the Panel addressed in its Report. In particular, India's arguments regarding the country-specific analysis of unforeseen developments and the global nature of safeguard measures have been summarized in paragraph 7.104 and addressed in paragraphs 7.107-7.110 of the Report. India's arguments presented in its responses to Panel question Nos. 16 and 90 regarding the product concerned were addressed in paragraphs 7.111-7.112. In light of this request, however, we have modified footnote 188 in order to note India's response to Panel's question No. 90. India's arguments regarding the timing of unforeseen developments (including the fact that the confluence of events was identified as "unforeseen developments") were considered in paragraph 7.114 of the Report.

2.2.5 Section 7.5.6 and section 7.5.7 (paragraphs 7.116-7.122)

2.81. India requests that the Panel review paragraphs 7.116-7.122 of the Report. India notes that, even though the Panel has acknowledged the finding in *US – Steel Safeguards* that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product"[5], it has found the specific reference to India's tariff concession in the Final Findings as being insufficient. India disagrees with the Panel's observation that the Indian competent authority cited, not the tariff concession, but the "low applied tariffs" as a reason for the increase in imports into India. India argues that "low applied tariffs" are clearly a result of India's tariff concessions.

2.82. Japan opposes India's request. Japan submits that India repeats its argument that evidence of the importing Member having a tariff concession for the relevant product itself proves the logical connection between tariff concessions and increased imports causing serious injury. Japan notes that the Panel has already considered India's arguments, as shown in paragraph 7.118 of Report.

2.83. We have decided not to grant India's request. In its comments, India repeats its arguments presented during the panel proceedings, which were summarised in paragraphs 7.118-7.119 and addressed in paragraphs 7.120-7.122 of the Report.

2.2.6 Section 7.6 (paragraphs 7.123-7.152)

2.84. India requests that the Panel revise paragraphs 7.123-7.152 of the Report. India reiterates that the first quarter of 2015-2016 has been annualized for an accurate comparison. India repeats that the annualization does not result in a change in the POI, but it is only a statistical tool used for comparing dissimilar periods. India submits that it is a uniform practice worldwide to annualize or extrapolate the data of a part of financial or calendar year to reflect the data of the complete financial or calendar year. India notes that the panel in *US – Lamb* considered that a focus on the interim data available pertaining to the end of an investigation period was logical and justified the extrapolation (annualization) of data.[6] India refers to the panel report in *US – Line Pipe* to reiterate that in the absence of any provision in Article XIX of GATT 1994 or the Agreement on Safeguards with regard to the breaking down or manner of analysis of available data, the methodology adopted by India cannot be questioned unless it is apparent that such adopted methodology is unreasonable or biased.[7]

2.85. Japan opposes India's request. Japan reiterates that the purpose of the interim review is to comment on "precise aspects" of the interim report meaning that the parties' comments must be sufficiently specific and detailed. Japan notes that India has only specifically addressed paragraph 7.141. Japan submits that by referring to an entire section of the Interim Report covering almost 30 paragraphs without indicating which specific paragraphs should be amended, India's request cannot be considered as sufficiently specific and detailed. Japan further submits that the Panel has already addressed India's arguments in paragraphs 7.138 and 7.139 of the Report.

2.86. We have decided not to grant India's request. In its comments, India repeats its arguments submitted during the panel proceeding regarding the use of annualized data, which were summarised in paragraph 7.136 and addressed in paragraphs 7.137-7.145 of the Report. In light of

[5] India's request for review of price aspects of the interim report (referring to India's first written submission, paras. 115-116, in turn quoting Panel Reports, *US – Steel Safeguards*, paras. 10.139-10.140).
[6] Panel Report, *US – Lamb*, paras. 7.192-7.194.
[7] Panel Report, *US – Line Pipe*, para. 7.203.

India's request, we have added footnote 219 in paragraph 7.136 of the Report in order to better reflect India's arguments.

2.2.7 Sections 7.8.3.2.2 and 7.8.3.3 (paragraphs 7.194-7.206 and 7.215-7.219)

2.87. India notes that the Panel's observation in paragraphs 7.194-7.206 and 7.215-7.219 of the Report is primarily based upon the premise that India used the annualized data of the first quarter of 2015-2016 for the purpose of its serious injury analysis. Therefore, India reiterates its comments regarding section 7.6 above.

2.88. Japan opposes India's request. Japan notes that India fails to explain which specific aspects of the Report it asks the Panel to review. Japan submits that India seeks to relitigate the issue of the use of annualized data by the competent authority without any explanation as to why such methodology was justified in the specific case at hand.

2.89. We have decided not to grant India's request. As noted, the Panel has discussed India's arguments regarding the annualized data in paragraphs 7.136-7.145 of the Report.

2.2.8 Section 7.8.4 (paragraphs 7.220-7.230)

2.90. India requests that the Panel modify section 7.8 of the Report in order to duly consider the arguments raised by India during the course of the panel proceeding. India reiterates that the Indian competent authority examined and made its conclusions with regard to serious injury as well as threat of serious injury in paragraphs 45-59 of the Final Findings. India notes that the expression "further" in paragraph 59 of the Final Findings was used in the context of the findings of the Indian competent authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.

2.91. Japan opposes India's request. Japan submits that in its comments regarding section 7.8.4 India challenges the Panel's findings and its legal interpretation of "threat of serious injury" within the meaning of Article 4.1(b). Japan reiterates that the parties cannot use the interim review stage to reargue their case if they disagree with the panel's findings. Japan also notes that the Panel carefully analysed the content of the Final Findings as well as India's arguments in paragraphs 7.224-7.229 of the Report, and reached the conclusion that the existence of a threat of serious injury was not adequately addressed in the Final Findings.

2.92. We have decided not to grant India's request. In its comments, India reiterates its contention that the Indian competent authority made a finding of both serious injury and threat of serious injury. The Panel has discussed this issue in paragraphs 7.220-7.230 of the Report.

2.2.9 Section 7.9 (paragraphs 7.232-7.278)

2.93. India requests that the Panel review and modify section 7.9 of the Report regarding the causal link between the increase in imports and serious injury. India submits that the Panel's observation regarding the absence of overall coincidence in trends between movements in imports and movements in injury factors is factually incorrect. India reiterates that the Indian competent authority discussed and reached a conclusion that, while the imports increased, the domestic industry lost its market share in the same period. India adds that the decline in profitability of the domestic industry occurred over the same period when the increased imports took place, and the entire injury analysis was for the period when the increased imports took place.

2.94. India submits that its competent authority found that there was a direct correlation between the increase in imports and the serious injury suffered by the domestic industry, as imports in absolute terms increased approximately three times during 2015-2016 (annualized) as compared to 2013-2014. India notes that the domestic industry's market share declined from 45% to 37% and the price of imports declined sharply, and consequently the domestic industry suffered losses. It is, thus, evident that the increased imports have caused serious injury to the domestic industry. India argues that its competent authority established a "direct correlation", rather than a mere "coincidence", between the increase in imports and serious injury suffered by the domestic industry.

2.95. India notes that the analysis in paragraphs 7.249-7.252 is based predominantly on the fact that the Indian competent authority used the annualized data of the first quarter of 2015-2016 for the purpose of its analysis. Therefore, India reiterates its comments regarding section 7.6 of the Report. Regarding the price competition between imported and domestic products, India reiterates that once the products are included into the scope of the investigation, then no further division or categorization is required with respect to covered products. India notes that the Agreement on Safeguards does not envisage a comparison of prices as required in Article 2.4 of the Anti-Dumping Agreement. India adds that the Panel did not consider the fact that, in the absence of the price related information from the relevant responding parties, India could not have examined the price competition between imported and domestic products.

2.96. Regarding the non-attribution analysis, India reiterates the arguments presented in its first written submission and requests that the Panel reconsider its findings in view of arguments advanced by India therein. India refers to the Panel's finding that the Indian competent authority failed to provide a reasoned and adequate explanation as to why the captive sales of the domestic industry and the sales of domestic producers outside the domestic industry were not a source of injury to the domestic industry. In this respect, India reiterates that Article 4 of Agreement on Safeguards requires competent authorities to only examine the "share of domestic market taken by the increased imports". India argues that its competent authority demonstrated that the share of imports had gone up, which leads to a conclusion that the share of the domestic market was reduced.

2.97. Japan opposes India's request. Japan submits that India repeats its arguments and attempts to reargue an issue that the Panel has already addressed. Japan reiterates that interim review stage is not the appropriate forum for relitigating arguments already put before the Panel. Japan notes that the Panel has already addressed India's arguments regarding the overall coincidence in trends between movements in imports and movements in injury factors in paragraphs 7.242-7.248 of the Report. Japan also notes that the Panel has addressed India's arguments regarding the price competition between imported and domestic products in paragraph 7.255 of the Report. Finally, Japan submits that India's comment regarding the non-attribution analysis is vague and it is unclear what specific aspects of the Panel's findings with regard to the non-attribution analysis India requests the Panel to modify and how.

2.98. We have decided not to grant India's request. In its comments, India reiterates its arguments regarding the causal link and non-attribution that were addressed by the Panel in its Report. In particular, the Panel addressed the question of whether there was an overall coincidence of trends in paragraphs 7.247-7.248. The Panel addressed India's arguments regarding the price analysis in the safeguard investigation and the products included into the scope of the investigation in paragraph 7.255 of the Report. The Panel addressed India's arguments regarding the non-attribution analysis, specifically regarding the domestic industry's captive sales and sales of producers outside the domestic industry, in paragraphs 7.264-7.269 of the Report.

2.2.10 Paragraphs 7.303-7.305

2.99. India requests that the Panel modify paragraphs 7.303-7.305 regarding the notification of provisional measures. India submits that the Panel should consider the difficulty faced by Members (especially developing countries), when the competent authorities reach a conclusion, upon the preliminary examination, that any delay in the imposition of the duties would cause damage which would be difficult to repair. In those circumstances, it might be difficult for a Member to notify the Committee on Safeguards prior to taking the provisional safeguard measures.

2.100. Japan opposes India's request. Japan submits that India's argument is a matter that should not be addressed through the interim review.

2.101. We have decided not to grant India's request. Article 12.4 of the Agreement on Safeguards does not provide any exception for developing countries with respect to the notification of provisional safeguard measures.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In the present dispute, Japan challenges the provisional and definitive safeguard measures imposed by India on imports of iron and steel products into India. These measures, together with the investigation that led to their imposition, violate several provisions of the Agreement on Safeguards and the GATT 1994. Japan respectfully asks the Panel to conclude that India acted inconsistently with its WTO obligations and to recommend the DSB to request India to bring its measures into compliance with the Agreement on Safeguards and the GATT 1994.

II. THE APPLICABLE STANDARD OF REVIEW

2. The Appellate Body in *Argentina – Footwear (EC)* clarified that the general standard of review set out in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards. Consequently, in a dispute involving the Agreement on Safeguards, the panel is required to assess whether the competent authorities have examined all the relevant facts and have provided a reasoned and adequate explanation as to how the facts support their determination. This assessment can only be based on the report published by the competent authorities pursuant to Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards. In this case, the Preliminary Findings and the Final Findings constitute the "published report" within the meaning of Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards.

III. TEXTUAL AND CONTEXTUAL INTERPRETATION OF ARTICLE XIX OF THE GATT 1994 AND OF THE AGREEMENT ON SAFEGUARDS

3. Japan emphasizes the importance of the context in interpreting Article XIX of the GATT 1994 and the Agreement on Safeguards for a proper understanding of the requirements to be met by a WTO Member wishing to impose safeguard measures. In particular, the requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards cannot be interpreted in an isolated manner but must be interpreted together in light of their context.

4. More specifically, Article XIX:1(a) of the GATT 1994 requires competent authorities to identify and establish the existence of certain circumstances as well as certain conditions in order to impose safeguard measures. Importantly, the competent authorities must establish a "logical connection" between these circumstances and conditions. This "logical connection" implies the following steps. First, the competent authorities must identify the "unforeseen developments" and explain how such unforeseen developments have resulted in increased imports causing serious injury or threat thereof to the domestic industry. Second, the competent authorities must demonstrate that the Member concerned incurred obligations under the GATT 1994 which prevented that Member from addressing the increased imports causing serious injury or threat thereof to the domestic industry. Third, the competent authorities must identify the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligation. Fourth, there must be a finding of serious injury or threat thereof to the domestic industry. In addition, such serious injury must be caused by the increase in imports which resulted from the unforeseen developments and from the effect of the GATT obligations.

IV. INDIA VIOLATED THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. Failure to demonstrate the existence of "unforeseen developments"

5. In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to *why* the identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. Merely identifying events and describing them as "unforeseen" without explaining why these events were unforeseen at the appropriate time does not satisfy the requirement laid down in Article XIX.

6. The Preliminary Findings and the Final Findings refer to a number of events raised by the applicants in their application. Japan submits that the Indian authority violated Article XIX:1(a) of the GATT 1994 since it failed to demonstrate why those events constituted "unforeseen developments". First, it is unclear whether the Indian authority considered that all or some of these events constituted "unforeseen developments" or whether these events together formed an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994. Contrary to what India argues, the mere fact that the Preliminary Findings and the Final Findings refer to the Panel Report in *US – Steel Safeguards* does not make it "evident that the Competent Authority considered that a confluence of all these events constitute [the] 'unforeseen developments'". Any explanation must be explicit and thus clear and unambiguous.

7. Second, regardless of whether the Indian authority considered these events, taken together or separately, as unforeseen development(s), the Indian authority did not discuss why these events could be considered as "unforeseen". In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide "as a minimum, some discussion by the competent authorities as to why [such developments] were unforeseen at the appropriate time". It also means that "[a] mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact". However, the Indian authority did not provide such explanation.

8. Third, Japan also notes that, while the Final Findings seem to indicate that certain developments were unforeseen by the domestic industry, it does not show that these developments were unforeseen by India for the purpose of Article XIX:1(a) of the GATT 1994.

2. Failure to demonstrate a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry

9. First, the Indian authority failed to demonstrate *how* imports increased as a result of the alleged unforeseen developments. Merely asserting that there is a "logical connection" cannot satisfy the requirement to provide a reasoned and adequate explanation as required under Article XIX. Japan submits that, in order to do so in this case, the Indian authority was required to provide a reasoned and adequate explanation regarding how and to what extent the alleged unforeseen developments changed the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry. This was necessary since, due to the nature of the events, there was no clear and automatic link between the allegedly identified events and an increase in imports into India.

10. Merely noting the "huge capacities" developed by certain exporting countries is insufficient since the existence of such capacities does not *per se* lead to the conclusion that it resulted in increased imports causing or threatening to cause serious injury to the Indian domestic industry. The same comment applies to the increase in demand in India and the fact that the US and the EU reduced their dependence on imported steel which is referred to in connection with excess capacities in certain countries as well as with regard to the other developments affecting these countries. Indeed, none of these events *per se* leads to increased exports from those countries to India. As there is no automatic link between the unforeseen developments examined above, taken separately or in conjunction, and the increase in imports into India causing or threatening to cause serious

injury, the Indian authority should have explained how these events changed the competitive relationship between imports and the domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing, or threatening to cause, serious injury to the domestic industry.

11. Furthermore, for those events which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis. Such explanation is, however, missing in the Preliminary Findings and the Final Findings.

12. Finally, the Indian authority should have demonstrated that the events identified as unforeseen developments occurred before imports started to surge. In the present case, however, the analysis does not indicate whether the alleged unforeseen developments occurred before the alleged surge in imports. Japan notes that the evidence on the record appears to indicate that some of the alleged unforeseen developments did not take place before the increase in imports and suggests that the increase in imports was caused by reasons other than the alleged unforeseen developments.

13. Second, the Indian authority failed to explain the impact of the unforeseen developments on the products concerned as the Preliminary Findings and the Final Findings refer to "steel" in general but fail to consider how the alleged unforeseen developments relate to the specific products at issue. Japan recalls that the Appellate Body in *US – Steel Safeguards* upheld the panel's findings that the factual demonstration of "unforeseen developments" must relate to the specific product covered by the specific measure at issue.

14. Third, the Indian authority's analysis is also deficient since the Preliminary Findings and the Final Findings do not provide any supporting data to substantiate its general assertion that the unforeseen developments resulted in the increase in imports causing or threatening to cause serious injury. As indicated by the panel in *US – Steel Safeguards*, an explanation that is not supported by relevant data cannot be seen as a reasoned and adequate explanation. Accordingly, Japan submits that simple assertions on the part of the Indian authority, without any supporting evidence, are insufficient to establish the existence of the "logical connection" between the alleged unforeseen developments and the increase in imports.

B. India violated Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

15. Under Article XIX:1(a) of the GATT 1994, the Member wishing to impose safeguard measures must demonstrate not only that it has incurred obligations under the GATT 1994 but also how the obligations incurred under the GATT 1994 prevented the WTO Member concerned from taking WTO-consistent measures to address the increase in imports causing or threatening to cause serious injury to the domestic industry.

16. In the present case, while the Indian authority noted that India's bound rate on the products concerned is 40%, it failed to explain how the tariff concession of 40% undertaken by India under the GATT 1994 had the effect of preventing India from taking WTO-consistent measures. In fact, the Indian authority acknowledged that there was no relationship between the effect of the 40% bound tariff rate India committed to and the alleged increase in imports since, according to the Indian authority, the alleged increase in imports was due to the effect of the "low applied tariffs" which are much lower than the bound tariff rate of 40%.

C. India violated Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

17. First, India failed to determine an increase in imports based on imports which arose "as a result of" the unforeseen developments and the effect of the obligations incurred under the GATT 1994. Since the Indian authority failed to demonstrate the logical connection between the increase in imports and the unforeseen developments and the effect of the obligations incurred under the GATT 1994, it improperly considered all imports in its analysis without ensuring that these

imports resulted from the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

18. Second, India failed to make a qualitative analysis of the increased imports by focusing solely on the quantitative change in the level of imports between 2013-2014 and the first quarter of 2015-2016.

19. In the present case, in order to determine whether the upward trend in imports – identified over a short-term period during the POI – could qualify as an increase in imports justifying the imposition of a safeguard measure, the Indian authority was required to conduct a qualitative analysis of this upward trend in imports. In order to make such a qualitative analysis, the Indian authority should have evaluated this short-term trend during the POI in light of longer-term trends or any other methods, taking into account that the short-term trend could appear simply as a recovery or return to a previous level of imports. The lack of qualitative analysis is striking in this case because, when the most recent data is examined in light of the data pertaining to 2011-2012 and 2012-2013, the increase in imports between 2013-2014 and 2014-2015 appears simply as a recovery or a return to the previous level of imports. Thus, without making a qualitative analysis of the increase in imports that occurred during the POI, e.g. without looking at this short-term increase in light of longer-term trends, India failed to make a determination of an increase in imports in accordance with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

20. Third, India failed to demonstrate an increase in imports based on "objective data". Indeed, the Indian authority annualized the data of Q1 of 2015-2016 without, however, explaining why this annualization was appropriate in light of the circumstances of the case. Japan does not argue that the annualization of data is not allowed in the context of a safeguard investigation. However, when used, the competent authorities must explain why such annualization is appropriate in light of the circumstances of the case. In the present case, the Indian authority failed to explain why it was reasonable to assume that data concerning Q1 of 2015-2016 was representative for the whole year. In fact, when one looks at quarterly figures for previous years, it is clear that there were fluctuations between different quarters and that it cannot be assumed that the figures for Q1 are representative for the entire year.

21. Fourth, India failed to demonstrate that the increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both in absolute and in relative terms, in light of the facts of the case. While the Final Findings use the words "sudden, sharp and significant" in the concluding paragraph of the section concerning the increased imports, they do not provide any explanation why the increase in imports in absolute or relative terms can be qualified as "sudden", "sharp" or "significant". An assertion that "[i]t is apparent" from the data "that there is a sudden, sharp and significant surge in imports … both in absolute terms as well as in relation to total domestic production" without further explanation is clearly not sufficient.

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

1. India violated Article 4.1(c) of the Agreement on Safeguards

22. When a domestic industry is defined as "a major proportion" under Article 4.1(c), it must encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production. This means that the competent authorities must ensure that the process of defining the domestic industry does not give rise to a material risk of distortion in the injury and causation determination. Japan claims that the determination of the "domestic industry" in this case does not comply with this standard.

23. In the Preliminary Findings and the Final Findings, the Indian authority considered that the applicants necessarily constituted "a major proportion" within the meaning of Article 4.1(c) of the Agreement on Safeguards merely because they represented at least 50% of the total production. However, the "major proportion" test is not a purely mathematical test. Indeed, it has both quantitative and qualitative connotations. In other words, the fact that domestic producers represent more than 50% does not necessarily mean that they constitute a "major proportion". Japan submits that the way in which the Indian authority defined the domestic industry gave rise to a material risk

of distortion. Indeed, while all domestic producers supported the Application, only three of them which were petitioners and replied to the questionnaires were included in the definition of the domestic industry. This self-selection process by the domestic producers introduced a material risk of distortion.

