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EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN 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/DS595/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 26 October 2020

General

1. (1) In this proceeding, 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 apply.

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

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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. The Panel may, upon request, fix a time-limit within which the party should endeavour to provide such summary.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall transmit to the Panel, in accordance with the timetable adopted by the Panel:

a. a first written submission, in which it presents the facts of the case and its arguments; and

b. a written rebuttal.

(2) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The European Union shall submit any such 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 and shall identify clearly that it seeks a ruling pursuant to the present procedure. Turkey shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the European Union before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel shall provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel with its first written submission, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question, exceptions being permissible upon a showing of good cause. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) 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. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by Turkey should be numbered TUR-1, TUR-2, etc. If the last exhibit in connection with the first submission was numbered TUR-5, the first exhibit in connection with the next submission thus would be numbered TUR-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. 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).

Questions

9. (1) In accordance with the timetable adopted by the Panel, following the parties' first written submissions and the third parties' written submissions:

a. The Panel may pose questions in writing to the parties and the third parties, to which the parties and third parties shall respond within the set time-frame.

b. A party may pose questions to the other party, to which the other party shall respond within the set time-frame.

(2) The Panel may pose questions to the parties and third parties at any other time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The Panel shall hold at least one substantive meeting with the parties. Upon request by either party, the Panel may hold a second substantive meeting with the parties. The first and second substantive meetings of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Turkey to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union 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. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement according to the Panel's instructions issued prior to the meeting. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 7 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Turkey presenting its 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 closing statement, if available.

f. Following the meeting:

   i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

   ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

   iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

   iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

Third party session

16. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

17. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

18. Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

19. Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

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

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

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement according to the Panel's instructions issued prior to the session and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 7 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part 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.

23. Each party shall submit a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statement(s), in accordance with the timetable adopted by the Panel.

24. The integrated executive summary shall not exceed 30 pages.

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

26. 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. If the document(s) comprising a third-party submission and/or oral statement does not exceed six pages in total, this will serve as the executive summary of that third party's arguments unless the third party submits a separate integrated executive summary or otherwise indicates that it does not wish those document(s) to serve as its executive summary.

Interim review

27. 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.

28. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

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

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall send an email to the DS Registry attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the exhibits to one email, the submitting party or third party may send separate emails. If the number of emails necessary to transmit the exhibits would exceed 5 or any one exhibit is too large to be transmitted via email, the party shall upload the relevant exhibits to the Disputes On-line Registry Application (DORA). The email version sent to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute, and shall, with respect to the due dates established by the Panel, be sent by 5.00 p.m. (Geneva time).

b. In addition, each party is invited to submit all documents through DORA within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to consult the User Guide available in the "Help" section of DORA and if necessary contact the DS Registry (DSRegistry@wto.org).

c. Following email submission, each party and third party shall submit two paper copies of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047) by 5:00 p.m. (Geneva time) the next business day. If, for any reason, the WTO building is extraordinarily closed, the "next business day" will mean the day that the Panel determines for such filings once normal operations have resumed. If the Member does not have a mission or representative in Geneva the submissions may be sent by post or courier and must have a postmark or proof that they were sent the next business day after the submission was due. The DS Registrar shall stamp the documents with the date and time of receipt. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format (e.g. USB key). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

d. The receipt of the email by the DS Registry shall constitute service on the Panel. Each party shall serve any document submitted to the Panel directly on the other party. A party shall submit its documents to the other party by email. Each party shall confirm, in writing, that it has served on the other party, as appropriate, at the same time it provides each document to the Panel, a copy of such documents. Each party shall, in addition, serve any document submitted in advance of the first substantive meeting with the Panel directly on the third parties. The receipt of the email by the other party and the third parties (where relevant) shall constitute service.

e. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report upon request.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

Developments in circumstances

32. The Panel will conduct the proceedings and apply the present procedures in such a way as to mitigate circumstances arising from the COVID-19 pandemic. The Panel may provide further guidance in that regard as any such circumstances develop. If the Panel considers that the present Working Procedures cannot be applied effectively because of the COVID-19 pandemic, the Panel may modify these Procedures after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL FOR THE FIRST SUBSTANTIVE MEETING

Adopted on 31 March 2021

General

1. The first substantive meeting with the Panel will be conducted via remote participation through Cisco WebEx Meetings.

Definitions

2. For the purposes of these additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting including the members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex Meetings platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel remotely join the hearing using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

4. Any technical questions that the participants may have, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions provided for in paragraph 7 below.