24. This is confirmed by the facts. Indeed, the examination of the information concerning the three domestic producers which were not included in the domestic industry showed positive trends in the injury factors for which information has been provided, namely sales, market share and production. Japan submits that, by concluding that the applicants represented a major proportion merely because they accounted for more than 50% and by disregarding that the information concerning the other domestic producers indicated positive trends with regard to some injury factors found to be critical to the finding of serious injury or threat thereof, the Indian authority introduced a material risk of distorting its analysis of the state of the domestic industry and therefore violated Article 4.1(c).

2. India violated Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

25. Given that the domestic industry was defined in a manner that is inconsistent with Article 4.1(c), it must be concluded that the injury and causation determinations were consequently also inconsistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards as well as with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. India violated Articles 2.1, 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat thereof

1. India violated Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards

26. First, India failed to provide an adequate explanation of the "bearing" or "effect" that the relevant factors had on the situation of the domestic industry. Not any injury can justify the imposition of a safeguard measure. The Appellate Body underlined that the standard of "serious injury" is, on its face, "very high" and "exacting." To establish serious injury, the competent authorities must evaluate "all relevant factors". This evaluation is not simply a matter of form since the competent authorities must conduct a substantive evaluation of the "bearing" or "effect" that the relevant factors have on the situation of the domestic industry such as to be able to make a proper overall determination as to whether the domestic industry suffers serious injury or threat thereof. In carrying out this analysis, the competent authorities' explanation must "fully [address] the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data." In that regard, India errs when arguing that the competent authorities are not required to examine the bearing of the injury factors explicitly listed in Article 4.2(a). Furthermore, while Japan agrees that not all injury factors need to show a negative trend, contrary to what India argues, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend.

27. Turning to the facts of the case, Japan submits that the Indian authority did not conduct a substantive evaluation of all relevant factors such as to make a proper overall determination that the domestic industry is seriously injured by the increased imports. In particular, there is no adequate explanation of the "bearing" or "effect" that the decline in market share, prices and profitability had on the overall situation of the domestic industry.

28. The Indian authority first erred in its analysis of the "market share" of the domestic industry. To start with, the Indian authority failed to consider how the "decline in market share" of the domestic industry ties in with the overall position of the domestic industry in a market where domestic demand is expanding. Indeed, the Indian authority's analysis seems to rely on the assumption that the domestic industry should have maintained or expanded its market share in an expanding market. The Indian authority, however, did not provide any explanation as to why this assumption could be made. Then, the Indian authority failed to evaluate the captive segment in considering the decline in market share of the domestic industry. Finally, the Indian authority overestimated the impact of the decrease in market share of the domestic industry. Indeed, it appears that the decrease in the market share of the domestic industry in the non-captive segment

identified by India was partly due between 2013-2014 and 2014-2015 to an increase in the market share of the captive sales of the domestic industry.

29. The Indian authority also erred in its analysis of the "domestic prices". Indeed, while the Indian authority considered that the effect on domestic prices was an important factor for the determination of serious injury, it merely noted that the domestic prices decreased from 100 to 83 but did not make any analysis of the effect of this factor on the financial condition of the domestic industry, taking into account that cost reduction occurred simultaneously. Moreover, an explanation based exclusively on indexed data is insufficient to show that the decrease in domestic prices led to financial losses. Furthermore, the exclusion of information concerning the captive market left the Indian authority without explanation of the overall state of the domestic industry.

30. The Indian authority further erred in its analysis of the "profitability" of the domestic industry. Indeed, the Indian authority failed to take into account the data pertaining to the entire POI since it focused exclusively on the data from the most recent past. In addition, the Indian authority did not consider the captive segment of the domestic industry in evaluating profitability.

31. Finally, the Indian authority failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the findings of serious injury. Most injury factors in this case (namely production sales, capacity utilization, employment, productivity and inventories) showed a stable or positive trend during the POI. Taking into account that the injury evaluated in the context of the Agreement on Safeguards must be an "overall impairment in the position of the domestic industry" for which the standard is very high, the Indian authority was required to provide a substantive and detailed explanation as to why those factors showing a stable or positive trend did not negate the finding of serious injury. Such analysis is, however, lacking in the Final Findings.

32. Second, the Indian authority failed to make a determination of serious injury based on "objective data" as required by Article 4.2(a) of the Agreement on Safeguards for two reasons.

33. The first reason is that, when examining the figures of inventories, production and sales for a given year of the POI, these figures do not match. In other words, taking the figure of inventories at the beginning of the year, adding the production figure, subtracting the amount of sales and ending inventories, there remains a substantial amount. The export sales figures found in the Investigation File do not permit to explain this amount. This seems to imply that some of the figures concerning the injury analysis (production, inventories or sales) might have been misreported in the analysis of the Indian authority and therefore that the injury analysis was not based on "objective data".

34. The second reason is that, in examining the injury factors, the Indian authority treated data of Q1 of 2015-2016 as being representative for the entire year 2015-2016. In other words, the Indian authority annualized the Q1 data to cover the period until 31 March 2016. The Indian authority, however, failed to explain why annualization was reasonable. It therefore failed to make a determination of serious injury that is based on objective data.

2. India violated Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards

35. Japan submits that India acted inconsistently with the Agreement on Safeguards since it made a determination of "threat of *further* serious injury" or "*further* threat of *greater* serious injury" which is not provided under the relevant provisions of that Agreement. Indeed, the Agreement on Safeguards provides that safeguard measures may be applied if there is "serious injury" or "threat of serious injury". In fact, if there is "serious injury", there is no need to make a prospective analysis about how this serious injury may evolve in the future.

36. Even if it were to be concluded that the Indian authority made a determination of "threat of serious injury", it does not meet the standard set out in Articles 4.1(b) and 4.2(a) which involves making fact-based projections concerning future developments of the domestic industry's conditions.

37. First, there is no fact-based assessment of likely development in the near future because there is no analysis of factual data concerning "surplus production capacities". Moreover, the Indian authority failed to explain how and to what extent these surplus production capacities would lead to additional production being exported to the Indian market. Second, while "the competent authorities

must evaluate all relevant injury factors," the Indian authority failed to do so because it did not make any assessment *at all* regarding the other factors, namely production, sales, market share, profitability, etc. Third, even if India argues that the factors examined in determining serious injury to the domestic industry are also relevant in determining threat of serious injury to the domestic industry, such determination is also deficient for the same reasons as those described in the section concerning "serious injury".

3. India violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

38. As demonstrated above, the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury to the domestic industry. Consequently, India also violated Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

F. India violated Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof to the domestic industry

1. India violated Article 4.2(b) of the Agreement on Safeguards

a. Failure to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry

39. Japan submits that India violated Article 4.2(b) of the Agreement on Safeguards by failing to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry.

40. First, the Indian authority failed to show the existence of an overall coincidence in time between the movements in imports and the movements in injury factors. Indeed, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized). Furthermore, the Indian authority's analysis includes a comparison of the relationship between the movements in import volume with only two injury factors and thus not of *all* injury factors. In fact, the data reveal that there was no clear "overall coincidence" in time. It follows that there was no basis for a finding of existence of a causal link between the increased imports and the serious injury or threat thereof to the domestic industry.

41. Second, in the absence of an overall coincidence between the movements in imports and the movements in injury factors, it was necessary for the Indian authority to provide a compelling explanation as to why a causal link nevertheless existed. However, the Indian authority, failed to provide such an explanation.

42. Indeed, the Indian authority's conclusion that the decreasing price of the imports prevented the domestic industry from sustaining its prices is baseless. First, a simple comparison between the unit average price of imported products and the unit average price of domestic products is unreliable as it ignores the fact that large differences in categories and prices between the various products included in the "products concerned" may distort the comparability of the average prices. Second, no meaningful conclusion can be derived from an end-to-end comparison of the results in 2013-2014 and 2015-2016 (Q1) since such comparison cannot show the existence or the extent of causation. Third, the explanations are based on indexed data which do not allow the authority to draw any meaningful conclusion. Fourth, a simple comparison of two prices, whether it is based on actual figures or index data, does not explain whether there is any causation between the two prices or which price is the cause and which price is the effect because there may be other factors having an impact on domestic prices.

43. Furthermore, the Indian authority's conclusion that the imports prevented the domestic industry from increasing its production and sales compared in proportion to the increase in demand/consumption is also baseless. Indeed, this conclusion is based on the assumption that the domestic industry should be able to increase its production and sales in proportion to the increase in demand/consumption in the absence of increased imports. The Indian authority, however, failed to provide any explanation for this assumption. In fact, the Indian authority did not examine the

possibility that the domestic industry was not able to increase its production and sales proportionally to increased demand in the absence of increased imports because of factors other than increased imports.

44. Finally, the Indian authority's conclusion that the imports led to a sharp decline in profitability and to losses recorded by the domestic Industry also lacks any adequate explanation. Indeed, while the Indian authority's conclusion is based on its findings that the imports prevented the domestic industry from sustaining its prices and increasing its production and sales in proportion to the increase in demand/consumption, these findings are baseless for the reasons explained above. Moreover, with regard to the relationship between profitability, on the one hand, and import volumes/price and domestic volumes/price, on the other hand, no meaningful conclusion can be derived from an end-to-end point comparison

b. Failure to demonstrate that the alleged serious injury and threat thereof caused to the domestic industry by factors other than the increased imports was not attributed to increased imports

45. Pursuant to Article 4.2(b), second sentence, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that the injury caused by such other factors is not attributed to the increased imports. The competent authorities are required to explain the particular process they have used to separate and distinguish other causal factors and how they have ensured that injury caused by such other factors was not included in the assessment of the injury caused by increased imports. Furthermore, when the competent authorities determine that there are no other factors causing injury at the same time as increased imports, or that factors argued to be causing injury are not, in fact, doing so, this, must be stated explicitly in the published report, accompanied with an explicit and adequate explanation.

46. Contrary to what India claims, the text of Article 4.2 does not support the understanding that the obligation to carry out the non-attribution analysis under Article 4.2(b) is limited only to the factors that have been identified as "relevant factors" under Article 4.2(a). The "relevant factors of an objective and quantifiable nature having a bearing on the situation" of the domestic industry referred to in Article 4.2(a) are those that must be examined in the context of the serious injury analysis as they are indicative of the state of the domestic industry. The "other factors" examined under Article 4.2(b) are those which have an effect on the state of the domestic industry.

47. In the present case, India violated Article 4.2(b) by failing to ensure that the alleged serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports for the following reasons.

48. At the outset, it should be noted that the Indian authority did not conduct a specific non-attribution analysis as the sections concerning the causal link between increased imports and the serious injury or threat of serious injury in the Preliminary Findings and Final Findings are silent on the issue of other factors that could be causing injury to the domestic industry.

49. In any event, the analysis of the Indian authority attributing the alleged injury of the domestic industry solely to the increased imports does not meet the standard of a "reasoned and adequate" explanation. First, while in the Final Findings the Indian authority noted that "[i]nterested parties have submitted that injury being suffered by the domestic industry is due to their own internal factors", it failed to properly examine those factors. Indeed, its cursory analysis does not include a clear determination that the identified factors are not causing injury to the domestic industry nor an explanation why this is so. Second, while the Indian authority addressed the argument concerning the sales by other Indian producers, it failed to expressly determine that such factor is not causing injury to the domestic industry and did not provide a reasoned and adequate explanation why it is so. Third, with regard to the argument concerning captive sales, the Indian authority should have examined whether such factor was not causing injury to the domestic industry and should have provided a reasoned and adequate explanation why such factor did not or could not cause injury to the domestic industry. Fourth, while various interested parties pointed out during the investigation that the decline in profitability of the domestic industry might be the result of factors other than the alleged increased imports, the Indian authority failed to examine and determine that those other factors were not the cause. Finally, for the purpose of the non-attribution analysis, India failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

2. India violated Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

50. The fact that India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury or threat thereof implies that India has violated not only Article 4.2(b) but also Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Furthermore, pursuant to Article 4.2(b), a causal link must be established, through an investigation described in Article 4.2(a), between the increased imports, on the one hand, and the serious injury or threat thereof, on the other hand. It follows that India also acted inconsistently with Article 4.2(a).

G. India violated Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

51. The requirements that a safeguard measure be limited to "the extent necessary" and "only for such period of time as may be necessary" to prevent or remedy serious injury" in Article 5.1, first sentence, and in Article 7.1 must be read as requiring that safeguard measures be applied only to the extent that they address serious injury attributed to increased imports. According to the Appellate Body, the violation of Article 4.2(b) is thus a sufficient basis to make a *prima facie* case that the safeguard measure has not been applied "to the extent necessary to prevent or remedy serious injury" under Article 5.1. This equally applies to the requirement of Article 7.1 and Article XIX:1(a) of the GATT 1994.

52. In the present case, the Indian authority failed to make a proper causation and non-attribution analyses, thereby violating Article 4.2(b) of the Agreement on Safeguards. The Indian authority was thus unable to ensure that the safeguard measures were applied only to the extent and only for such a period of time necessary to address the serious injury attributed to increased imports.

H. India violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

53. It has been demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its determination concerning the unforeseen developments, the effects of the obligations incurred under the GATT 1994, the increase in imports, the domestic industry, the serious injury and threat thereof, the causal link and of the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury. Thereby, Japan has also demonstrated that India violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards as the Preliminary Findings and the Final Findings do not set forth findings and reasoned conclusions for all pertinent issues of fact and law.

I. India violated Article 11.1(a) of the Agreement on Safeguards

54. Japan has demonstrated that the safeguard measures imposed by India violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. As a result, India also violated Article 11.1(a) of the Agreement on Safeguards.

V. INDIA ACTED INCONSISTENTLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

55. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards. That provision imposes an obligation for the Member imposing a provisional safeguard measure to notify such measure before taking it. India does not dispute the fact that the provisional measure was notified after the measure was taken. This constitutes a clear violation of Article 12.4.

56. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards. The notifications were made only after the following number of days passed, pursuant to Article 12.1(a) 8 days; pursuant to Article 12.1(b) 6 days and pursuant to Article 12.1(c) 6 days. Japan submits that as a result of such delays, the notifications were not "immediate", taking into account that the notifications were not complex and did not have to be translated.

57. Third, India violated Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 failed to provide the following information: information on the causal link between

the increased imports and the serious injury or threat thereof; a precise description of the product involved; a precise description of the scope of the proposed measure; and the proposed date of introduction of the proposed measure.

58. Fourth, India failed to comply with Article 12.3 of the Agreement on Safeguards. Indeed, India failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views on the issues identified.

VI. INDIA VIOLATES ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India violates Article II:1(b) of the GATT 1994

59. India violates Article II:1(b) of the GATT 1994 since, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. While the impugned measures are duties levied by customs, considering their design and structure, they are of an "extraordinary" nature and therefore qualify as "other duties or charges" and not as "ordinary customs duties" under Article II:1(b) of the GATT 1994. Since the duty at issue is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.

B. India violates Article I:1 of the GATT 1994

60. India violates Article I:1 of the GATT 1994 since the safeguard duty is not applied to the products concerned originating in certain countries and this constitutes an advantage that is not accorded immediately and unconditionally to the like products originating in other WTO Members including Japan.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF JAPAN

I. INDIA ACTED INCONSISTENTLY WITH THE SUBSTANTIVE REQUIREMENTS UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994

A. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on unforeseen developments

1. India failed to demonstrate the existence of "unforeseen developments"

1. First, by failing to clearly indicate in the Preliminary Findings and the Final Findings whether it was the confluence of events rather than the events taken separately that were considered as the "unforeseen developments", the Indian authority failed to properly identify the alleged unforeseen developments. Contrary to what India argues, the mere reference to the Panel Report in *US – Steel Safeguards* does not make it evident that the Indian authority considered that it was the confluence of events that constituted the "unforeseen developments".

2. Second, India failed to provide a reasoned and adequate explanation *why* the relevant events constituted the "unforeseen developments". India's interpretation that Article XIX:1(a) of the GATT 1994 only requires a "discussion" and not an "analysis" of unforeseen developments whereby the competent authorities should merely identify events that they present as being unforeseen is manifestly erroneous. Indeed, as clarified by the Appellate Body, in order to satisfy the requirement to demonstrate the existence of "unforeseen developments" the competent authorities must discuss or offer an explanation "as to why [the identified] changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994."

3. Third, the fact that the Indian authority concluded that the events were unforeseen for the domestic industry does not mean that these events were unforeseen for India, as required by Article XIX of the GATT 1994. India failed to rebut Japan's argument.

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

4. Although India agrees that there must be a logical connection between the unforeseen developments and the increase in imports causing serious injury or threat thereof, India appears to implicitly consider that merely claiming that there is a "logical connection" is sufficient to comply with Article XIX. According to India the "logical connection" test is of a lesser threshold when compared to the "causal link" test. This interpretation of the "logical connection" requirement must be rejected. First, the issue is not to determine whether the "logical connection" is of a lesser or a higher threshold than the "causal link" test. Second, there is no textual support to the position that the "logical connection" requirement is of a lesser threshold than the "causation" requirement. Third, India errs in considering that merely claiming that there is a "logical connection" between the unforeseen developments and the increased imports is sufficient to comply with Article XIX:1 of the GATT 1994. Indeed, the "logical connection" entails the obligation for the competent authorities to explain *how* the unforeseen developments have the *effect* or *outcome* of resulting in an increase in imports which has caused or is threatening to cause serious injury to the domestic industry.

5. In the present case, the Indian authority failed to demonstrate the existence of the "logical connection" for three reasons. First, the Indian authority failed to explain *how* imports of the products concerned increased *as a result* of the alleged unforeseen developments. In that regard, Japan submits that since there is no clear and automatic link between the identified events and the increased imports into India causing or threatening to cause serious injury to the domestic industry, the Indian authority was required to provide a more detailed analysis including the examination of how the alleged unforeseen developments have modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in

an increase in imports causing or threatening to cause serious injury to the domestic industry. Furthermore, to the extent the Indian authority relied on events which relate to certain specific countries, it had to explain why each of those events resulted in increased exports from those countries and why this caused other countries, with respect to which India failed to provide any explanation, to export more to India, in order to explain that those "unforeseen developments" collectively resulted in the alleged increase in imports causing serious injury to its domestic industry. Finally, since the increase in imports must occur "as a result of" unforeseen developments, the Indian authority was required to demonstrate that the events identified as unforeseen developments occurred before the imports started to surge. The fact that in its response to the Panel's questions India stated that "the 'unforeseen developments' occurred prior to the increase in imports of PUC into India" cannot cure the deficiency of the Indian authority's published report. In any event, such statement lacks any basis and contradicts the information on the record.

6. Second, the Indian authority failed to explain the impact of the "unforeseen developments" on the specific products at issue as the relevant developments refer to "steel" in general. India's responses to the Panel's questions confirm that India failed to examine the relation between the alleged unforeseen developments and the increase in imports of the specific products concerned, thereby failing to demonstrate the "logical connection" required by Article XIX:1(a) of the GATT 1994.

7. Third, the Indian authority failed to provide supporting data to substantiate the assertion that the unforeseen developments *resulted in* the increase in imports causing or threatening to cause serious injury to the domestic industry. Contrary to what India argues, the fact that the Indian authority provided data concerning the increase in imports is not sufficient. The lack of supporting data is confirmed by India's responses to the Panel's questions. Indeed, while India refers to the data submitted by the applicants with regard to the alleged huge production capacities developed in China, Russia, Ukraine, Japan and Korea, Japan has failed to find those data in the Application. In any event, the analysis included in the Final Findings contains no reference to the specific evidence submitted by the applicants. India also confirmed that, while the Indian authority concluded that India was the "natural choice" for export, it failed to establish the connection between the alleged excess capacities in certain exporting countries and the increase in imports into India by not examining whether there were alternative markets with increasing demand and high prices that could absorb those excess capacities.

B. India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determination on a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry

8. First, India mischaracterizes the obligation to demonstrate a "logical connection" between tariff concessions and increased imports. Contrary to what India argues, merely indicating that the importing Member has made tariff concessions does not in itself prove a logical connection between those concessions and the increase in imports. Rather, the "logical connection" entails the obligation for the competent authorities to explain *how* the GATT obligations prevented the importing member from addressing the increase in imports allegedly causing serious injury or threat thereof to the domestic industry.

9. Second, contrary to what India argues, the Final Findings fail to demonstrate the logical connection between the obligations incurred by India under the GATT 1994 and the increase in imports. While the Final Findings identify India's bound rate of 40%*,* the Indian authority failed to demonstrate how that concession of 40% prevented it from addressing the increase in imports causing or threatening to cause serious injury.

10. Third, India's reference to the obligations incurred under Article XXIV of the GATT 1994 is without merit. Indeed, the Indian authority did not identify Article XXIV of the GATT 1994 as one of the obligations incurred under the GATT that was constraining its freedom of action and, in any case, Article XXIV of the GATT 1994 does not impose an obligation on the importing Member to apply a specific duty rate on imports from its FTA/RTA partners.

C. India acted inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of an increase in imports

11. Japan submits that, contrary to what India argues, Japan has substantiated its claim under Article 2.1 of the Agreement on Safeguards and thus India's argument that the Panel cannot make findings under Article 2.1 should be rejected.

12. Japan further submits that since the Indian authority has failed to demonstrate the logical connection between the unforeseen developments and the effect of the obligations incurred under the GATT 1994, on the one hand, and the increased imports, on the other hand, it has failed to demonstrate an increase in imports based on imports arising "as a result" of the unforeseen developments and the effect of the obligations incurred under the GATT 1994.

13. Japan has also demonstrated that the Indian authority failed to make a qualitative analysis of the "increase in imports" since its analysis did not enable it to ensure that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury. More specifically, by focusing on the occurrence of an increase in imports between 2013-2014 and the first quarter of 2015-2016, the Indian authority could not ensure that this upward trend over such a short period was not simply a recovery or a return to a previous level of imports. The lack of qualitative analysis is particularly striking when the data of the imports relating to 2011-2012 and 2012-2013 is examined. In order to make a qualitative analysis, the Indian authority should have evaluated the real significance of this short-term trend during the POI in light of longer-term trends or any other methods such as to ensure that this short-term upward trend was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively.

14. Furthermore, India failed to demonstrate an increase in imports that is based on "objective data" because India relied on annualized data for 2015-2016 without explaining why annualization was appropriate in light of the circumstances of this case. While Japan does not take issue with the annualization of data *as such*, Japan considers that, when using that method, the competent authorities are required to explain why the yielded results are representative for the entire year and why the simple annualization of data is appropriate for the purpose of comparison with the annual data from previous years.

15. Finally, Japan submits that, even if it were to be concluded that the Indian authority did not fail to make a qualitative analysis that is based on "objective data," India nonetheless acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 since it failed to provide a reasoned and adequate explanation on how it determined that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury". India did not address that claim.

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

1. India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards

16. In all circumstances where the domestic industry does not cover the producers of the product concerned as a whole, the competent authority needs to ensure that the manner in which it defines the domestic industry does not introduce a material risk of distortion. Contrary to what India argues, the mere fact that the domestic producers represented 67% of the domestic production does not automatically imply that there was no material risk of distortion in the definition of the domestic industry. In fact, the "major proportion" test is not a purely quantitative test. A "major proportion" should be understood as "a relatively high proportion that substantially reflects the total domestic production". It has "both quantitative and qualitative connotations".

17. In the present case, there is a material risk of distortion that stemmed from the self-selection process of the domestic producers included in the definition of the domestic industry. Indeed, the domestic producers themselves selected those producers to be included in the domestic industry. The purely quantitative approach followed by the Indian authority, whereby it accepted the domestic

industry as proposed by the applicants simply because they represented more than 50% of the domestic production, cannot exclude the possibility that the domestic producers purposively decided to include in the domestic industry only the low performing producers while ignoring the high performing producers. The information submitted in the application to the Indian authority clearly show that the domestic producers not included in the domestic industry performed substantially differently from those included in the domestic industry. This confirms that the domestic industry did *not substantially reflect* the total domestic production.

2. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

18. Since the domestic industry has been defined in a manner that is inconsistent with Article 4.1(c), the injury and causation determinations are consequently also inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

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

1. India's determination of serious injury is inconsistent with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards

19. First, Japan submits that India mischaracterizes the standard of "serious injury". Indeed, contrary to what India appears to argue, not *any* injury can justify the imposition of a safeguard measure. India also misrepresents the obligations imposed on the competent authorities in the context of the serious injury analysis. Article 4.2(a) expressly states that the competent authorities shall "evaluate" all relevant factors including those specifically listed in that provision. While not all injury factors need to show a negative trend, the competent authorities are nonetheless required to carefully analyze each of the injury factors before they can make an overall determination as to whether there is a serious injury. This also implies that, if certain injury factors show that the domestic industry is doing well, the competent authorities must explain how those positive factors do not negate the finding of serious injury based on other factors showing a negative trend. Without such an explanation, the competent authorities are not in a position to reach a reasoned and adequate conclusion with regard to the existence of serious injury.

20. Second, India failed to explain the "bearing" of the relevant injury factors on the situation of the domestic industry. With respect to the analysis of market share, India erroneously argues that it only had to establish that the domestic industry lost its market share to imports. The substantive evaluation required by Article 4.2(a) implies that the Indian authority should have considered the decline in market share against the domestic industry's sales in absolute terms as well as other elements. In any event, India failed to establish that "the market share of the domestic industry has [been] taken away by the increased imports" since no meaningful conclusion could be drawn from merely comparing the change in the market share of the imported and domestic products. Japan also submits that by looking only at the figures relating to non-captive market, the Indian authority examined only one part of the domestic industry. While India argues that the captive segment did not have "any bearing on the performance of the domestic industry", there is nothing on the record that would support this assertion. At the very least the Indian authority should have explained why the performance of the captive segment did not negate its finding of serious injury and threat thereof based on the examination of the non-captive segment of the market.

21. With respect to the analysis of prices, Japan reiterates that without absolute figures or an adequate explanation, it is impossible to draw any meaningful conclusions regarding the "bearing" that the price decrease had on the financial situation of the domestic industry. Furthermore, to the extent that the information concerning captive sales was excluded from the price analysis, the Indian authority was required to conduct a separate analysis of such captive sales or explain why such analysis was not necessary despite the fact that it had relevant data regarding the captive segment of the domestic industry. With respect to the Indian authority's analysis of profitability, although India argues that it "has adequately analyzed the profitability over the entire investigation period", the Preliminary Findings and the Final Findings refer only to the decrease in profitability that occurred in Q1 of 2015-2016 and thus fail to take into account the increase in profitability that took place between 2013-2014 and 2014-2015. Furthermore, as confirmed by India, the Indian authority did

not consider the captive segment of the domestic industry in evaluating profitability. While India argues that the captive production should be considered in the context of all injury factors except sales and profitability, this position has no textual basis in the Agreement on Safeguards. Furthermore, accepting India's position would lead to a distorted analysis of the situation of the domestic industry as the captive market would be analysed in the context of some injury factors but not others. Finally, the Indian authority erred in its evaluation of the overall position of the domestic industry because it failed to provide a reasoned and adequate explanation of how the injury factors showing a stable or positive trend did not negate the competent authority's findings of serious injury. While Japan agrees that not all injury factors need to show a negative trend in order to warrant a finding of a serious injury, when certain injury factors demonstrate a positive trend, it is up to the competent authority to explain how this fact affects the finding of an overall serious injury. This understanding is supported by the panel's findings in *Dominican Republic – Safeguards Measures*, which contrary to what India argues are relevant to the present case.

22. Third, India failed to base its determination on "objective data". First, India does not rebut Japan's *prima facie* case that the determination of serious injury is not based on "objective data" when taking into account the data available in the record which, clearly do not match. Indeed, although India asserts that the exact matching of the figures of inventories, production and sales for a given year of the POI is not possible, it failed to substantiate that assertion. Second, India's argument that the annualization of data for Q1 of 2015-2016 was performed to "make figures of different periods comparable", ignores the fact that the Indian authority should have explained why the yielded results were representative for the entire year and why the simple annualization of data was appropriate for the purpose of comparison with the annual data from previous years.

2. India's determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards

23. Japan submits that India's determination of "further threat of greater serious injury" lacks any legal basis in the Agreement on Safeguards which provides for a determination of "serious injury" and "threat of serious injury". In any event, such a determination is irrelevant because a determination of further threat of greater serious injury" is entirely dependent on a prior finding of "serious injury". To the extent India is now trying to argue that the Indian authority made a determination of "threat of serious injury" within the meaning of the Agreement on Safeguards, this constitutes an *ex post* explanation that has no support in the text of the Final Findings and should be rejected by the Panel. In any event, even if the finding of "further threat of greater serious injury" made by the Indian authority was to be considered as a finding of "threat of serious injury" – *quod non* – that finding fails to comply with the various requirements set out in Articles 4.1 and 4.2 of the Agreement on Safeguards.

3. India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

24. Since the Indian authority failed to properly evaluate and give a reasoned and adequate explanation of its determination concerning serious injury and threat of serious injury, it follows that the conditions for the imposition of safeguard measures were not met and, as a consequence, India also acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

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

1. India violated Article 4.2(b) of the Agreement on Safeguards

a. India failed to establish the existence of a causal link

25. India has failed to rebut Japan's arguments that there was no basis for a finding of a causal link. Japan maintains that the Indian authority failed to demonstrate an "overall coincidence" in time between the movements in imports and the movements in injury factors, let alone a direct correlation between the two, as argued by India. In the present case, the analysis of all injury factors shows that there was no overall coincidence in time between the movements in imports and the movements in injury factors (other than market share). It follows that there was no basis for concluding that the increase in imports has caused serious injury or threat thereof to the domestic industry. India did not respond to the argument that it failed to examine the relationship between the *movements* in imports and the *movements* in injury factors because instead of looking at the *trends* in imports and the injury factors, the Indian authority merely compared the starting point in 2013-2014 with the end point in Q1 of 2015-2016 (or 2015-2016 annualized).

26. Furthermore, the Indian authority failed to provide a compelling explanation as to why, in the absence of the coincidence in time, there was nevertheless a causal link between the alleged increase in imports and the alleged serious injury or threat thereof. First of all, the conclusion that the decreasing price of the imports prevented the domestic industry from maintaining its prices is baseless as the Indian authority failed to explain why the comparison of the average price of imported products and the average price of domestic products was appropriate given the numerous types of products concerned with very different prices. The competent authorities can only reach a reasonable conclusion regarding the impact of the prices of imports on the domestic prices if they have first established that there is a price-based competition between the imported and domestic products. In any event, the explanations provided by the Indian authority are not reasoned and adequate to the extent that they are based solely on the comparison of indexed data and since the analysis is based on an end-to-end comparison of the results in 2013-2014 and Q1 of 2015-2016. Second, the conclusion that the imports prevented the domestic industry from increasing its production and sales compared to increase in demand/consumption is baseless. Since several elements could have an impact on the domestic industry's inability to increase its production and sales in relation to the increase in demand/consumption despite the existence of spare capacity, without addressing such factors, the Indian authority could not properly explain why it considered that it was the imports that *prevented* the domestic industry from increasing its production and sales compared to increase in demand/consumption. Moreover, while India argues that "there was sufficient spare capacity available with the domestic industry and there were no constraints on their ability to increase its production and sales," the arguments submitted by the interested parties suggest otherwise. To the extent the Indian authority relied on the assumption that the domestic industry was able to increase its production and sales, it was required to explain the basis for making such assumption. Third, Japan has demonstrated that the explanation provided by the Indian authority in the Preliminary and Final Findings did not warrant the conclusion that profitability declined and the domestic industry recorded losses in the degree presented in the Final Findings *due to* the increased imports. The limited *ex post* explanation provided by India in its first written submission cannot cure the deficiencies in the Indian authority's findings.

b. India failed to carry out a proper non-attribution analysis

27. Japan has demonstrated that India acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because it failed to ensure that the serious injury and threat thereof caused by factors other than the increased imports was not attributed to the increased imports. Contrary to what India argues, the obligation to carry out the non-attribution analysis is not limited only to the factors that have been identified as "relevant factors" in the context of the injury analysis under Article 4.2(a). India also errs when arguing that Article 4.2(b) does not require any "independent evaluation" in addition to the analysis carried out under Article 4.2(a). Contrary to what India argues, Articles 4.2(a) and 4.2(b) impose distinct obligations on the competent authorities. While Article 4.2(a) focuses on the elements to be considered by the competent authorities in order to

demonstrate the existence of serious injury (or threat thereof), Article 4.2(b) relates to the demonstration of the causal link between such serious injury and the increased imports.

28. In the present case, the Indian authority failed to meet its obligations under Article 4.2(b) because it failed to properly examine the other factors invoked by the interested parties in order to ensure that the injurious effects of those factors were not attributed to the increased imports. First, with regard to five factors addressed by the Indian authority at paragraphs 51-52 of the Final Findings, the Indian authority failed to provide a clear determination that these factors were not causing serious injury to the domestic industry or an explanation why this is so. Second, the Indian authority failed to address at all other factors raised by the interested parties, namely (i) changes in the market share of other Indian producers not included in the definition of the domestic industry, (ii) captive sales of the domestic industry, and (iii) other factors causing the decline in profitability. By ignoring such other factors, the Indian authority failed to make a proper non-attribution analysis.

29. India did not address Japan's argument that it failed to distinguish the impact of imports caused by the unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons.

c. India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

30. Since India failed to demonstrate the causal link between the alleged increased imports and the alleged serious injury and threat thereof, India acted inconsistently not only with Article 4.2(b) but also with Articles 2.1 and 4.2(a) of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. India has failed to rebut Japan's arguments.

G. India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the imposition of the safeguard measures to the extent and for such time necessary to prevent or remedy serious injury

31. Japan claims that India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to apply the safeguard measures at issue only to the extent and for such time as necessary to prevent or remedy serious injury. Indeed, since the Indian authority failed to make a determination of the causal link between the increased imports and the alleged serious injury and/or threat thereof in accordance with Article 4.2(b), it was unable to ensure that the safeguard measures were applied only to the extent necessary and only for such a period as necessary to address serious injury attributed to increased imports. As confirmed by the Appellate Body in *US – Line Pipe*, the violation of the non-attribution obligation under Article 4.2(b) constitutes a sufficient basis to make a *prima facie* case of violation of Articles 5.1 and 7.1.

H. India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards

32. Japan has demonstrated that the Indian authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its various determinations. Thereby, Japan has also demonstrated that India acted inconsistently with its obligations pursuant to Articles 3.1 and 4.2(c) of the Agreement on Safeguards to publish a report that contains a detailed analysis of the case and sets forth findings and reasoned conclusions covering all pertinent issues of fact and law.

I. India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards

33. It has been demonstrated that the challenged safeguard measures are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1 and 7.1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. It follows that they are also inconsistent with Article 11.1(a) of the Agreement on Safeguards.

II. INDIA FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:2 OF THE GATT 1994

34. First, India acted inconsistently with Article 12.4 of the Agreement on Safeguards since it notified the provisional safeguard measures to the Committee on Safeguards after the provisional safeguard measures have been taken. Contrary to what India argues, the fact that the measures allegedly had to be imposed "on an urgent basis" does not relieve India from the obligation to notify the Committee on Safeguards before taking the provisional measures. In fact, the notification obligation in Article 12.4 has been imposed taking into account the "urgent" nature of provisional measures.

35. Second, India acted inconsistently with Article 12.1 of the Agreement on Safeguards because the notifications made after 8 days or 6 days fail to comply with the requirement of "immediate" notification under Article 12.1, taking into account that the notifications were not complex and did not have to be translated. Japan also notes that domestic procedures described by India cannot constitute a justification for failing to make the required notifications pursuant to Article 12.1 of the Agreement on Safeguards "immediately" upon the occurrence of the specified events.

36. Third, India acted inconsistently with Article 12.2 of the Agreement on Safeguards because India's notification of 21 March 2016 does not contain information on (i) the causal link between the increased imports and the serious injury or threat thereof; (ii) a precise description of the product involved; (iii) a precise description of the scope of the proposed measure and; (iv) the proposed date of introduction of the proposed measure. With regard to the first element, contrary to what India argues, the requirement to include information regarding the causal link between increased imports and serious injury clearly follows from the words "caused by" in Article 12.2 which refers to "evidence of serious injury or threat thereof caused by increased imports." With regard to the second element, Japan notes that India's notification failed to indicate which sub-categories of products falling within the scope of the "product under consideration" were excluded from the scope of the safeguard measures. With regard to the third element, Japan submits that India's notification did not indicate that the anti-dumping duty paid would be deducted from the safeguard duty rate nor that the duty should not be imposed on goods imported at or above the MIP. Finally, with regard to the fourth element, contrary to what India argues, the "proposed date" does not mean a "theoretical date" but the actual date on which the safeguard measures will be applied.

37. Fourth, India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because it failed to provide Japan with *sufficient information* and with *sufficient time* to allow for the possibility, through consultations, for a meaningful exchange of views. In light of the Appellate Body's findings in *US – Line Pipe*, Japan submits that the period of 8 days in the present case was clearly insufficient for Japan to have a meaningful exchange of views within the meaning of Article 12.3. This is even more so as Japan did not know the effective date of application of the measures.

III. INDIA ACTS INCONSISTENTLY WITH ARTICLE II:1(B) AND ARTICLE I:1 OF THE GATT 1994

A. India acts inconsistently with Article II:1(b) of the GATT 1994

38. India acts inconsistently with Article II:1(b) of the GATT 1994 because, through the measures at issue, it imposes "other duties or charges" contrary to the second sentence of that provision. Japan notes that India agrees that the measures at issue constitute "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994. Thus, since the safeguard duty is not recorded in India's Schedule of Concessions in the column "other duties or charges" and does not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, there is a violation of Article II:1(b) of the GATT 1994. India's defense that there is no violation of Article II:1(b) of the GATT 1994 because, given that the measure was imposed pursuant to Article XIX, India's obligations under Article II:1(b) *ipso facto* gets suspended must be rejected. Indeed, the fact that a measure is taken pursuant to Article XIX does not automatically imply that there cannot be an inconsistency with Article II:1(b).

B. India acts inconsistently with Article I:1 of the GATT 1994

39. India acts inconsistently with Article I:1 of the GATT 1994 because the measures at issue are not applied to the products originating in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in other WTO Members including Japan. India's argument that there is no violation of Article I:1 of the GATT 1994 since the discriminatory treatment was done in accordance with Article 9 of the Agreement on Safeguards must be rejected. Indeed, the fact that a measure is applied in accordance with Article 9 of the Agreement on Safeguards does not mean that that measure is consistent with Article I:1 of the GATT 1994.

IV. THE CHALLENGED MEASURES ARE SAFEGUARD MEASURES WITHIN THE MEANING OF ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

40. Japan submits that there is no requirement for this Panel to examine, as a preliminary step, whether the measures at issue constitute "safeguard measures" as a result of which the Agreement on Safeguards would be applicable. Indeed, there is no definitional language of what is a "safeguard measure" in Article XIX of the GATT 1994 understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports". At best, it can be deduced from that provision that Article XIX of the GATT 1994 and the Agreement on Safeguards can be relied upon by a Member applying a measure that would otherwise be inconsistent with a GATT obligation provided that the measure complies with all the substantive and procedural requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards. Since the measures at issue which are inconsistent with the GATT obligations have been imposed by India pursuant to Article XIX of the GATT 1994 and notified in advance by India to the WTO Members pursuant to Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, this Panel has to examine whether the measures at issue are consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

41. Furthermore, even if the Panel were to conclude that it is required to examine whether the measures at issue constitute "safeguard measures" understood as "measures that suspend, withdraw or modify a GATT obligation to prevent or remedy serious injury caused by the increased imports", the measures at issue fulfil those conditions, and therefore, constitute "safeguard measures". Indeed, the measures at issue suspend both the obligation under Article II:1(b) of the GATT 1994 in relation to "all other duties or charges" and the most-favoured-nation obligation under Article I:1 of the GATT 1994 with the purpose of preventing or remedying serious injury to the domestic industry.

42. Although India argues that the obligations suspended by the measures at issue also include Article XXIV of the GATT 1994, and, more specifically, Article XXIV:4, XXIV:8 and XXIV:12, Japan submits that none of those provisions imposes an obligation on Members to establish a customs union or a free trade area nor to apply a particular duty rate on imports of products from certain FTA/RTA partners. It follows that India has failed to demonstrate how the measures at issue suspend an obligation under Article XXIV of the GATT 1994.

V. INDIA'S CLAIM THAT JAPAN'S CASE IS NOT COMPLIANT WITH ARTICLE 3.7 OF THE DSU MUST BE REJECTED

43. Japan submits that the Panel should reject India's objection based on Article 3.7 of the DSU and make findings and recommendations with respect to the challenged measures in accordance with its terms of reference.

44. First, with regard to India's claim under the first sentence of Article 3.7 of the DSU that the panel proceedings are not fruitful since the measures imposed by India expired on 13 March 2018, Japan submits that pursuant to the text of that provision, it is before bringing a case that a Member must exercise its judgment as to "whether action under these procedures would be fruitful". Therefore, the fact that the measure expires or is withdrawn during the panel proceedings should not be relevant to the determination as to whether "before bringing a case" the Member exercised its judgement as to "whether action under these procedures would be fruitful".