Technical support

5. (1) The host will provide participants with technical support pertaining to the platform and its functionality in preparation for, and during the course of, the meeting with the Panel.

(2) The host will prioritize assisting those participants designated as main speakers on the delegations' list in accordance with paragraph 6 below.

(3) Each party and third party shall be responsible for its own technical support pertaining to issues not related to the platform.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel, on a dedicated form to be provided by the Panel Secretary, the list of the members of its delegation no later than 5:00 p.m. (Geneva time) on Tuesday 20 April 2021, to allow for advance testing as provided in paragraph 7, below. Such list

shall include all members of each party's and third party's delegation. Each party or third party shall indicate who among their participants will be their main speaker(s).

Advance testing

7. On dates to be determined in due course, the Secretariat will hold (a) a separate test session for each party and third party; and (b) a joint session with all participants (including all parties, third parties, and the panelists). Such sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. All participants should make themselves available for the test sessions.

Advance questions

8. At the time specified in the Panel's timetable, the Panel will send parties and third parties an advance copy of questions it intends to pose during the meeting. By that same time, the parties may also send each other an advance copy of questions they intend to pose to each other or to third parties during the meeting. This is without prejudice to the possibility for the Panel and the parties to pose additional questions during the meeting. This is also without prejudice to paragraphs 15(f)(ii)-(iv) and 21(f)(ii)-(iv) of the Working Procedures of the Panel adopted on 26 October 2020.

Confidentiality and security

9. As set out in paragraph 12(2) of the Working Procedures of the Panel, each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and the Panel's Working Procedures with regard to the confidentiality of the proceeding.

10. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the Panel record.

12. The parties and third parties are strictly prohibited from:

(1) Recording, via audio, video, screenshot, or otherwise, the meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video, screenshot, or otherwise, the meeting or any part thereof.

Access to the virtual meeting room

13. The participants shall access the virtual meeting room in accordance with these Additional Working Procedures.

14. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation join the virtual meeting room.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

(2) Remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

(3) Remote participants will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party or third party takes the floor to deliver its opening statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement through DORA, clearly marking it "check against delivery".

(2) Before each party takes the floor to deliver its closing statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement, if available, through DORA, clearly marking it "check against delivery".

(3) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

(4) Parties and third parties shall then submit the final written version of their opening and closing statements, and copies of any other documents shared with the other participants during the meeting, by the deadline set forth in paragraph 21(f)(i) of the Working Procedures adopted on 26 October 2020, and in accordance with the rules for service of documents in paragraph 30 of the same Working Procedures.

Communication breakdown

17. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41 22 739 67 46.

18. After consulting the parties and the third parties as appropriate, the Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected.

Length of opening statements

19. Each party is requested to limit the length of its opening statement to 45 minutes.

20. Each third party is requested to limit the length of its opening statement to 15 minutes.

Interventions

21. If a participant wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

22. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Interpretation

23. With current technical means, simultaneous interpretation on the platform is not possible. If requested, consecutive interpretation of interventions from an official WTO language to the language of the proceedings is possible. Such a request shall be made no later than Tuesday 20 April 2021.

Relationship with the Working Procedures of the Panel adopted on 26 October 2020

24. These additional Working Procedures complement the Working Procedures of the Panel adopted on 26 October 2020, and prevail over the latter to the extent of a conflict.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL FOR THE SECOND SUBSTANTIVE MEETING

Adopted on 2 June 2021

General

1. The second substantive meeting with the Panel will be conducted via remote participation through Cisco WebEx Meetings.

Definitions

2. For the purposes of these additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting including the members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' delegations, and interpreters.

"Platform" means the Cisco Webex Meetings platform.

Equipment and technical requirements

3. Each party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel remotely join the hearing using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

4. Any technical questions that the participants may have, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions provided for in paragraph 7 below.

Technical support

5. (1) The host will provide participants with technical support pertaining to the platform and its functionality in preparation for, and during the course of, the meeting with the Panel.

(2) The host will prioritize assisting those participants designated as main speakers on the delegations' list in accordance with paragraph 6 below.

(3) Each party shall be responsible for its own technical support pertaining to issues not related to the platform.