45. Furthermore, as recognized by the Appellate Body, given the largely self-regulating nature of the requirement of Article 3.7, first sentence, it must be presumed that whenever a Member submits a request for the establishment of a panel, it does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful". India actually does not dispute "the discretion to be enjoyed by any Member in deciding whether to bring a case against another Member under the DSU" nor that "Japan's request for the establishment of a panel was [made] in good faith." It follows that the claim of inconsistency with Article 3.7 of the DSU is manifestly misplaced and, in any event, has no legal merit.

46. Second, with regard to India's claim under the second sentence of Article 3.7 of the DSU that the alleged expiry of the measures at issue should somehow affect the outcome of these proceedings, Japan recalls the Appellate Body's finding that "the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure." In light of the guidelines provided in previous WTO cases, Japan submits that the Panel should not refrain from making findings with regard to the measures at issue.

47. Indeed, the challenged measures were identified in the panel request and thus are within the Panel's terms of reference. Furthermore, since India continues to argue that its measures are fully consistent with its WTO obligations and since Japan, as the complaining party, continues to request that the Panel make findings, there is still a dispute between the parties as to the consistency of the challenged measures with the relevant provisions of the Agreement on Safeguards and the GATT1994. Japan also notes that India could take measures that may give rise to certain of the same, or materially similar, WTO inconsistencies. With regard to India's argument that, because of Article 7.5 of the Agreement on Safeguards which imposes restrictions on imposition of the same measures, there is no possibility of the measures to be easily re-imposed, Japan notes that Article 7.5 only provides for a time limit during which a safeguard measure should not be re-imposed and thus, it does not prevent India from re-imposing the measures once such time limit expires. In any event, India acknowledges that there is no provision in its domestic legislation that would explicitly prevent the Indian authorities from re-imposing the measures. Finally, given the temporary nature of safeguard measures and the increasing delays in dispute settlement proceedings, concluding that no findings should be made where the measures have expired would raise systemic concerns as it would amount to preventing Members from effectively challenging safeguard measures.

48. Japan submits that the Panel should also make recommendations with regard to the challenged measures. Indeed, pursuant to Article 19.1 of the DSU, if a panel makes findings that a challenged measure is inconsistent with a covered agreement, it "shall" recommend that the Member concerned bring the measures into conformity with that agreement. Previous WTO cases suggest that recommendations are to be made in particular with respect to measures that, despite their expiry, continue to exist or to have legal effects. In that regard, Japan submits that, even assuming that the challenged measures have expired (something that India has failed to demonstrate), those measures continue to have effect as they may still apply to imports of the products concerned that took place during the time the safeguard measures were in force but for which the duties were not collected, for instance, due to errors in customs declarations. India has failed to rebut Japan's argument. In particular, India has not shown that an *a posteriori* collection of the challenged safeguard duty is prohibited. There is therefore no basis for the Panel to refrain from making recommendations with respect to the challenged measures given the clear language of Article 19.1 of the DSU.

49. Lastly, refraining from making findings and recommendations would introduce a fundamental risk of circumvention of the dispute settlement procedures under the DSU. Indeed, assuming, for the sake of argument, that India introduces a new measure with effects similar to those of the challenged safeguard measures – whether or not such new measure would be subject to the Agreement on Safeguards – in the absence of findings and recommendations of the Panel, Japan may not be able to challenge the new measure through compliance proceedings pursuant to Article 21.5 of the DSU. Indeed, the newly adopted measure may be found not to be a "measure taken to comply" given that the lack of recommendations to bring the measures into conformity with the relevant agreements may be interpreted as meaning that any measure adopted thereafter is not a "measure taken to comply".

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF INDIA

I. Introduction

1. In the present dispute, Japan has challenged the provisional and definitive safeguard measures imposed by India on imports of certain iron and steel products into India. Japan alleges that India, by way of the present measures, have violated various provisions of the 'Agreement on Safeguards' ('the Safeguard Agreement') and its obligations under the GATT 1994.

2. However, India submits that the measures taken were in full compliance with India's obligations under GATT 1994 and the provisions of the Safeguard Agreement.

II. Standard of Review to be followed by the Panel under Article 11 of the DSU

3. Article 11 of the DSU provides for the panel's standard of review. A panel has to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case. The panel has to also examine applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

4. "Objective assessment" has been understood as mandating neither a *de novo* review (i.e. the complete repetition of the fact-finding conducted by national authorities) nor "total deference" to domestic authorities (i.e. the simple acceptance of their determination).[1]

5. India considers that the appropriate standard of review is to assess, if a reasoned and adequate explanation is discernible from the Competent Authority's findings, and further, that in the event another plausible interpretation is proffered by the complainant, whether that interpretation can supersede the explanation provided by the Competent Authority. The burden of proof that the Competent Authority's findings do not provide a reasoned and adequate explanation rests on the complainant (as opposed to suggestions on the manner in which the Competent Authority ought to have, or could have conducted the determination). Further, if such burden is not discharged by the complainant, the explanation of the competent authority must automatically prevail.

III. Burden of Proof to establish that India acted inconsistently with its obligations

6. Under the Agreement, the complainant bears the burden of proof to demonstrate an inconsistency. Unless the complainant discharges that burden with regard to a particular measure, there would be no basis for the Panel to find that measure to be inconsistent with the WTO Agreement.[2] India submits that the complainant has not met its burden to establish a *prima facie* case with respect to the claims contained in its panel request. The complainant has merely relied upon unsubstantiated assertions without any supporting evidence or legal support.

IV. India has fully complied with its obligations under Article XIX:1(a) of the GATT 1994

7. India submits that the requirement under Article XIX:1(a), is to show that the developments which led to a product being imported in such increased quantities must have been "unexpected". Therefore, the term "unforeseen developments" covers any change that the negotiators did not foresee when they undertook obligations or tariff concessions with regard to the product subject to the measure. The appropriate focus is on what was actually "foreseen" rather than "theoretically foreseeable".

8. India states that what is required to be demonstrated is a "logical connection" between the "unforeseen developments" and "increased imports". The Final Findings of the Competent Authority

[1] Appellate Body Report, *EC – Hormones*, para. 117.
[2] Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192 /R.

(i) contains a separate discussion on "unforeseen developments";[3] (ii) clearly refers to the panel report in *US – Steel Safeguards*, and, indicates that a confluence of events/circumstances can constitute "unforeseen developments";[4] and, (iii) contains an identification and discussion of circumstances/events, the confluence of which is regarded as "unforeseen developments" by the Competent Authority.

9. India further submits that the Final Findings clearly demonstrate the factum of "increased imports" of the PUC,[5] the existence of "unforeseen developments", and, the logical connection between the "unforeseen developments" and the "increased imports". The clear conclusion of the Competent Authority, after detailed discussion on the issue in the findings, is that there was a significant increase in imports of the PUC in absolute terms, and, that the increase in imports of the PUC was linked to "unforeseen developments".[6] The Preliminary Findings[7] and the Final Findings[8], make it clear that a confluence of events/circumstances has been taken to constitute "unforeseen developments" by the Competent Authority. India submits that the demonstration of the "logical connection" referred above, is to be seen in the context of the confluence of events/circumstances treated as 'unforeseen developments' and "increased imports", and not between each such individual event/circumstance. India has fully demonstrated the "logical connection" existing between the "unforeseen developments" and an increase in imports of the product that is causing and threatening to cause serious injury.

10. The panel in *Argentina – Peaches*[9], has noted that the demonstration of 'unforeseen developments', should at a minimum have some discussion by the competent authorities as to why they were unforeseen at the appropriate time. India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact'[10], and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. Japan seeks to assert[11] that in order to demonstrate the existence of "unforeseen developments", the competent authorities need to provide an explanation as to why identified events could and should be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994. Such understanding of Japan would be tantamount to reading in an additional condition into Article XIX:1(a), which does not emanate from the plain text of Article XIX:1(a).

11. India's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such increased quantities and under such conditions as to cause serious injury. India's analysis also showed that the increased imports and the conditions which caused injury were a result of unforeseen developments. India has addressed the issue of correlation between the unforeseen developments and the subject goods in both the Preliminary Findings[12] as well as the Final findings.[13] India has also examined the relevant evidences set out as Exhibit IND-20.

12. India expressed its view that the effect of depreciation of currency is felt across products including the PUC, as also observed in the findings of the Competent Authority in terms of the falling prices from these countries. This has been specifically dealt with in the Final Findings[14] and in the Preliminary findings[15] of the Indian Competent Authority.

13. The FTAs entered into by India with Korea and Japan under the aegis of Article XXIV of the GATT 1994 is an 'obligation' under the GATT 1994. India therefore, does not view the fact of lowering of duties as an 'unforeseen development' but considers it as an act in compliance with its obligations

[3] Final Findings, (Exhibit IND-11), paras. 71-82.
[4] Final Findings, (Exhibit IND-11), para. 74.
[5] Final Findings, (Exhibit IND-11), paras. 34-42.
[6] Final Findings, (Exhibit IND-11), paras. 102(i) and 102(iii).
[7] Preliminary Findings, (Exhibit IND-7), para. 24.
[8] Final Findings, (Exhibit IND-11), para. 79.
[9] Panel Report, *Argentina – Peaches*, para. 7.23.
[10] Appellate Body Report, *US – Lamb*, para. 76.
[11] Japan's first written submission, para. 104.
[12] Preliminary Findings, (Exhibit IND-7), paras. 18-24.
[13] Final Findings, (Exhibit IND-11), paras. 75 -78 and 79-82.
[14] Final Findings, (Exhibit IND-11), paras. 76-77 and 79 (which incorporates the findings from the Preliminary Findings).
[15] Preliminary Findings, (Exhibit IND-7), paras. 21-22.

under Article XXIV of the GATT 1994. India reiterates that any obligation taken by a member under Article XXIV is also an obligation referred to in the first part of Article XIX:1(a) of the GATT 1994. The subsequent spur of imports (i) in view of the confluence of developments was indeed considered to be an "unforeseen development" which was further triggered by (ii) the effect of India's obligations under the said FTAs under Article XXIV of the GATT 1994.

14. India believes that there is no requirement that the "unforeseen developments" should necessarily coincide in time with the increase in imports. The only legal requirement is that the "increased imports" must be an effect or outcome of the "unforeseen developments". It has not been disputed by any of the interested parties that the currency devaluation indeed took place and also the fact that the imports increased in the more recent part of the Period of Investigation (POI). India also submitted that the interested parties have also not denied the occurrence of the individual circumstances/events - the confluence of which was treated as "unforeseen developments". Therefore, India is of the view that it would be illogical to suggest that the "unforeseen developments" should occur and its effects felt exactly at the time of increase in imports.

15. India states that an investigation for safeguard duties is initiated on the basis of an application by the Domestic Industry. Under the rules, it is incumbent upon the Domestic Industry to provide information on all aspects of the factors which need to be examined by the Competent Authority. The Final Findings at paragraphs 82 and 102(iii) clearly show that the Indian Competent Authority has concluded that the domestic industry was able to demonstrate that the developments in the market, which resulted in a surge in imports of the PUC, were indeed unforeseen. It is therefore, evident that the discussions[16] and conclusions as regards the existence of "unforeseen developments", are only that of the Competent Authority as set out at paragraph 81(g) of India's First Written Submissions.

16. In the context of a request by the Panel to elaborate India's argument that the "logical connection test" under the first part of Article XIX:1 is distinct from the "causal link test" under the second part of Article XIX:1, India submitted that since separate and different expressions are used in the said Article, complete meaning must to be given to the use of such separate and distinct expressions. India's contention in this regard also draws support from Article 31.1 of the Vienna Convention on Law of Treaties, which *inter-alia* states that "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

17. India's understanding is that the requirement under Article XIX:1(a) necessitates the existence of a logical connection between the "unforeseen developments" and the increased imports. India submits that Article XIX:1(a) itself uses two distinct expressions namely – "as a result of" and "as to cause or threaten". The expression "as a result of" has been interpreted by the Appellate body in *Argentina- Footwear (EC)*[17] to mean that there should be a "logical connection" between the "unforeseen developments" and the increased imports. The "causation analysis" referred to in the second part of Article XIX:1(a), is therefore, clearly distinct from the "logical connection test" emanating from the first part of Article XIX:1(a). The "logical connection" test is clearly of a lesser threshold when compared to the "causation analysis"/ "causal link test" prescribed in the second part of Article XIX:1(a). In India's view, the logical connection test is limited to the demonstration of a "logical link" between "unforeseen developments" and the increase in imports. However, the causal link test puts an obligation on the party to show a "cause and effect" relationship.

18. The Panel sought India's views in the context of the Appellate Body report in *Korea – Dairy* wherein it is stated that "there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure" (paragraph 85 of the Appellate Body Report). India's understanding on what the "logical connection" entails is set out in detail at paragraphs 82 to 84 of its First Written Submissions.

19. As regards India's views on the scope of discussion - the competent authority's determination should entail regarding 'unforeseen developments' under Article XIX of the GATT 1994, India's understanding is that Article XIX of the GATT 1994 does not provide any express guidance on the

[16] Final Findings, (Exhibit IND-11), paras. 71-82.
[17] Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

manner in which "unforeseen developments" should be demonstrated. However, the Appellate Body while interpreting Article XIX, has provided guidance that the demonstration should be a 'matter of fact', and, what is required is only some minimum discussion as to why they were unforeseen at the appropriate time. The discussion, as opposed to explanation, on 'unforeseen developments' is to be on why identified events/circumstances could be regarded as "unforeseen developments". The test is to consider what was and was not actually "foreseen" rather than what might or might not have been theoretically "foreseeable". Broadly, India considers that there should be some discussion regarding the existence of "unforeseen developments" and there is no requirement of establishing a cause and effect relationship with increased imports. India's understanding is more fully reflected at paragraphs 78 to 80 of India's First Written Submissions.

20. India clarifies that steel production worldwide is measured in terms of the crude capacity and the proportion of the PUC remains the same with respect to the crude production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. The analysis is fully reflected in the Preliminary Findings[18] and the Final Findings[19]

21. India submits that its obligation is only to examine whether any unforeseen developments resulted in an increase in imports of the PUC into India. There is no requirement to evaluate the demand pattern in other countries as it is not the case of India that India was the only "natural choice". India is of the view that the determination required to be undertaken under Article XIX:1(a) of the GATT 1994 was limited only to the extent whether the result of the unforeseen developments was an increase in imports of PUC into India. Since India was not obligated under Article XIX:1(a) of the GATT 1994 to determine whether there were alternate markets with increasing demand and high prices, no such exercise was required to be undertaken. India states that this examination has been done by the Indian Competent Authority, and the specific findings with respect to increase in imports of as a result of "excess capacity of major exporting nations" are clearly set out at paragraphs 19, 21, 24 of the Preliminary finding of the Indian Competent Authority and also at paragraphs 75, 79 and 82 of the Final Findings of the Indian Competent Authority. As regards the observation relating to decrease in demand in European Union and the United States, the Indian Competent Authority has examined the facts and data on record. The said facts and evidences can be found at pages 101-190 of Exhibit- IND 20.

V. India has demonstrated a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing serious injury

22. India expressed its view that the measure in question is a 'safeguard measure' under Article XIX of GATT 1994. India believes that by way of the impugned measures India has suspended it's obligations under Article II and Article XXIV of the GATT 1994. Being in the category of "all other duties or charges of any kind" in terms of article II:1(b) of the GATT 1994, measures adopted by India lead to the suspension of the obligations of India under Article II:1(b), second sentence, of the GATT 1994. By way of the impugned measures, India has also suspended obligations incurred under Article I:1 of GATT in as much as the measures did not apply to imports of subject goods from developing countries other than China PR and Ukraine. India's measures have also suspended its obligation with respect to the FTAs/RTAs formed under Article XXIV of the GATT 1994. Section 13 of Article XXIV:12 of the "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" provides that "*Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory*". In the *EC-Customs Matters*[20], the Panel has noted that Article XXIV:12 of the GATT 1994 is drafted as a positive obligation rather than as a defence. More specifically, the use of the word 'shall' in Article XXIV:12 of the GATT 1994, indicates that that Article imposes an obligation on Members to take all reasonable measures to ensure that local authorities comply with WTO obligations.

23. The panel decision in US-Steel Safeguards[21], holds that - "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the

[18] Preliminary Findings, (Exhibit IND-7), para. 24.
[19] Final Findings, (Exhibit IND-11), paras. 71-82.
[20] Panel Report, *EC – Customs*, para. 7.144.
[21] Panel Report, *US – Steel Safeguards*, paras. 10.139-10.140.

importing Member has tariff concessions for the relevant product". The Final Findings[22] issued by the Competent Authority clearly identifies that India has incurred obligations under the GATT 1994 including tariff concessions and clearly indicate[23] why India has chosen to initiate measures under the Safeguard Agreement and not any measures under the respective Free Trade Agreements.

24. In the context of the recent panel report in *Indonesia – Iron or Steel Products*[24], where the panel noted that Article XXIV of the GATT 1994 is a permissive obligation and does not impose any positive obligation to enter into a FTA or to provide a certain level of market access to its FTA partners through bound tariffs (paragraph 7.20 of the panel report), India is of the view that as long as there is an obligation which is incurred by a contracting party under the GATT 1994, it would be incorrect to state that it is not an obligation in terms of Article XIX on the ground that it is not a positive obligation. A plain reading of Article XIX does not allow any distinction to be made for obligations under different provisions of the GATT 1994. Needless to state that such categorization of obligations in terms of Article XIX would tantamount to adding words to the plain language and further qualifying the plain expressions of Article XIX which is completely against the general rules of interpretation of treaties, the customary rules of interpretation of public international law and the Vienna Convention on the Law of Treaties. Further, the panel report was in the context that Indonesia had no binding tariff obligation with respect to galvalume inscribed into its Schedule of Concessions for the purpose of Article II of the GATT 1994. In India's view, Article XXIV is permissive insofar as the Member country has the option to enter or not enter into a FTA/RTA. However, Article XXIV becomes a mandatory obligation, once the FTA/RTA is entered into and accordingly the Member has to necessarily comply with the provisions of the same. Article XXIV cannot be a defence against other binding obligations unless it confers an obligation in itself. Only if Article XXIV confers an obligation in itself, can, the reduced tariff rates under Article XXIV not be violative of Article I and Article II of the GATT. Such a reading is also consistent when Article XXIV is harmoniously read with the other article of GATT 1994. The interpretation adopted as to the construction of Article XXIV of the GATT 1994 should be consonant with the larger objective of making trade free and without barriers. This interpretation is furthered only if Article XXIV is treated as an obligation under the GATT 1994.

25. As regards the effect of the obligation referred to in Article XIX of the GATT 1994, these have been expressly dealt with at paragraphs 80, 81 and 82 of the Final Findings of the Competent Authority. Paragraph 82 of the Final Findings clearly identifies the effect of the obligations as being the increase in imports of PUC in a sudden, sharp, significant and recent manner into India.

VI. India has complied with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of an increase in imports

26. India submits that Japan's claims regarding the violation or breach of Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994 are not only unsubstantiated but also do not have any legal support. After evaluation of all the factors, the Competent Authority found that the significant increase in imports of the PUC in absolute terms, and the increase in imports of PUC was linked to "unforeseen developments".[25] The Preliminary Findings[26] and the Final Findings[27] make the existence of unforeseen developments abundantly clear and also establish a clear correlation between the confluences of events/circumstances constituting "unforeseen developments" and the spurt in imports.

27. India submits that there is no obligation, direction or even guideline under the Safeguard Agreement regarding the selection of the period of investigation. It has been held by successive panels and the Appellate Body, that selection of a period of investigation is the discretion of the investigating authorities so long as it is established that the period selected by the importing member allows it to focus on the recent imports and the period selected by the investigating Authority is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.

[22] Final Findings, (Exhibit IND-11), paras. 80-81.
[23] Final Findings, (Exhibit IND-11), para. 55.
[24] Panel Report, *Indonesia – Iron or Steel Products* (under appeal to the Appellate Body).
[25] Final Findings, (Exhibit IND-11), paras. 71-82, 102(i) and 102(iii).
[26] Preliminary Findings, (Exhibit IND-7), para. 24.
[27] Final Findings, (Exhibit IND-11), para. 79.

28. India asserts that the selection of the period of investigation and its breakdown was consistent with Article 2.1 of the Safeguard Agreement and Article XIX. The selection of the period of investigation by the Competent Authority fulfills the requirements as enunciated by the panels and Appellate Body. India considers that the period of investigation selected by the Competent Authority was long enough to establish the requirement of increased imports as well as to allow appropriate conclusions to be drawn regarding the state of the domestic industry. The same has been detailed in the initiation notification[28]and the provisional findings[29] issued by the Competent Authority.

29. The selection of the period of investigation is the sole discretion of the investigating authorities and cannot be questioned unless it is clearly demonstrated that the selected period of investigation presented a distorted picture of the market. Japan's claim that selection of a longer period would have given a different picture, is also not supported by the facts on record. Even assuming that the period of investigation ought to have started from 2011-12, the trends with regard to the imports would have revealed that the imports had indeed gone up in absolute terms as well as in relation to the domestic production. India submits that its selection of the period of investigation fully enabled the Competent Authority to examine the recentness of the imports in the context of the long-term trends and concluded that increase evidenced a certain degree of *recentness, suddenness, sharpness and significance*.

30. Japan's claim that India was required to examine the data preceding the period of investigation is contrary to the Appellate Body report in the *US Steel safeguards* case. India further submits that annualization of data is actually the most obvious and logical methodology available where the data of unequal periods is required to be compared.

VII. India's determination of 'domestic industry' is compliant with Articles 2.1, 4.1(a), (b), (c), 4.2(a) and (b) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994

31. India submits that there is no violation of Article 4.1(c) of the Safeguard Agreement. Article 4.1(c) of the 'Agreement on Safeguards' provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry".

32. Under the second option, the term "domestic industry" shall be understood as producers that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". The definition does not prescribe any specific percentage of total production to qualify the test of "a major proportion", presumably for the reason that such a prescription would have created practical and conceptual difficulties. In the context of the Anti-Dumping Agreement, the panel in *Argentina – Poultry*[30], had an occasion to consider whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The panel considered different dictionary definitions and noted that the word "major" is also defined as "important, serious, or significant". The panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.

33. The panel in *US – Wheat Gluten*[31] had the occasion to examine the link between the phrase "a major proportion" and the question of data coverage, and, has concluded that the 'major proportion' criteria in the definition of 'domestic industry' implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage".

34. India submits that the portion of the domestic producers considered by the Competent Authority in the facts of the present case as "domestic industry" is accounting for more than 67% of the total domestic production and, therefore, it cannot be said to be a low percentage even

[28] Initiation Notification (Exhibit- 4), para. 4.
[29] Preliminary Findings, (Exhibit IND-7), para. 9.
[30] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341-7.343.
[31] Panel Report, *US – Wheat Gluten*, paras. 8.54–8.56.

arithmetically, relative to the total production in India. Though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.[32] The present case is not a case in which Competent Authority excluded producers that filed information but is a case in which rest of the producers did not cooperate.

35. The fact that the Competent Authority has examined data of 67% of the total domestic production leaves no basis to presume that either the injury or the causation determination could have been distorted. In India's view, a portion of the domestic producers who account for "the major proportion" of the total domestic production, can, under no circumstances, be said to be not "a major proportion" of the total domestic production. In other words, "the major proportion" is invariably "a major proportion" but the vice versa may not be true. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehension.

36. Thus, India submits that the 'domestic industry' was defined in a manner that was consistent with Article 4.1(c). Consequently, the injury and causation determinations were also consistent with Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Safeguard Agreement as well as with Article 2.1 of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994. India has also clarified that the data taken by the Competent authority covers both captive and non-captive segments of the domestic production.

VIII. India's measures are compliant with Articles 2.1, 4.1(a) & (b) and 4.2(a) of the 'Agreement on Safeguards' and Article XIX:1(a) with respect to its determination of serious injury

37. India submits that it has appropriately determined the serious injury and threat thereof as required by Articles 4.1(a), 4.1(b) and 4.2(a) of the Safeguard Agreement, Further, Japan has failed to demonstrate that the increased imports are not the cause of serious injury to the domestic industry.

38. India evaluated each of the enumerated factors under Article 4.2(a) of the Safeguards Agreement in its Final Findings that were "of an objective and quantifiable nature" and that were "having a bearing on the situation" of the domestic industry. The Competent Authority has thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".[33] As regards the factors specifically mentioned under Article 4.2(a), it is settled position that they have to be necessarily evaluated being *ipso facto* "relevant". However, with regard to the "other factors", the text of Article 4.2(a) specifically empowers the Competent Authority to make a judgment whether a particular factor is relevant or not, based on the twin criteria referred above. It is only after the Competent Authority decides about the "relevance" of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise.

39. There is no specific or implied obligation on the competent authorities to give a detailed explanation as to how the trend of each of the factors individually ties in with the findings of serious injury. There is also no obligation to provide any explanation of the "bearing" or "effect" of each of the factors individually on the situation of the domestic industry.

40. Apart from the existing injury, the Competent Authority in the Final Findings, has clearly analyzed as to why there is threat of injury to the domestic industry. The Competent Authority has held that there is a serious injury to the domestic industry due to the surge of imports and the most recent trend of import volumes entering India. It is clear that the findings of the Competent Authority are based on the analysis of the most recent trend of imports which have admittedly shown a sharp increase over the investigation period.

41. India has clarified that the Period of investigation is 1 April 2013 to 30 June 2015. First quarter of the financial year 2015-16 has been annualized for proper comparison with the preceding years. While determining the period of investigation, the Indian Competent Authority took the most recent data in the context of reasonable and sufficiently longer term trends preceding the POI. India

[32] Final Findings, (Exhibit IND-11), para. 2.
[33] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis. The detailed reasoning has been explained in paragraphs 139 and 140 of India's First Written Submissions. The analysis of the Competent Authority was solely based on the imports which had already taken place in the first quarter of the financial year 2015-2016 at the time and there has been no forecasting. Annualization does not mean a futuristic comparison or analysis but it is a simple methodology to compare the data of one quarter of that year with a 12 months' data of previous year. However, for the purpose of a fair comparison, the most recent data of the second quarter was considered by the Competent Authority[34] for threat of "serious injury" analysis.

42. India submits that the panel statement in *US- Line Pipe* has been referred at paragraph 30 of the Final findings only to highlight the fact that there is no prescription on how long the POI should be under the 'Agreement on Safeguards' and that it is the discretion of the Competent Authority to select the period of investigation. The two factors which require examination while choosing a POI are (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered while fixing the POI as evident from a reading of the Final Findings[35] of the Indian Competent Authority.

43. As regards the decision of the Competent Authority not to use the data on volume of imports in 2011-2012 and 2012-2013, India is of the view that under the 'Agreement on Safeguards', there is no prescription on how long the Period of Investigation ('POI') should be. India clarified that it is the discretion of the Competent Authority to select the POI. The two factors which require examination while choosing a POI, as has been noted in the panel statement in *US – Line Pipe* are, (i) whether the period selected allow the authority to focus on the recent imports, and, (ii) whether the period selected is sufficiently long enough to allow conclusions to be drawn regarding the existence of increased imports, both of which have been considered by the Indian Competent Authority while fixing the POI as evident from a reading of paragraphs 30 and 31 of the Final findings of the Indian Competent Authority. Without prejudice, India submits that it has already demonstrated in its first written submissions (paragraph 130) that even if the data of previous years had been taken, the trend would have remained the same. In view thereof, India restricted its analysis for the period of investigation only.

44. In the context of paragraph 189 of Japan's First Written Submissions, India submits that there has not been any drop in imports in 2013-14 which requires explanation, as the Competent Authority is only mandated to look at the import trend during the POI and not compare the same to periods preceding the POI.

45. India considers that the expression used in Article XIX:1(a) of the GATT 1994 is "*to cause or threaten serious injury to domestic producers*". Therefore, actual serious injury or threat of serious injury can both be considered simultaneously as there is no such prohibition under the 'Agreement on Safeguards'. The Indian Competent Authority has analyzed[36] and given its conclusions with regard to "serious injury" as well as "threat of serious injury".

46. India clarifies that the captive production has been considered for production, demand, inventory and capacity utilization while examining the serious injury to the Domestic Industry, and, that captive production has not been considered for sales and profitability, as no sales transactions are involved. India's view is that imports can certainly affect production meant for captive use as such imports can displace the goods produced for captive use. Fall in production leads to increased costs per unit which has a direct impact on the overall profitability. Consequently, imports can lead to loss of market share even when goods are destined for captive use. India clarifies that the 'Domestic Industry' keeps relevant costs data separately for captive production and non-captive sales. There are no sales data for captive segment as legally or commercially, no sales are involved. As regards Japan's contention concerning captive sales, India submits that the Competent Authority is required to examine the "share of domestic market taken by the increased imports". The Competent Authority has clearly demonstrated[37] that the share of imports had gone up which leads to the inescapable conclusion that the share of the domestic market was reduced.

[34] Final Findings, (Exhibit IND-11), paras. 27-28 and 100-101.
[35] Final Findings, (Exhibit IND-11), paras. 30-31.
[36] Final Findings, (Exhibit IND-11), paras. 45-59 and 100-101.
[37] Final Findings, (Exhibit IND-11), para. 49.

47. In India's view, once the products are covered under "Products under Consideration" ('subject goods'), then no further division/categorization is required with respect to the goods covered under PUC. Consequently, there is no requirement of any such price comparison for categories within such PUC. India submits that in contradistinction to anti-dumping, a safeguard investigation does not envisage detailed model-wise or source-wise price analysis as the focus of the investigation is "increased imports".

48. India submits that increasing or stable trends in injury factors do not necessarily suggest a positive development in the situation of the domestic industry. For example, if the demand in the market has increased and the sales of the domestic producers remain constant, it could still be an indicator of "serious injury" as the entire growth in the market has been taken away by increased imports. Even if some trends suggest a positive development, the conditions may still be sufficient to meet the standard of serious injury. India's view is that only other "relevant factors" and not all "other factors" are required to be examined in the context of injury determination.[38]

49. India submits that the imposition of safeguards measures by India are only in relation to "Products under Consideration" ('PUC') and that all the comments of interested parties have been fully dealt with while determining the 'PUC'.[39]

IX. India has complied with Articles 2.1, 4.2(a) and 4.2(b) of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and the serious injury and threat thereof

50. India submits that it has fully established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b) of the Safeguard Agreement. India has also adequately determined that the increased imports have caused or are threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Safeguard Agreement and Article XIX:1(a) of the GATT 1994.

51. India submits that in its causation assessment, it has evaluated all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. India has based its assessment on the principles set out in the panel report in *Korea –Dairy*.[40] India submits that Japan has failed to point out any "other factors" which "are of a quantifiable and objective nature" and "have a bearing" on the situation of the domestic industry.

52. India submits that the panel in *US – Wheat Gluten* expressed its views that "overall coincidence" is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the Competent Authority has considered. India further submits that detailed findings have been recorded in respect of the coincidence of increased imports and the factors which the Competent Authority has considered as relevant. Therefore, Japan's claim that India has failed to establish overall coincidence in time between the movements in imports and the movements in injury factors, does not have either the factual or legal support. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan that the Competent Authority must carry out the causation analysis of all injury factors. The Competent Authority has also adequately analyzed the movement of the decreasing price of the imported products and the decreasing price of the domestic products.[41]

53. India submits that the entire analysis of the Competent Authority is based on the actual data made available to it, keeping in view the obligations under Article 3.2 of the 'Agreement on Safeguards'. Further, no '*What if*' type analysis were undertaken by India, as there is no such obligation under the 'Agreement on Safeguards'.

54. India refutes Japan's claim that the Final Findings do not contain any non-attribution analysis in the section entitled "Causal Link between Increased Import and Serious Injury or Threat of Serious Injury". The Competent Authority has clearly determined that for the purpose of determining causation, all relevant factors of an objective and quantifiable nature having a bearing on the

[38] India's first written submission, paras. 181-192.
[39] Final Findings, (Exhibit IND-11), paras. 18-23.
[40] Panel Report, *Korea — Dairy*, paras. 7.89–7.90.
[41] Preliminary Findings, (Exhibit IND-7), para. 25(g); Final Findings, (Exhibit IND-11), para. 49(g)(ii).

situation of that industry have been evaluated[42]. There was no occasion to refer to any other factor in view of the determination by the Competent Authority that none of the "other factors" can be considered as relevant on account of the fact that they were neither objective nor quantifiable in nature, nor did they have a bearing on the situation of the industry.

55. India also clarifies that imports from all sources including those from Japan and Korea have been considered as a "relevant factor of an objective and quantifiable nature having a bearing on the situation of [domestic] industry". In India's view, it is not permissible to carry out the injury analysis in the context of any particular country or a group of countries as the entire analysis is in the context of "imports" alone irrespective of its source. Further, any bilateral safeguard proceedings under the respective FTAs would not have addressed the imports from other sources which are not a part of the relevant FTA.

56. In view of the above, India submits that it has fully complied with its obligations and appropriately demonstrated the causal link between the increased imports and the serious injury or threat thereof.

X. India's safeguard measures are in accordance with Articles 5.1 and 7.1 of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994

57. India submits that the safeguard measure adopted by India clearly reflect that India levied the safeguard duties only to the extent and duration necessary to prevent and remedy serious injury to its domestic industry in terms of Article 5.1 & 7.1 respectively of the 'Agreement on Safeguards'. Further, there is no obligation as such to provide any justification or reasoning to demonstrate the necessity of the measures except when there are quantitative restrictions. India further submits that Japan has failed to show any obligations emanating from Article 5.1, which make it imperative for the Indian Authority to have "explained and attributed" the serious injury due to increased imports and decided upon the extent of applicability of safeguard measures explaining a nexus between serious injury due to increased imports and the extent of safeguard measures applied. India further submits that Japan has not provided any reason in support of their claim nor have they established as to how there is a violation of Article 7.1 when India has fully complied with its obligations under Article 4.2(b).

58. India clarifies that there is no indication or even a suggestion in the text of the Agreement that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Safeguard Agreement.

XI. India acted in full compliance with Articles 3.1 and also 4.2(c) of the Safeguard Agreement and its obligation thereto.

59. India submits that the analysis of the panel in *US – Steel Safeguards* dispute[43] makes it abundantly clear that the requirement as to reasoned conclusion under Article 3.1 is limited to "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the Safeguard Agreement only. In other words, Article 3.1 does not require any additional explanation than what is expressly prescribed under Agreement on Safeguards or Article XIX of the GATT 1994. Further, Article 4.2 (c) requires the Competent Authority to publish a report containing detailed analysis of the case under investigation and to demonstrate relevance of the factors examined. India submits that the report of the Competent Authority was clearly in accordance with the above provisions, fulfilling every condition required therein.

60. Also, India has clearly demonstrated in the previous sections that the Indian Competent Authority has fully complied with its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 and has provided a reasoned and adequate explanation of its determination concerning "all pertinent issues of facts and law". Therefore, India has not violated any of its obligations under Agreement on Safeguards or under Article XIX:1(a) of the GATT 1994.

[42] Final Findings, (Exhibit IND-11), para. 65.
[43] Appellate Body Report, *US – Steel Safeguards*, para. 304.

XII. India has complied with Article 11.1(a) of the Safeguard Agreement.

61. India submits that since the safeguard measures imposed by India are fully in compliance with the provisions of the 'Agreement on Safeguards' and Article XIX:1(a) of the GATT 1994, there can be no violation of Article 11.1(a) of the Safeguard Agreement.

XIII. India has complied with Article 12 of the 'Agreement on Safeguards'

62. India submits that the Competent Authority had come to a conclusion that increased imports of subject goods into India has caused and threatened to cause serious injury to the domestic industry of subject goods, and, that any delay in application of provisional safeguard duties would have caused damage which would have been difficult to repair. Imposition of provisional safeguard duties ('*which measure has now elapsed*') on an urgent basis was necessitated due to the existence of critical circumstances. India had immediately thereafter notified the fact of imposition of a provisional safeguard measure to the "Committee on Safeguards". India states that it notified the relevant requirements in all instances to the Committee of safeguards within 6-8 days of the date of initiation, findings of serious injury or the imposition of definitive safeguard measures and has complied with the requirement under Article 12.1 of the Safeguard Agreement as interpreted by the panel in *US – Wheat Gluten*.

63. The nature of information provided by India in the notification to the "Committee on Safeguards" is in accordance with the requirements under Article 12 of the "Agreement on Safeguards" as interpreted by the Appellate Body decision in *Korea -Dairy*. Further, the notification by India contained all the necessary facts and information which were required to be provided to the committee on Safeguards.

XIV. There is no violation of India's obligations under Article I:1 or Article II:1(b) of the GATT 1994

64. India submits that since the measures at issue were imposed in pursuance of Article XIX of GATT 1994, the obligation of India under Article II:1(b) and Article I:1 *ipso facto* gets suspended. Since the measures at issue was imposed in the form of a safeguard duty in terms of Article XIX of GATT 1994 and the Safeguard Agreement, the question of any violation of Article II:1(b) or Article I:1 of GATT does not arise.

65. Under the Indian legislation, safeguard duties are not "ordinary customs duties" as they can only be imposed only through the application of the law on safeguards, strictly adhering to all the conditions prescribed therein like progressive liberalization, facilitation of adjustment and the obligation to impose it only for the time and to the extent necessary. Therefore, under the Indian legislation too, like Article II:1(b) of GATT, safeguard duties would be considered as "any other type of duties". India is of the view that as long as a measure has been taken under the provisions of the 'Agreement on Safeguards' and 'Article XIX of the GATT 1994', it can only be regarded as a "safeguard measure".

XV. Conclusion

66. Firstly, India and Japan both unanimously agree that the measures in issue are Safeguard measures and have been levied under Article XIX:1(a) of the GATT 1994 read with the Safeguard Agreement. In this regard, India submits that India considers the measures in dispute as "other duties and charges" in terms of Article II:1(b) of the GATT 1994.

67. Secondly, Japan seems to be not too sure about the fruitfulness of the dispute or its outcome.

68. Thirdly, both India and Japan agree that the requirement in the first part of Article XIX, i.e., the test of "as a result of" is different from the "causation analysis" mentioned in the second part of Article XIX:1(a) of the GATT 1994.

69. Fourthly, Japan accepts that the "change in the competitive relationship between the imports and the domestic sales" is not emanating out of the text of either the Safeguard Agreement or the GATT 1994.

70. Fifthly, India understands that both the parties agree that the requirement with regard to "unforeseen developments" has to find "at least some discussion" in the Final Findings of the Authority as opposed to an elaborative analysis.

71. Sixthly, Japan does not dispute the fact that the examination of both injury as well as the threat to injury is possible under the Safeguard Agreement.

72. India submits that it has adequately demonstrated that the measures in dispute have not violated any requirement emanating from its international obligations. In particular, there were no violation with respect to India's determination with regard to unforeseen developments, domestic industry, serious injury or threat to serious injury determination, causal link and any other specific provisions contained in GATT 1994 or in Agreement on Safeguards.

73. For the foregoing reasons, India requests the Panel to find that the measures that the Complainant has challenged are not inconsistent with India's WTO obligations that the Complainant has cited.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. In its First Written Submission, Second Written Submission and in its oral statements in the first and second substantive meetings, India clearly established that the measure taken by India is in compliance with its obligations under the Agreement on Safeguards and the GATT, 1994. Further, in India's reply to the questions posed by the Panel and its comments on Japan's responses to the questions posed by the Panel, India has elaborately explained why the issues raised by Japan do not hold any factual or legal merit.

2. One of the preliminary issues in the current dispute remains whether the Panel should give its ruling in the present dispute and whether such a ruling would serve the objective set out in terms of Article 3.7 of the DSU. In this regard, the Panel had raised a specific question[1] to Japan regarding India's request that the Panel specifically determine whether the complaint brought by Japan in these proceedings is in accordance with Article 3.7 of the DSU. Japan, in its response[2], submitted that it is the discretion of the Members to decide upon bringing a case against another Member under the DSU.

3. In this context, India reiterates that it does not question the discretion enjoyed by any Member in deciding whether to bring a case against another Member under the DSU. However, in India's view, this Panel may appreciate the relevance of the second part of Article 3.7 which refers to the possible remedy or outcome of any decision of the DSB. Even if this Panel rules that the measures imposed by India are not consistent with its obligations under the WTO Agreements, the only possible outcome in the present case would be withdrawal of the measures by India. Since the measures imposed by India have already expired on 13 March 2018, it is clear that no useful purpose would be served if Japan wishes to pursue with its claims.

4. In its Second Written Submissions India clarified that the measure at issue has expired on 13.03.2018.[3] In its oral statement at the second substantive meeting, Japan stated that even if the measures have expired, "those measures will continue to have effect after their alleged expiry".[4] India in its response to the question posed by the Panel clarified that Section 28 of the Customs Act, 1962, which Japan has referred to, cannot be applied to any imports subsequent to the date of the expiry of the measure in dispute i.e., after 13 March, 2018.[5] India also submitted that since the safeguard measure in question has already lapsed, it cannot be renewed under any circumstances. In fact, India is proscribed from even imposing a fresh safeguard measure against the products in question in terms of Article 7.5 of the Agreement on Safeguards for the period equivalent to the period in which the measure in dispute was in force i.e., for two years and six months from 13 March, 2018.[6] Japan also contended that India failed to demonstrate that the measure in dispute has indeed expired.[7] In this regard, India submits that the document imposing the measure in question itself categorically states that the measure shall be in force only until 13 March, 2018.[8] Further, India's notification dated 04.04.2015 to WTO Committee on Safeguard also clearly states that the measure is in force only until 13 March, 2018.[9] Thereafter, in its Second Oral Statement, India has formally clarified that the measure has not been extended beyond 13 March 2018 and that it has expired on that date.[10]

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[1] Panel question No. 13.
[2] Japan's response to Panel question No. 23.
[3] India's second written submission, para. 2.
[4] Japan's opening statement at the second substantive meeting of the Panel, para. 19.
[5] India's response to Panel question No. 76.
[6] India's response to Panel question No. 75. See also, India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para. 17.
[7] Japan's response to Panel question No. 72.
[8] Customs Notification No. 1/2016 (SG) dated March 29, 2016 (Exhibit – IND 13).
[9] Notification under Article 12.1(b) of the Agreement on Safeguards, notification pursuant to Article 12.1(c) of the Agreement on Safeguards, notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, dated 04.04.2016 (Exhibit – IND 14).
[10] India's comments on Japan's responses to questions from the Panel following the second substantive meeting, para 12.

5. Japan claims that India has failed to demonstrate that the challenged measure has expired on the basis of the provisions of section 28 of the Customs Act.[11] India submits that Japan has failed to appreciate that Section 28 of the Customs Act, 1962 is a provision meant only for collection of duties which were not levied or have been short levied or erroneously refunded. Section 28 is not even remotely connected with the imposition of duties. India submits that the existence or expiry of a measure is to be understood in the context of "levy" or "imposition" alone and not with reference to its "collection". Therefore, any reference to a collection mechanism of a duty (which was otherwise due at the time of importation) for making a claim that the effect of the measure still survives, is completely misplaced.[12] India would also submit that non-collection of any duty which was due prior to the expiry of the measure as a consequence of a ruling of the Panel, would amount to giving effect to the Panel's recommendations retrospectively which would be contrary to the decision of the Appellate Body in *US – Cotton case* and the text and interpretation of the DSU.[13]

Japan's claims regarding "unforeseen developments" are without merit

6. India submits that it has fully complied with its obligations under Article XIX:1(a) of the GATT 1994. India states that the entirety of Japan's claims regarding "unforeseen developments" are premised on (i) erroneous interpretations which do not find support from either the text of Article XIX:1(a) or the 'Agreement on Safeguards'; (ii) reading in additional words/obligations into the text of Article XIX:1(a) which is impermissible; (iii) incorrect application of the decisions of the panels or the Appellate Body; (iv) a "what if" kind of analysis based on assumptions and presumptions instead of countering the analysis carried out by Competent Authority on merits, and (v) erroneous and incomplete reading of the Preliminary Findings and Final findings of the Competent Authority.[14]

7. While India's understanding is that Article XIX of the GATT, 1994 does not provide any express guidance on the manner in which "unforeseen developments" should be demonstrated, India has, as a matter of fact, provided adequate explanation as to why they were unforeseen at the appropriate time. In fact, Japan itself in its Second Written Submission at paragraphs 8 and 15 clearly accepts that the requirement as per the panel and Appellate body decisions is only of "some discussion" in the published report.[15] The Final findings of the Competent Authority clearly refer to the panel report in *US – Steel Safeguards*, which observes that a confluence of events can constitute 'unforeseen developments,[16] and, thereafter, contains an identification and discussion of circumstances/events, the confluence of which constitutes "unforeseen developments". The Preliminary Findings,[17] also clearly indicate that a confluence of circumstances/developments, has been taken to constitute "unforeseen developments" by the Competent Authority[18]. Japan itself does not dispute that a confluence of circumstances can together form the basis of "unforeseen developments"[19].

8. Further, Japan is not correct in believing that the obligation of demonstrating the existence of "unforeseen developments" should be only with respect to the specified products. India states that while the determination of "increased imports" should be with respect to the PUC, the existence of "unforeseen developments" need not be limited to the PUC alone. Japan's interpretation is based on an erroneous reading of Article XIX:1(a). Also, the specific findings in the Final Findings under the heading "increased imports", clearly demonstrate that the determination of "increased imports" has been made only in relation to the PUC[20].

9. While Japan asserts that the "unforeseen developments" should modify the competitive relationship between the imported and domestic products, it has not addressed the issue raised by the Panel as to what are the elements demonstrating the change of competitive relationship to the detriment of domestic products resulting in increased imports causing serious injury to the domestic

[11] Japan's opening statement at the second substantive meeting of the Panel.
[12] India's comments on Japan's response to Panel question No. 72, para. 4.
[13] India's comments on Japan's response to Panel question No. 72, para. 5.
[14] India's opening statement at the second substantive meeting of the Panel, para. 9.
[15] Japan's second written submission, paras. 8 and 15.
[16] Final Finding, (Exhibit IND-11), para. 74.
[17] Preliminary Findings, (Exhibit IND-7), para. 24.
[18] India's first written submission, para. 81.
[19] Japan's second written submission, para. 10.
[20] Final Findings, (Exhibit IND-11), paras. 34-42. *See* India's opening statement at the second substantive meeting of the Panel, para. 10(c).

industry. India submits that such obligation/requirement does not flow from Article XIX:1(a) and that Japan is trying to read in additional obligations/requirements into Article XIX:1(a), where none exists. India believes that since there is no such requirement under the GATT or the Agreement on Safeguards, it would neither be necessary nor possible to identify elements demonstrating the same.[21]

10. Japan has, apart from a mere assertion that it is a complex matter, not discharged its burden of proof to demonstrate that how the present investigation can be considered as a complex matter[22] as it involves only a single safeguard measure. India's understanding is that a complex matter, requiring a more detailed discussion, would be in the nature of that referred to in the panel report in *US – Steel Safeguards*, which dealt with ten safeguard measures applied by the USA on imports of ten different products.[23] Thus, India has fully complied with its obligations under Article XIX:1(a).

11. While Japan has claimed that for those developments which are specific to certain exporting countries, the Competent Authority should have made an analysis on a country-specific basis[24], Japan does not cite any basis/authority in support of its claim. India submits that Japan's assertion that India has to show a causal link between "unforeseen developments" with respect to some specific countries and increase in imports from all the sources, is misplaced. The Agreement on Safeguards or the GATT does not require a member to impose safeguard duties only against the sources from where there has been an increase in imports or the sources with respect to which "unforeseen developments" have occurred. Such a requirement would indeed result in creating a paradoxical situation where the Competent Authority would have to impose the duties against sources from where there has been no increase in imports even after an express finding that they are not causing serious injury in terms of Article 4.[25]

12. As regards Japan's contention regarding the need to explain the impact of the "unforeseen developments" on the specific product at issue,[26] India reiterates that steel production worldwide is measured in terms of the crude steel capacity. The proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable. Japan has, apart from making certain bare allegations[27], not provided any evidence to prove to the contrary. In fact, Japan itself proceeds on the assumption that the production of PUC increases in the same proportion as the production of crude steel.[28]

13. Japan further asserts that the Preliminary Findings and Final Findings do not contain any explanation with regard to crude capacity. In this regard India submits that paragraph 24 of the preliminary findings clearly refers to the report published in World Steel Dynamics while concluding that the world excess capacity and increasing Indian demand are the reasons of increase in imports.[29] Since it is a known fact that the steel production worldwide is measured in terms of the crude steel capacity, it is apparent that the steel capacity mentioned in the above analysis of the Competent Authority is the crude steel capacity. India reiterates that the proportion of the PUC remains the same as compared to the crude steel production for which data is available in public domain.[30]

14. India vehemently disagrees with Japan's contention that the conclusions regarding "unforeseen developments" in the Final Findings are that of the domestic industry. India reiterates its submissions made in response to question 23 of the Panel that paragraph 102 of the Final Findings indeed reflects the conclusion of the Competent Authority. That the events constituted "unforeseen developments", is clearly a conclusion reached by the Competent Authority in the Final Findings at

[21] India's second written submission, paras. 9-10.
[22] India's second written submission, para. 88.
[23] India's opening statement at the second substantive meeting of the Panel, para. 10(e).
[24] Japan's first written submission, para. 124.
[25] India's comments on Japan's response to Panel question No. 89, para. 24.
[26] Japan's second written submission, para. 53.
[27] Japan's second written submission, paras. 57-58.
[28] Japan's second written submission, para. 59. See also, India's comments on Japan's response to Panel question No. 89, para 27.
[29] India's comments on Japan's response to Panel question No. 89, para. 27.
[30] Refer to pages 82 to 86 of the petition filed by DI on 27.07.2015, which was a part of the public file (Exhibit – IND 20).

paragraph 82 and 102(iii). These are the conclusions of the Competent Authority on the basis of which the safeguard measures were notified. The mere fact that submissions of domestic industry in this context were accepted by the Competent Authority, does not make them the conclusions of the domestic industry. The conclusion clearly remains that of India's Competent Authority.[31]

15. In view of India's submissions, Japan's claim that India did not properly determine whether the unforeseen developments resulted in increased imports in such quantities and under such conditions so as to cause or threaten to cause serious injury to the domestic industry, deserves to be rejected by the Panel.

Japan's claims regarding absence of logical connection between increase in imports and unforeseen developments are baseless

16. Japan disputes India's understanding that the "logical connection" requirement is a test of lesser threshold as compared to the "causation" requirement.[32] It states that there is no textual basis to argue that one is of a lesser threshold than the other and that they merely relate to different elements examined in a safeguard investigation.[33] India submits that the said statement of Japan is contradictory to its own response to the question 24 asked by Panel[34] wherein Japan has stated that the logical connection test requires demonstrating how the increase in imports causing serious injury or threat thereof is connected or linked to the unforeseen developments and the effect of the obligations incurred under the GATT 1994.[35] Japan further states that the causal link test requires demonstration of the existence of a causal link, i.e., a genuine and substantial relationship of cause and effect between the increased imports and the serious injury or threat thereof suffered by the domestic industry.[36] It is evident from Japan's own submission that the logical connection test requires merely a connection or link whereas the causal link test requires the demonstration of a genuine and substantial relationship. Evidently, the requirement of demonstrating a connection or link is of a lower threshold than that of demonstrating a genuine and substantial connection.[37] Further, Japan while acknowledging that the two tests are inherently different[38], denies the difference in the threshold in any of the tests. However, as stated above, Japan itself contradicts its stance wherein it has clearly expressed its understanding as to how the logical connection test is of a lower threshold as compared to that of the causation test.[39]

17. Japan further argues that increase in imports would occur when imported products replace domestic products, resulting in both an increase in imports as well as a decrease in sales of domestic products in absolute or relative terms.[40] Japan's interpretation does not emanate from the plain text of the GATT 1994 or the Agreement on Safeguards which requires the Competent Authority to merely demonstrate an increase in imports in absolute or relative terms.

18. In view of the above, India submits that Japan has clearly failed to indicate any flaw in the examination of the Competent Authority with regard to unforeseen developments and its logical connection to increased imports.

Japan failed to substantiate its claim regarding improper determination of 'period of investigation'

19. In response to question 94 by the Panel, Japan asserts that the Indian authority failed to make a qualitative analysis of the increase in imports such as to ensure that the alleged increase in imports was "recent enough, sudden enough, sharp enough and significant enough", both quantitatively and qualitatively. Further, while Japan does not point out any specific shortcoming in the Competent Authority's selection and analysis of the POI, it suggests that the Competent Authority should have

[31] Final Findings, (Exhibit IND-11), paras. 34-42. *See* India's opening statement at the second substantive meeting of the Panel, para. 10(i).
[32] Japan's second written submission, para. 29.
[33] Japan's second written submission, para. 29.
[34] Japan's response to Panel questions, paras. 23-24.
[35] Japan's response to Panel questions, para. 23.
[36] Japan's response to Panel questions, para. 24.
[37] India's opening statement at the second substantive meeting of the Panel, paras. 12-14.
[38] Japans' response to Panel questions, para. 25.
[39] India's opening statement at the second substantive meeting of the Panel, para. 15.
[40] Japan's second written submission, para. 38.

conducted its examination as per the methods suggested by it.[41] Further, Japan takes retreat from its previous claim[42] and clarifies that its claim focuses on the fact that the Indian authority failed to make a qualitative analysis, noting that while examining data outside the POI or determining a longer POI would be one possible method to ensure a qualitative analysis, there may be other methods to do so.[43]

20. In this regard, India reiterates that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.[44] While Japan expressly admits that there could be various methods of doing qualitative analysis[45], it fails to specifically point out how the POI selected by the Competent Authority does not qualify the test of 'qualitative analysis'. Japan further contends that determining a longer POI would be one possible method to ensure a qualitative analysis. However, it does not indicate how much longer a POI (3 years, 4 years or 10 years) would have qualified its understanding of the test of 'qualitative analysis'. Further, when specifically asked by the Panel in question 96(a) that whether a period of investigation of two years and three months would be sufficient in order to make an objective analysis of import trends, Japan refrains from providing any answer to the said question. Therefore, while Japan's claims regarding POI lack factual or legal basis, Japan also failed to discharge the burden of proof to establish that the period selected by the Competent Authority was not in accordance with the Agreement on Safeguards or the legal framework as interpreted by panels and the Appellate Body.[46]

21. Japan notes that there is no provision in the Agreement on Safeguards which prohibits the examination of data outside the POI.[47] India agrees with Japan that there is no bar on the Competent Authority to examine the data outside the POI. However, India notes that the discretion, in this regard, lies with the Competent Authority.[48]

22. As regards the basis of the selection of the POI, in paragraphs 30 and 31 of the Final Findings, the Competent Authority has clearly provided the basis of selection of the POI. As discussed in paragraph 30 of the Final Findings, the selection of the POI was based on (i) principles set out in the panel findings in US – Line Pipe; (ii) facts of the present case; and (iii) the information and sources of information analyzed by the Competent Authority. Further, in paragraph 31 of the Final Findings the Competent Authority clearly considered it appropriate to take the present POI in view of the decision of panel mentioned in paragraph 30.[49]

Japan failed to substantiate its claim regarding improper determination of 'Increase in imports'

23. In its Second Written Submission, Japan seeks to dispute India's claim that the Panel cannot be called upon by Japan to rule with regard to the alleged violation of Article 2.1 of the Agreement on Safeguards.[50] Japan contends that it has, at various junctures, claimed violation of Article 2.1. However, India submits that Japan did not make any claim with respect to the violation of Article 2.1 *per se* and all its claims are merely consequential. India further submits that a mere reference by Japan to an Appellate Body report cannot be construed as an independent claim of violation of Article 2.1. India submits that the facts of the present case are *similis* to the panel's finding in *Korea – Dairy* to the extent that Japan has merely stated (without specifically claiming) that India violated Article 2.1 of the Agreement on Safeguards and all the claims regarding such violation are merely consequential. However, in its submissions, Japan did not specifically claim nor did it submit any evidence in respect of violation

[41] Japan's response to Panel question No. 94, para. 39.
[42] Japan's first written submission, para. 179.
[43] Japan's response to Panel question No. 94, para. 40.
[44] India's first written submission, paras. 118-140.
[45] Japan's response to Panel question No. 94, para. 40.
[46] India's comments on Japan's response to Panel question No. 94, para. 35.
[47] Japan's response to Panel question No. 96.
[48] India's comments on Japan's response to Panel question No. 96, para. 39.
[49] India's response to Panel question No. 99.
[50] India's first written submission, para. 120.

of Article 2.1. India submits that in such circumstances, the Panel may refrain from ruling upon the alleged violation of Article 2.1 of the Agreement on Safeguards.[51]

24. Japan contends that the Indian authority failed to make a qualitative analysis of the "increase in imports".[52] In this regard, India observes that the throughout its submission, Japan's emphasis has been on suggesting alternate methods of investigation instead of demonstrating any shortcoming or lacuna in the investigations carried out by India. In fact, Japan's claims are not only in the form of alternative methodologies but effectively seek to cast more onerous burden than what is envisaged under the Agreement on Safeguards or the GATT 1994. India has indeed demonstrated through its First Written Submissions that the increase in imports was recent, sudden, sharp and significant.[53]

Japan failed to substantiate its claim regarding improper determination of Domestic Industry

25. Japan seems to disagree with India's contention that there is no violation of Article 4.1(c) because the producers included in the domestic industry accounted for more than 67% and therefore constituted a "major proportion" of the total domestic production. As already explained in India's First Opening Statement, the term "domestic industry" under Article 4.1(c) of the Agreement on Safeguards is defined as "the producers as a whole of the like or directly competitive products" or "those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". It is undisputed that Article 4.1(c) of the Agreement on Safeguards provides two options for defining the term "domestic industry". The first option is to take "producers as a whole" as domestic industry; meaning thereby that all the producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products, are understood as "domestic industry". Under the second option, the term "domestic industry" shall be understood as producers in the territory of the member that are engaged in the manufacture of the like or directly competitive products whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".[54]

26. Under the second option, the Agreement on Safeguards consciously does not specify any precise definition in terms of a percentage of total production to qualify the test of "a major proportion" presumably for the reason that such a prescription would have created practical and conceptual difficulties. For example, any prescription of a particular percentage, say more than 50% for applying the test of "major proportion" in Article 4.1(c) of Agreement on Safeguards in the context of fragmented industry, may result in practical difficulties not only for data collection but also for injury and causation analysis. India considers that it is in this backdrop that Article 4.1(c) of the Agreement on Safeguards is silent on what proportion of total production of domestic producers must be taken into consideration for evaluating whether a certain percentage constitutes "a major proportion".[55]

27. Japan places reliance on *Russia – Commercial Vehicles* to assert that the determination of the Domestic Industry by the Competent Authority was flawed. In this regard, India submits that Japan's reliance on *Russia – Commercial Vehicles* is completely misplaced in the facts and circumstances of the present case. The panel in *Russia – Commercial Vehicles* had found that the investigating authority: (a) had decided not to include a domestic producer of the like product after having reviewed that producer's data; and (b) had not provided the reasons for the exclusion of that producer in the investigation report. On the contrary, the present case is not about the exclusion of certain domestic producer. In the present case, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, nevertheless questionnaires were sent to all other known producers of the PUC, as reflected in the Final Findings.[56] Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meet

[51] India's opening statement at the second substantive meeting of the Panel, para. 18.
[52] Japan's second written submission, para. 103.
[53] India's first written submission, paras. 118-140. *See,* India's opening statement at the second substantive meeting of the Panel, para. 21.
[54] India's opening statement at the first substantive meeting of the Panel, paras. 16-17.
[55] India's opening statement at the second substantive meeting of the Panel, para. 25.
[56] Final Findings, (Exhibit IND-11), para. 2.

the requirements set out under the Agreement on Safeguards.[57]

28. Further, in response to question 104 by the Panel, Japan agrees that the facts in *Russia – Commercial Vehicles* and in the investigation at issue are different. However, Japan claims that the way the Indian authority determined the domestic industry introduced a material risk of distortion. Japan also makes an assumption that, in the present case, the Indian authority received information concerning all six domestic producers but only three were included as a part of the domestic industry. Japan states that although the three producers (not included in the domestic industry), did not expressly indicate their willingness to be included in the domestic industry, they had provided information in the application and expressly supported the application.[58]

29. India vehemently denies the claims made by Japan as they are neither supported by facts of the case or the information available on record nor are they supported by any evidence. Indeed, even though there was no legal obligation to refer to the rest of the producers not constituting the domestic industry, the Competent Authority nevertheless sent questionnaires to all other known producers of the PUC, as reflected in the Final Findings.[59] In fact, since the other domestic producers did not respond to the questionnaire sent to them by the Competent Authority or sent any request for being considered as an interested party, the said other domestic producers were not even considered as interested parties in the present investigation.[60] Japan's claim that the Competent Authority had the data and information pertaining to the domestic producers not constituting domestic industry is also not supported by any evidence on record. Japan fails to appreciate that in the absence of cooperation from domestic producers not constituting domestic industry, the Competent Authority is required only to ensure that the information relied upon to reach its conclusions, meets the requirements under the Agreement on Safeguards.[61]

30. While Japan considers the method of determination of domestic Industry by India as a "mere quantitative approach", it fails to present any alternative method of such determination or point out any legal inconsistency in the method adopted by the Competent Authority. In any case, Japan has failed to place on record any averment or evidence to substantiate their apprehensions. India respectfully submits that injury determination of Competent Authority is based on wide-ranging information regarding domestic producers and is not distorted or skewed as is evident from the details in the Final Findings.[62]

31. In question 106 when Panel asked Japan to substantiate its claim that only the alleged low performing producers were *on purpose* included into the definition of the domestic industry, Japan states that such evidence is not necessary.

32. Japan further alleges that in the present case there was a 'self selection' of the Domestic Industry by the domestic producers.[63] India submits that the Japan's contention is presumptuous as there was neither any 'self-selection' by the Domestic Industry nor any 'automatic acceptance' by Competent Authority. Japan fails to appreciate that in the absence of cooperation from any interested party, the Competent Authority is required only to ensure that the information and data relied upon for reaching its conclusions meets the requirements set out under the Agreement on Safeguards. In any case, Japan failed to indicate any alternate method by which the Competent Authority could have examined the other producers whose data was also not available with the Competent Authority.[64]

33. India submits that Japan's claim with respect to violation of Articles 4.1(a), 4.1(b), 4.2(a) and 4.2(b) is based on the presumption that the determination of the "domestic industry" by the Competent Authority is inconsistent with its obligations under Article 4.1(c) which India vehemently denies. As explained earlier, India has sufficiently established that its determination of the "domestic industry" was wholly consistent with the provisions of

[57] India's response to Panel question No. 105.
[58] Japan's response to Panel question No. 104.
[59] Final Findings, (Exhibit IND-11), para. 4.
[60] Final Findings, (Exhibit IND-11), para. 5.
[61] India's comments on Japan's response to Panel question No. 104, para. 45.
[62] Final Findings, (Exhibit IND-11), paras. 24-26. *See also,* India's opening statement at the second substantive meeting of the Panel, para. 29.
[63] Japan's response to Panel question No. 106.
[64] India's comments on Japan's response to Panel question No. 106, para. 48.

Article 4.1(c).[65]

Japan's claims regarding improper determination of serious injury and threat thereof are without merit

34. Japan stated in its Second Written Submission that the standard of serious injury is, on its face, "very high" and "exacting.[66] It further contends that India misread the Appellate Body's findings in *US – Wheat Gluten* when it argues that "the term 'exacting' was used in the context of the 'legal standard in the Agreement on Safeguards' and not for 'serious injury' itself".[67] In this regard, India reiterates that "serious injury" is defined under Article 4.1(a) of the Agreement on Safeguards as "a significant overall impairment in the position of a domestic industry" and there is no obligation, explicit or implicit, that the standard of "serious injury" set forth in Article 4.1(a) is, on its face, "very high" and "exacting", as proposed by Japan.[68] India also reiterates that the observation of the Appellate Body was unambiguously in the context of making a contradistinction between the term "material injury" in the Anti-dumping Agreement and "serious injury" as defined under Agreement on Safeguards. India further submits that while the term "serious injury" may be of a higher standard as compared to "material injury" under the Anti-dumping Agreement, the observations of the Appellate Body cannot be construed to give the term "serious injury" the status of an absolute standard, as proposed by Japan. The obligations of the Members in terms of Article 4.1(a) have to be understood and given its meaning within the framework of the Agreement on Safeguards and there is no room for casting any additional burden or obligation on a Member than what is specifically provided in the Agreement on Safeguards.[69] In other words, the Appellate Body merely stressed the point that the legal standards have to be exacting which cannot be construed to mean that the assessment of "serious injury" itself ought to be "exacting".[70]

35. With regard to Japan's contentions relating to obligations imposed on the competent authorities in the context of the serious injury analysis[71], India reiterates that the Competent Authority in its findings has not only evaluated the listed factors in Article 4.2(a) to justify a determination of 'serious injury' under the Agreement on Safeguards"[72] but has also thoroughly evaluated the overall position of the domestic industry in light of all the relevant factors having a bearing on a situation of that industry in order to determine that there is 'a significant overall impairment' in the position of that industry".[73] The Competent Authority has indeed conducted a substantive evaluation of the 'bearing', or the 'influence' or 'effect' or 'impact' that the relevant factors have on the 'situation of the domestic industry' as suggested in the Appellate Body Report, *US – Lamb*.[74]

36. Japan disagrees with India's argument that the "other factors" that must be examined in the framework of the non-attribution analysis pursuant to Article 4.2(b) are factors that are found by the competent authorities to be "relevant".[75] In India's view, whether a factor is "relevant" depends on whether it is "of an objective and quantifiable nature" and "having a bearing on the situation" of the domestic industry pursuant to Article 4.2(a). India claims that "it is only after the Competent Authority decides about the 'relevance' of a factor applying the twin criteria that the obligation of carrying out the non-attribution analysis in terms of the second part of Article 4.2(b) shall arise".[76]

37. Further, Japan contends that there is no textual basis to support India's understanding that the "other factors" examined under Article 4.2(a) and Article 4.2(b) of the Agreement on Safeguards should be identical. According to Japan, the "other factors" examined pursuant to Article 4.2(b) in the context of the non-attribution analysis are factors which have an effect on the state of the domestic industry.[77] India submits that Japan is attempting to read words and phrases which are not a part of the Agreement. There is nothing in the text of the Article to suggest that the non-

[65] India's opening statement at the second substantive meeting of the Panel, para. 30.
[66] Japan's second written submission, para. 135.
[67] Japan's second written submission, para. 136.
[68] India's opening statement at the second substantive meeting of the Panel, para. 33.
[69] India's opening statement at the second substantive meeting of the Panel, para. 34.
[70] India's first written submission, para. 180.
[71] Japan's second written submission, section E. 2 (ii), paras. 138-142.
[72] Appellate Body Report, *Argentina – Footwear (EC)*, para. 138.
[73] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.
[74] Appellate Body Report, *US – Lamb*, para. 104. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 36.
[75] India's first written submission, paras. 276, 278 and 279.
[76] India's first written submission, para. 279. See, India's second written submission, para. 16.
[77] India's second written submission, para. 17.

attribution obligation requires a distinct examination in the context of "factors which have an effect on the state of the domestic industry". It is submitted that the two paragraphs of Article 4.2 cannot be read disjunctively as is being suggested by Japan. It is very clear from a plain reading of Article 4.2(a) that in the investigation to determine whether increased imports have caused serious injury or are threatening to cause serious injury, the competent authorities shall evaluate "all relevant factors". Thus, the examination is not restricted to some factors but extends to all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry. It is important to note that Article 4.2(b) is intricately linked to Article 4.2(a) inasmuch as the opening sentence itself states that "The determination referred to in sub-paragraph (a) shall not be made …". Thus, it is clear that Article 4.2(b) only imposes an additional burden on the competent authorities to demonstrate the causal link between increased imports and serious injury based on the examination of the factors referred to in Article 4.2(a).[78]

38. Further, the last sentence of Article 4.2(b) merely prohibits the competent authorities from attributing injury caused by "factors other than increased imports" to increased imports. In India's view, there is no independent or separate identification envisaged under Article 4.2(b). Therefore, the phrase "factors other than increased imports" has to be necessarily understood to refer to only those factors that have been found to be relevant in terms of Article 4.2(a). It also needs to be appreciated that the last sentence of Article 4.2(b) does not envisage any independent evaluation but only presupposes an analysis elsewhere which obviously is under Article 4.2(a). It may also be noted that unlike Article 3.5 of the Anti-dumping Agreement, no separate identification of "other factors" is envisaged under Article 4.2(b) of the Agreement on Safeguards. Accordingly, Japan's reference to the panel's findings in *EC – Tube or Pipe Fittings* is also misplaced.[79]

39. Further, as confirmed by India in response to question 119[80] by the Panel, there is no conflict in the decision of the Appellate Body in *US – Line Pipe* and India's argument that there is no independent or separate identification envisaged under Article 4.2(b). In India's view, the factors required to be analyzed in terms of Article 4.2(b) are the ones identified in terms of Article 4.2(a). India's view is also fully supported by the report of the panel in *US – Steel*.

40. Regarding Japan's claim of mismatch in the figures of inventories, production and sales, India has already clarified in its First Written Submissions that the production, sales and inventories have been duly verified from the excise records of the domestic industry and that they were correct.[81] Further, regarding the issue of annualization of data, India reiterates that the data for one quarter has been annualized to make it comparable to the full year data of the preceding periods. No estimate or forecast for the full year has been done for the purpose of "serious injury" analysis.[82] Annualization does not result in a change in the POI but is only a statistical tool used for comparing periods which are dissimilar. In India's views, whenever the periods are different over the length of the investigation period, the only methodology that can be adopted for a proper comparison is to bring the periods to a common denominator. For instance, if the period of investigation is nine months, it cannot be directly compared to a preceding period of 12 months.[83]

41. Japan also asserts that the analysis of "further threat of greater serious injury" as examined under the Final Findings of the Competent Authority, does not have any legal basis and the same is different from "threat of serious injury" as prescribed in the Agreement on Safeguards. In this regard, India reiterates that the expression "further" has been used in the context of the findings of the Competent Authority with regard to the existence of "threat of serious injury" as reflected in paragraphs 100 and 101 of the Final Findings.[84] Therefore, Japan's contention in this regard is without any merit.[85]

[78] India's second written submission, para. 18.
[79] India's second written submission, para. 19.
[80] India's response to Panel question No. 119.
[81] India's first written submission, para. 228.
[82] India's response to Panel question No. 31.
[83] India's response to Panel question No. 95.
[84] India's response to Panel question No. 47. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 42.
[85] India's opening statement at the second substantive meeting of the Panel, para. 39.

42. Japan, while relying on its First Written Submission, also reiterated that India's determination does not meet the standard of "threat of serious injury".[86] India submits that it has clearly demonstrated in its First Written Submissions[87] that apart from the existence of serious injury, there was also a further threat of serious injury to the domestic industry.[88]

Japan's claims regarding determination of the causal link are without merit

43. India submits that it has clearly established the causal link between the alleged increase in imports and the alleged serious injury and threat thereof to the domestic industry as required by Article 4.2(b). Further, the determination of the Competent Authority has also demonstrated that the increased imports had caused or were threatening to cause serious injury to the domestic industry as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[89]

44. Japan contends that in the present case there was no overall coincidence in time between the movements in imports and the movements in injury. India submits that Japan's contention is bereft of factual support. The Competent Authority in its findings has discussed and come to a conclusion that while the imports have gone up, the domestic industry has lost its share in the same period. At the same time, decline in profitability of the domestic industry is also of exactly the same period when the increased imports have taken place. As a matter of fact, the entire injury analysis is for the period when the increased imports have taken place.[90] Further, the Competent Authority has clearly held that there is a direct correlation (emphasis added) between the increase in imports and serious injury suffered by the domestic industry as imports in absolute terms increased approximately three times during the year 2015-16 (Annualized on the basis of the figures of Q1) as compared to base year 2013-14. The domestic industry's market share declined so did the landed price of imports per ton. Consequently, the domestic industry has suffered losses. It is, thus, evident that injury to the domestic industry has been caused by the increased imports.[91] Clearly, in the facts of the present case, the Competent Authority has not only established a mere "coincidence" but has, as a matter of fact, established a "direct correlation" between the increase in imports and serious injury suffered by the domestic industry.[92]

45. Further, India reiterates that the Competent Authority is required to establish a relationship between the movements in import volume and the movements in only those factors which are held to be a cause of injury. India asserts that it would be logically incorrect to link the injury to those factors which are admittedly not a cause of injury, as proposed by Japan.[93]

Japan's Claims regarding violation of the Article 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 are without merit

46. Japan has clarified that its claims under Articles 5.1 and 7.1 of the Agreement on Safeguards are consequential to a finding of violation of Article 4.2(b) of the Agreement on Safeguards. Japan seems to indicate that its entire claim of violation of Article 5.1 and 7.1 is based on the presumption of improper non-attribution and therefore, a violation of Article 4.2(b).[94] Further, in response to question 127 by the Panel, Japan seems to change its stance and accept that a violation of Article 4.2(b) of the Agreement on Safeguards does not necessarily mean a violation of Article 5.1. Contrary to the position taken earlier where Japan disagreed with India's understanding that the violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1, Japan seems to concede the point.[95]

[86] Japan's second written submission, para. 182.
[87] India's first written submission, paras. 237-243.
[88] India's opening statement at the second substantive meeting of the Panel, para. 40.
[89] India's first written submission, paras. 244-291. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 42.
[90] India's opening statement at the second substantive meeting of the Panel, para. 43.
[91] Final Findings, (Exhibit IND-11), para. 66. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 44.
[92] India's opening statement at the second substantive meeting of the Panel, para. 45.
[93] India's first written submission, para. 261. *See also*, India's opening statement at the second substantive meeting of the Panel, para. 46.
[94] Japan's response to Panel question No. 62.
[95] Japan's response to Panel question No. 63.

47. In response to the questions posed by the Panel subsequent to the first substantive meeting[96] and in its opening oral statement at second substantive meeting[97], India clarified that in its understanding a violation of non-attribution analysis does not necessarily lead to a violation of Article 5.1 and Article 7.1. It may be recalled that India has relied upon the text of Article 5.1 and 7.1 which does not contain any indication or even a suggestion that a violation of the non-attribution requirement would necessarily lead to an inconsistency of the measure at issue with Articles 5.1 and 7.1 of the Agreement on Safeguards.[98] India has clearly demonstrated that in the present case, India has fully complied with each and every requirement of Article 4.2(b) of the Agreement on Safeguards. Further, India has also demonstrated through its First Written Submissions and subsequent submissions[99] that the duties levied were only to the extent necessary in terms of Article 5.1 of Agreement on Safeguards. India further submits that Japan has clearly failed to even indicate *how* the duties levied by India are not only to the extent necessary and *what* should have been the extent of duties which would have been proper in its understanding. Therefore, Japan has completely failed to establish even a *prima facie* case that the duties levied by India were not only to the extent necessary to counter the injurious effects of increased imports.[100]

Japan's Claims regarding violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are without merit

48. Japan's claim regarding the violation of Article 3.1, Article 4.2(c) and Article 11.1(a) are wholly consequential to its presumption that by way of measures at issue, India has violated other provisions and requirements under GATT 1994 and Agreement on Safeguards.[101] India submits that since it has fully complied with the obligations under the GATT 1994 and the Agreement on Safeguards, there can be no question as to the violation of Article 3.1, Article 4.2(c) and Article 11.1(a). Therefore, the Panel should reject the contention of Japan in this regard.[102]

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[96] India's response to Panel question No. 63.
[97] India's opening statement at the second substantive meeting of the Panel, para. 49.
[98] India's response to Panel question No. 127.
[99] India's opening statement at the first substantive meeting of the Panel.
[100] India's comments on Japan's response to Panel question No. 127, para. 62.
[101] Japan's second written submission, paras. 244-245.
[102] India's opening statement at the second substantive meeting of the Panel, para. 50.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF AUSTRALIA

I. Introduction

1. Australia's written submission and response to questions in this dispute have addressed the proper interpretation of Article XIX:1(a) of GATT 1994 and the Agreement on Safeguards (Safeguards Agreement) with respect to the constituent elements of a safeguard measure. Drawing on this analysis, Australia has examined the parties' arguments with respect to:

i. the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry;

ii. the application of obligations under Article I:1 of the GATT with respect to the disputed safeguard measure; and

iii. the application of obligations under Article II:1(b) of the GATT with respect the disputed safeguard measure.

II. The proper interpretation of Article XIX:1(a) of the GATT 1994

2. In Australia's view, Article XIX:1(a) of GATT 1994 provides clear direction for determining whether a measure contains the constituent elements of a safeguard measure. It enables a Member to temporarily suspend an obligation incurred under the GATT 1994 where as a result of that obligation, a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the Member's domestic industry producing like products. The Appellate Body has confirmed this view:

> … only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred *that obligation*. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend *the obligation* in whole or in part["]…[1] (emphasis added)

3. In Australia's view, Article XIX:1(a) therefore establishes that a "safeguard measure" is a measure that:

i. suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff concession; and

ii. suspends that GATT obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue.

4. In Australia's view, these two elements can be seen as: (i) the *content* of a safeguard; and (ii) the *objective* of a safeguard. Both must be present for a measure to constitute a safeguard measure.

III. The Parties' arguments with respect to the "logical connection" between the effect of obligations incurred under the GATT 1994 and the increase in imports that causes or threatens to cause serious injury to like domestic industry.

5. Japan claims India has violated Article XIX:1(a) of the GATT 1994 because it failed to demonstrate a "logical connection" between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to its like

[1] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

domestic industry.[2] In response, India claims the logical connection exists through the existence of tariff concessions for the relevant product.[3]

6. As set out above, Australia holds the view that the suspension, withdrawal or modification of a GATT obligation through a safeguard measure must be undertaken with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue. The mere existence of an obligation or concession would not be satisfactory to demonstrate the logical connection between the effect of the obligations incurred and the surge in imports. The Appellate Body has noted there must be:

> … [a] logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions…" – and the conditions set forth [regarding increased imports] in the second clause of Art XIX:1(a) for the imposition of a safeguard.[4]

7. In the current dispute, Australia considers that if India's measure did not in fact suspend, withdraw or modify its bound tariff concession of 40 per cent under GATT 1994, the Panel should find that the measure lacked the requisite content of a safeguard. It therefore would not constitute a safeguard measure under Article XIX:1(a) of the GATT 1994.

IV. The application of obligations under Article I:1 of the GATT 1994 with respect to the disputed safeguard measure

8. Japan submits India has violated Article I:1 of GATT 1994 because its purported safeguard measure does not apply equal tariffs to all WTO Members.[5] India submits it is permitted to suspend the obligations in Article I:1 of GATT 1994 through a safeguard measure.[6] India further submits that Article 9 of the Safeguards Agreement permits the application of safeguard measures in a manner which favors developing country WTO Members.[7]

9. In light of the requisite link between the content and objective of a safeguard, outlined above, Australia submits that a "suspension" of MFN obligations under Article I:1 in the application of a safeguard measure is permitted only to the extent that this derogation addresses the cause or threat of serious injury to the like domestic industry.

10. Australia's view is supported by the Panel in *Indonesia – Iron or Steel Products*, which said it failed to see:

> … how a course of action that *dilutes* the protective impact of a safeguard measure … could result in the suspension of a Member's MFN obligations under Article I:1 *for the purpose of* Article XIX:1(a), given that the fundamental objective of Article XIX:1(a) is to allow Members to "escape" their GATT obligations to the extent necessary to prevent or remedy serious injury to a domestic industry.[8] (original emphasis modified)

11. The panel further noted:

> … the discriminatory application of a safeguard measure for the purpose of affording [special and differential treatment] pursuant to Article 9.1 [of the Safeguards Agreement] does not result in a suspension of a Members obligations under Article I;1, within the meaning of Article XIX:1(a) of the GATT 1994.[9] (original emphasis)

12. Therefore, where the obligation or concession being suspended, withdrawn or modified did not *contribute* to the surge in imports which injured or threatened to injure domestic industry

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[2] Japan's first written submission, paras. 152, 162-3.
[3] India's first written submission, paras. 117-118.
[4] Appellate Body Report, *US – Steel Safeguards*, para. 317, referring to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.
[5] Japan's first written submission, para. 521.
[6] India's first written submission, paras. 337, 342.
[7] India's first written submission, paras. 337, 342.
[8] Panel Report, *Indonesia – Iron or Steel Products*, para. 7.28.
[9] Panel Report, *Indonesia – Iron or Steel Products*, para. 7.30.

producing like goods, the requisite o*bjective* of the safeguard measure is not present. Where the *objective* of the purported safeguard measure is not present, then no safeguard has been imposed. In such circumstances, obligations under Article I:1 of GATT 1994 have not been suspended, and the exception under Article 9.1 of the Safeguards Agreement cannot apply.

V. The application of obligations under Article II:1(b) of the GATT 1994 with respect to the disputed safeguard measure

13. Japan submits that India violates Article II:1(b) of GATT 1994 because through the measures at issue, India imposes "other duties or charges" in violation of the second sentence of that provision; and that while the disputed measures are duties levied in customs, as safeguard measures they are by nature "extraordinary" or "exceptional" and not "ordinary" measures.[10] India submits that since the measures at issue were imposed in pursuance of Article XIX of the GATT 1994, the obligation of India under Article II:1(b) ipso facto is suspended, and therefore the question of any violation under Article II:1(b) does not arise.[11]

14. In the present dispute, India's Schedule permitted it to impose a tariff rate of 40 per cent on the particular products at issue.[12] Prior to imposing the purported safeguard measure, India applied a tariff rate in the order of 7.5 per cent – well below its scheduled tariff concession.[13] To address "the effect of such low applied tariffs",[14] India imposed a purported safeguard measure comprising an additional tariff of around 10 - 20 per cent.[15]

15. In these circumstances, neither the *content* or *objective* of a safeguard measure are present:

i. India's imposition of the purported safeguard measure did not in fact withdraw or modify its scheduled tariff concession of 40 per cent; and

ii. India's imposition of the purported safeguard measure did not in fact address serious injury to its like domestic industry caused or threatened by a surge of imports resulting from its scheduled tariff concession of 40 per cent.

16. As such, Australia does not consider that India's measure constitutes a safeguard measure within the meaning of Article XIX of the GATT 1994 and the Safeguards Agreement.

VI. Conclusion

17. In summary, Australia submits that this dispute provides an opportunity for the Panel to clarify a number of questions of legal interpretation regarding the scope and application of provisions in the GATT 1994, and Safeguards Agreement. In Australia's view, the constituent *content* and *objective* of a safeguard measure are not present in this instance. In light of that, India has failed to implement a safeguard measure, and the measure it has implemented contravenes a number of GATT obligations.

[10] Japan's first written submission, paras. 503, 513.
[11] India's first written submission, paras. 344, 346.
[12] India's first written submission, para. 48.
[13] Japan's first written submission, paras. 160 - 163; also India's first written submission, para. 49.
[14] Japan's first written submission, para. 160.
[15] Japan's first written submission, paras. 27 - 30.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THE EUROPEAN UNION

I. APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

1. A measure should be deemed a safeguard within the meaning of Article XIX of GATT 1994, when it: (i) suspends an obligation under the GATT 1994 or withdraws or modifies a scheduled tariff concession; (ii) with purpose of remedying or preventing injury caused by an increase in imports. The obligation that may be suspended in accordance with the last part of Article XIX:1(a) of the GATT 1994 refers to the obligation which, according to the first part of the Article, has given rise to the increase in imports which has caused or threatens to cause serious injury.

2. In the view of the EU, the nature of a safeguard measure under Article XIX of GATT 1994 is that of a derogation to obligations or commitments entered into by WTO Members. If a measure, defined as a tariff increase or a quantitative restriction, adopted by a WTO Member does not amount to such a derogation, it is not a safeguard measure within the meaning of Article XIX of GATT 1994 and, consequently, does not fall under the Agreement on Safeguards. The EU notes in this respect that the Agreement on Safeguards provides for the possibility of compensation and that several provisions make reference to the need to maintain a "substantially equivalent level of concessions and other obligations" once the safeguard measure has been adopted, precisely because of its inherent nature of derogation to those concessions. This reference would not make sense if a safeguard measure would not lead to a suspension of obligations or concession since, in that case, there would be nothing to compensate for.

3. Unlike the anti-dumping rules that apply to any "specific action against dumping" of exports, Article XIX of GATT 1994, read together with the Agreement on Safeguards, makes clear that certain measures can only be considered as safeguards if they suspend an obligation under the GATT 1994 in whole or in part or withdraw or modify a concession.

4. Therefore, an increase of the applied tariff rate, while still remaining at or below the level of the bound tariff rate, would thus not require (or indeed allow) the adoption of safeguard measures.

5. The application of Article 9.1 of the Agreement on Safeguards does not qualify a specific measure as a safeguard measure for the purposes of Article XIX GATT 1994 and the Agreement on Safeguards, but rather presupposes the existence of a safeguard. The application of Article 9.1 of the Agreement on Safeguards does not violate the MFN obligation in Article I:1 of GATT 1994 as the former prevails if and to the extent there is a conflict with the latter. Moreover, if compliance with the obligation under Article 9.1 were to be tantamount to a suspension of an obligation within the meaning of Article XIX of the GATT 1994, that would mean that compliance with an obligation under the Agreement on Safeguards would give rise to compensation rights for other Members under Article 8 of the Agreement on Safeguards without suspension, withdrawal, or modification of obligations or concessions that caused the alleged serious injury. Clearly such a result would be absurd.

6. Article 9 in practice operates as a limited exception to the non-discrimination obligation as reflected in Article 2.2 of the Agreement on Safeguards for safeguards measures and the MFN principle, as reflected in Article I:1 of the GATT 1994 for trade in goods generally. However, in the absence of language clearly designating it as an exception to these provisions, this should be dealt with as a case of legal conflict between obligations which are simultaneously applicable but mutually exclusive. According to the General Interpretative Note to Annex 1A to the WTO Agreement, which deals with conflicts between the GATT 1994 and any of the other agreements in Annex 1A, including the Agreement on Safeguards, priority should be given to the Agreement on Safeguards, which prevails if and to the extent there is a conflict. As for the conflict between Article 2.2 and 9.1 of the Agreement on Safeguards, the principle of lex specialis directs to set aside the general obligation under Article 2.2 in favour of the more specific obligation under Article 9.1 to the extent there is a conflict between them.

7. The nature of duties imposed following a safeguard investigation ordinary is contingent upon their design and structure. If they have the essential attributes of customs duties they could be qualified as "ordinary customs duties" within the meaning of Article II:1 of the GATT 1994; otherwise they fall in the residual category of "other duties or charges of any kind". In the present case, the EU considers that the duties imposed are "ordinary customs duties" within the meaning of Article II:1 of the GATT 1994.

8. The EU also notes that while a Member could carry out a safeguards investigation in accordance with the procedures of the Agreement on Safeguards, the ensuing measures in the form of an increase in the tariff may not need to go above the bound rate in order to "prevent or remedy serious injury and to facilitate adjustment". In such circumstances, it is plausible to argue that the Agreement on Safeguards would nonetheless apply to all acts that have already taken place.

9. Finally the European Union submits that the wording "obligations" in the first clause in in Article XIX:1(a) of the GATT 1994 includes all obligations incurred under the GATT 1994. However, some obligations are not capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers. For example, Article XXIV of the GATT does not appear to impose obligations under the GATT 1994 that are capable of causing an increase in imports under such conditions as to cause or threaten serious injury to domestic producers.

II. CLAIMS UNDER ARTICLE II:1(B) AND ARTICLE I:1 OF THE *GATT 1994*

10. The EU submits that safeguard measures, within the meaning of Article 1 of the Agreement on Safeguards, which comply with the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards, do not breach Article II:1(b) and Article I:1 of the GATT 1994.

11. Assuming, *quod non*, the measures at issue in this dispute are safeguard measures within the meaning of Article 1 of the Agreement on Safeguards, any breach of Article II:1(b) and Article I:1 of the GATT 1994 would have to be consequential to a breach of the conditions and disciplines set out under Article XIX of the GATT 1994 and the Agreement on Safeguards.

12. To put it differently, if a measure is a safeguard measure, it is clear for everybody that the Member imposing it would have to comply with Article 9.1 of the Agreement on Safeguards, and thus would have to exclude developing countries meeting the conditions set out in Article 9.1 from the scope of the measure. The simple exclusion of developing countries meeting those criteria could thus not reasonably be considered as a breach of Article I:1 of the GATT 1994. Unless the challenge is really directed against e.g. the wrongful application of Article 9.1 (or some other provision) of the Agreement on Safeguards, with a consequential breach of Article I:1 of the GATT 1994.

13. The EU notes that Japan does not frame its claims under Article II:1(b) and Article I:1 of the GATT 1994 as purely consequential to a breach of the Agreement on Safeguards. At the same time it is not entirely clear to the EU whether Japan wishes to challenge the specific duty at issue as a stand-alone measure (i.e. regardless of whether or not it can be considered as a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards).

14. The EU would limit itself to recalling the standing case-law of the Appellate Body that "a party's submissions during panel proceedings cannot cure a defect in a panel request"[1], a principle which is "paramount in the assessment of a panel's jurisdiction". The Appellate Body has stressed that "although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request" and that "in every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing".[2]

[1] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642, quoting Appellate Body Reports, *EC – Bananas III*, para. 143 and *US – Carbon Steel*, para. 127.

[2] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu offers comments on the following issues:

(a) characterization of the measure at issue;

(b) whether country-specific analysis was required to demonstrate a logical connection between unforeseen developments and increased imports; and

(c) the logical connection between obligations incurred and increased imports.

II. CHARACTERIZATION OF THE MEASURE AT ISSUE

2. Australia and the European Union consider that a measure does not constitute a safeguard measure within the meaning of Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards if it does not suspend a GATT obligation or withdraw or modify a concession. We consider this approach to be flawed, as it undermines the procedural and substantive obligations of the Agreement on Safeguards, and has no basis in the text of Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards.

3. We believe that the ordinary meaning of the term "safeguard measure" encompasses all measures taken to safeguard the domestic industry against serious injury arising from increased imports, without any limitation to particular types of measures. In this dispute, because India's safeguard measure was taken to safeguard its domestic industry against serious injury arising from increased imports, it constitutes a safeguard measure within the meaning of Article XIX:1(a) and the Agreement on Safeguards.

4. However, even if one were to accept the argument that a measure must "suspend" a concession or obligation in order to constitute a safeguard measure, that condition would be satisfied in this case. The measure at issue was imposed on a product for which a tariff binding exists (40%). Therefore, the measure at issue could result in a violation of the prohibition on "other duties and charges" (ODC) under Article II:1(b), second sentence of the GATT 1994. Here, because Indian law appears to treat safeguard duties as an exceptional measure distinct from ordinary import duties, we believe that the measure at issue constitutes an ODC. Since India has not inscribed this type of ODC in its WTO Schedule of Concessions[1], the safeguard measure gives rise to a suspension of India's obligation under Article II:1(b), second sentence.

III. WHETHER COUNTRY-SPECIFIC ANALYSIS WAS REQUIRED TO DEMONSTRATE A LOGICAL CONNECTION BETWEEN UNFORESEEN DEVELOPMENTS AND INCREASED IMPORTS

5. Regarding demonstrating a logical connection between unforeseen developments and increased imports, Japan argues that, "for those developments which are specific to certain exporting countries, the Indian authority should have made an analysis on a *per country* basis".[2] India argues that such analysis is impossible as it is a confluence of circumstances and not a single event which constitutes unforeseen developments.

6. We consider that India's reliance on a confluence of circumstances does not detract from its ability to analyze trade flows and price and demand developments occurring in any specific country.

[1] Schedule of Concessions XII – India, annexed to the Marrakesh Protocol.
[2] Japan's first written submission, para. 124. (emphasis original)

Moreover, we consider it incumbent on the Indian authority to conduct its analysis on a per country basis because the Indian authority relied on shifts of imports from individual import markets to India. Because the Indian authority did not perform analysis on a per country basis, we consider that the Indian authority failed to sufficiently demonstrate a logical connection between the alleged unforeseen developments and increased imports.

IV. LOGICAL CONNECTION BETWEEN OBLIGATIONS INCURRED AND INCREASED IMPORTS

7. India argues that Article XIX:1(a) of the GATT 1994 requires only that an investigating authority show that the importing Member has incurred tariff concessions for the relevant product.[3]

8. We consider that the phrase "as a result of … the effect of the obligations incurred by a contracting party under this Agreement" in Article XIX:1(a) of the GATT 1994 requires a showing of three elements: (1) an obligation incurred under the GATT 1994; (2) the effect of that obligation; and (3) how such effect resulted in increased imports causing or threatening to cause serious injury.

9. In this dispute, the Indian authority only explains how India's applied rates might have the effect of increased imports. This is not an explanation of how India's *bound rates*—the relevant GATT obligation here—have the effect of increased imports. Thus, the Indian authority failed to make the relevant inquiry, and has not met the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

[3] India's first written submission, paras. 114-118.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF UKRAINE

I. Introduction

1. Ukraine's submissions in this dispute have focused on several points with respect to some of the India's methodologies used in the investigation that led to the imposition of safeguard measures on imports of certain steel products.

II. Methodology used for imports trend examinations

2. First of all, Ukraine would like to address the issue of Indian authority's approach of showing the increase in imports based on an annualized forecast because proper analysis of the import development is the key issue to justify imposition of safeguard measures. Indeed, Article 2.1 of the Agreement on Safeguards does not stipulate any kind of annualization methodology or usage of forecasted data for the import development. In fact, the language of Article 2.1 of the Agreement on Safeguards "requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[1] Usage of such wording as "product is being imported" and "increase in imports must have been" indicates that the investigation requires examination of factual imports and not forecasted trends.

3. Therefore, Ukraine considers that the conclusions made on distorted evidence and imposition of safeguard duties basing on forecasted data on imports would be inconsistent with Article 2.1 of the Agreement on Safeguards.

4. Ukraine agrees with Japan's point that quadrupling figures relating to first quarter of 2015-2016 in order to obtain data for 2015-2016 (Annualized) would be inconsistent with requirements that the investigating authority must rely on "objective data" pursuant to Article 4.2(a)of the Agreement on Safeguards. Indeed, such a simple assumption that indicators of imports and industry operation in each of three other quarters of 2015-2016 would be the same as in the first quarter of this period is rather groundless. The investigating authority did not provide any explanation of why such an assumption was reasonable.

5. Ukraine submits that usage of annualization methodology for analysis of import development and domestic industry position would result in lack of objectivity in the safeguard investigation and therefore would be inconsistent with Articles 2.1and 4.2 of the Agreement on Safeguards.

III. Evidence of serious injury

6. Ukraine notes that the existence of serious injury in the safeguard investigation should be demonstrated properly within the meaning of Article 4 of the Agreement on Safeguards. According to Article 4.1 (a) of the Agreement on Safeguards, under 'serious injury' shall be understood to mean a significant overall impairment in the position of the domestic industry. In addition, the term 'serious injury' means a high standard of injury. However, as long as certain key industry indicators – including domestic sales, production of domestic industry, capacity utilization, employment and productivity – showed positive trends or as mentioned in the Indian Notification 'remained same over the injury period'[2] the position of the domestic industry should not be qualified as being seriously injured.

7. Therefore, in Ukraine's view, conclusions based on forecasted data with lack of objectivity that imports have caused serious injury to the domestic industry do not constitute a sufficient justification for the application of safeguard measures pursuant to the Agreement on Safeguards and Article XIX of the GATT 1994.

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[1] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[2] G/SG/N/8/IND/28-G/SG/N/10/IND/19-G/SG/N/11/IND/14/Suppl.2.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. ANSWERS TO THE PANEL'S QUESTIONS TO THIRD PARTIES

I. QUESTION REGARDING ARTICLE XIX:1 OF THE GATT 1994

1. The expression "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1 of the GATT 1994 refers not only to a tariff concession, but also to any obligation a Member assumed at the time the WTO was established or at the Member's accession. The text of Article XIX:1 refers to "obligations incurred by a contracting party" and, as an example of this, "include[es] tariff concessions" expressly. It would be contrary to the text of the provision to limit the type of obligations that may result in the increase of imports to those that are only a result of tariff concessions.

2. Besides tariff obligations, any WTO obligation affecting importation may potentially be a relevant obligation if it results in an unforeseen increase of imports that causes serious injury to a Member's domestic producers. Accordingly, each safeguard measure should be evaluated on a case-by-case basis while taking into consideration the relevant facts and context in which a Member has decided to take action to prevent or remedy an injury.

II. QUESTION REGARDING THE NATURE OF DUTIES RESULTING FROM APPLICATION OF A SAFEGUARD MEASURE

3. GATT 1994 Article II:1 provides that an imported product shall be accorded treatment no less favourable than that set out in a Member's Schedule and further contemplates that an imported product shall be subject to scheduled ordinary customs duties and (as set out in the Understanding on Article II) designated other duties or charges. A duty pursuant to a safeguard measure (or "emergency action") would not, in principle, be an ordinary customs duty – for example, set out in the customs tariff of a Member normally corresponding to the Harmonized System.

4. Duties imposed pursuant to a safeguard measure could, in principle, be considered an "other duty or charge" under the second sentence of Article II:1(b). Should those duties be applied consistent with the requirements of Article XIX (and the Agreement on Safeguards), a Member would be in conformity with its WTO obligations (including those under GATT 1994 Article II). This is explicit in the text of Article XIX:(1)(a) of the GATT 1994, which provides that a Member "shall be free" to suspend an obligation, in whole or in part, or modify a concession – "including tariff concessions". That is, Article II would not prevent the application of a WTO-consistent safeguard measure because the Member "shall be free" to apply that measure.

III. QUESTION REGARDING THE DEFINITION OF SAFEGUARD MEASURE

5. The United States agrees, in part, with the argument Chinese Taipei raises with respect to the relevance of the Appellate Body's reasoning in *US – 1916 Act*. The United States acknowledges that the Appellate Body found, for purposes of the Antidumping Agreement, that the phrase "anti-dumping measure" is not immediately clear and that, without an express definition, the phrase could apply to all measures taken to address imported products sold for less than their fair market value. From this, Chinese Taipei extrapolates that a safeguard measure, which also does not have an express definition in the Agreement on Safeguards, is any measure taken to safeguard a domestic industry from increased imports.

6. However, Chinese Taipei does not recognize that, to qualify as a safeguard measure, the measure at issue must be to remedy or protect domestic producers from serious injury or a threat of serious injury and that the action a Member takes must be related to the suspension, withdrawal, or modification of a GATT obligation or concession.

IV. QUESTION WHETHER APPLICATION OF A MEASURE BELOW A BOUND RATE CAN BE CONSIDERED A SAFEGUARD MEASURE

7. A Member has, in effect, two bound rates in relation to the charge it may impose on an imported product. The first, under the first sentence of GATT 1994 Article II:1(b), is in relation to the rate it may impose as an "ordinary customs duty". The second, under the second sentence of that provision, is in relation to the rate it may impose as an "other duty or charge". The bound rate for an ordinary customs duty is as set out in a Member's Schedule. Under the Understanding on Article II, a Member was required to specify in its schedule the nature and level of any "other duty or charge" it could apply on an imported product. In the absence of any such scheduled "other duty or charge", a Member would not be able to apply a duty or charge on importation other than an ordinary customs duty.

8. If there is a duty or charge resulting from application of a safeguard measure, the issue is whether this duty or charge falls under the first or second sentence of GATT 1994 Article II:1(b). In principle, it would not seem that "emergency action" and application of a duty or charge while suspending, withdrawing, or modifying a concession (Article XIX:1) would normally result in an "ordinary customs duty". Therefore, that a duty or charge resulting from a safeguard measure falls within a Member's bound rate for an ordinary customs duty would not seem relevant. Instead, the proper analysis would seem to be whether the duty or charge resulting from a safeguard measure falls within a Member's bound rate for an "other duty or charge".

V. QUESTION REGARDING A PERIOD OF INVESTIGATION UNDER THREE YEARS

9. Most Members use at least three years as a baseline period of investigation. The most important aspect, however, is that the time period is unbiased and fair, and especially that it is not manipulated or otherwise selected to achieve a particular outcome during the investigation. Accordingly, the United States believes that a period of investigation under three years should not always be considered per se inadequate, although a reasonable explanation of that choice may be warranted.

VI. QUESTION REGARDING THE POSSIBILITY OF FINDING BOTH SERIOUS INJURY AND THREAT OF SERIOUS INJURY FOR THE SAME SAFEGUARD INVESTIGATION

10. Under the Agreement on Safeguards, it is possible to have findings of both serious injury and threat of serious injury for the same safeguard investigation. Under Article 2.1, a Member may impose a measure if imports cause or threaten to cause serious injury, and the text does not exclude that both situations may arise.

11. The Appellate Body addressed this issue in the context of whether discrete findings were necessary under the Agreement on Safeguards. In *US – Line Pipe*, the Panel found that the Member imposing the measure had breached the Agreement on Safeguards because the Member had determined that increased imports were the substantial cause of serious injury or the threat of serious injury and, in the Panel's view, the Agreement on Safeguards required a discrete determination as to one or the other.

12. On appeal, the Appellate Body reviewed the Panel's analysis. As an initial matter, the Appellate Body agreed with the Panel that Article 2.1 of the Agreement on Safeguards necessitates the inclusion of "findings" or "reasoned conclusions" in a published report from the competent authorities. The Appellate Body, however, questioned the kind of findings that must appear in the published report.

13. In particular, the Appellate Body examined the meaning of the term "or" in the phrase "cause or threaten to cause" serious injury. That is, it examined whether the use of this term required discrete findings or allowed the possibility of finding one (serious injury), the other (threat of serious injury), or both. The Appellate Body focused on the context in which the term "or" is used. The Appellate Body determined that the phrase "or" did not necessarily mean "one or the other, but not both" and that the clause could mean "either one or the other, or both in combination" and, as such, it did not see that it matters, for purposes of imposing a safeguard measure, whether the competent authority finds the one (serious injury), the other (threat of serious injury), or the one or the other (serious injury or the threat of serious injury). On this basis, it found that the Member's determination had established the right to apply a safeguard.

VII. QUESTION REGARDING IMMEDIATE NOTIFICATION UNDER THE AGREEMENT ON SAFEGUARDS

14. The term "immediately" as used in Article 12.1 suggests a certain level of urgency. At the same time, the use of this term would not support a bright line test. Indeed, if the negotiators had intended to adopt a bright line test, they would have included that test in the text of the Agreement. Accordingly, each circumstance must be evaluated on a case-by-case basis. Appropriate considerations would include whether a Member subject to a safeguard received sufficient time to adequately defend its rights and support its position during and after the safeguard investigation.