Pre-meeting

Registration

6. Each party shall provide to the Panel, on a dedicated form to be provided by the Panel Secretary, the list of the members of its delegation no later than 5 p.m. (Geneva time) on Tuesday 15 June 2021, to allow for advance testing as provided in paragraph 7, below. Such list

shall include all members of each party's delegation. Each party shall indicate who among their participants will be their main speaker(s).

Advance testing

7. On a date to be determined in due course, the Secretariat will hold a joint session with all participants (including all parties and the panelists). This session will seek to reflect, as far as possible, the conditions of the proposed meeting. All participants should make themselves available for the test session.

Confidentiality and security

8. As set out in paragraph 12(2) of the Working Procedures of the Panel, each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and the Panel's Working Procedures with regard to the confidentiality of the proceeding.

9. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

10. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the Panel record.

11. The parties are strictly prohibited from:

(1) Recording, via audio, video, screenshot, or otherwise, the meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video, screenshot, or otherwise, the meeting or any part thereof.

Access to the virtual meeting room

12. The participants shall access the virtual meeting room in accordance with these Additional Working Procedures.

13. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party shall ensure that only participants from its delegation join the virtual meeting room.

Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

(2) Remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

(3) Remote participants will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

15. (1) Before each party takes the floor to deliver its opening statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement through DORA, clearly marking it "check against delivery".

(2) Before each party takes the floor to deliver its closing statement, it shall provide the Panel and other participants at the meeting with a provisional written version of the statement, if available, through DORA, clearly marking it "check against delivery".

(3) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

(4) Parties shall then submit the final written version of their opening and closing statements, and copies of any other documents shared with the other participants during the meeting, by the deadline set forth in paragraph 21(f)(i) of the Working Procedures adopted on 26 October 2020, and in accordance with the rules for service of documents in paragraph 30 of the same Working Procedures.

Communication breakdown

16. Each party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41 22 739 67 46.

17. After consulting the parties as appropriate, the Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected.

Length of opening statements

18. Each party is requested to limit the length of its opening statement to two hours.

Interventions

19. If a participant wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

20. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Relationship with the Working Procedures of the Panel adopted on 26 October 2020

21. These additional Working Procedures complement the Working Procedures of the Panel adopted on 26 October 2020, and prevail over the latter to the extent of a conflict.

ANNEX A-4

ADDITIONAL WORKING PROCEDURES OF THE PANEL

Adopted on 1 April 2022

Whereas on 22 March 2022 the parties notified the Panel of agreed procedures for arbitration under Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in dispute DS595[1] (Agreed Procedures), and

Whereas, through those Agreed Procedures, the parties request the Panel to take certain steps relating to the report of the Panel and to the record of the Panel proceedings,

After consulting the parties, the Panel has adopted the following Additional Working Procedures reflecting the parties' requests:

1. Within two working days of adoption of these Additional Working Procedures, the Panel will transmit to the parties and third parties the text of the final panel report in the three WTO official languages (the "Translated Report"); it is understood that transmission of this text will not amount to circulation of the report of the Panel within the meaning of Article 16 of the DSU. Transmission of the Translated Report to the parties will take place through the WTO Disputes On-Line Registry Application (DORA).

2. Once transmitted to the parties and third parties as per paragraph 1 above, the Translated Report remains confidential. In the event of the filing of a Notice of Appeal under the Agreed Procedures, confidentiality is hereby entirely lifted on the Translated Report. For greater certainty, as per the parties' request, this means that the Translated Report can be shared with the arbitrators, the WTO Membership and the public. The Panel takes note that according to paragraph 5 of the Agreed Procedures, the Notice of Appeal would include the Translated Report.

3. If a Notice of Appeal is filed under the Agreed Procedures, as soon as the arbitrators are appointed the Panel will transmit the record of the Panel proceedings to the arbitrators, including, after consulting the third parties concerned, the third party submissions, third party oral statements and third party responses to questions. Transmission of the record of the Panel proceedings to the arbitrators will take place through DORA.

[1] See WT/DS595/10.

ANNEX A-5

INTERIM REVIEW

1 INTRODUCTION

1.1. We set out below a "discussion of the arguments made at the interim review stage" as required by Article 15.3 of the DSU, including an overview of each party's specific review requests, the other party's position on those requests, and our evaluation. We have revised certain aspects of the Interim Report in the light of these requests. In addition, we have made certain changes to improve the clarity and accuracy of the Final Report and to correct typographical and non-substantive errors.

1.2. Some of the paragraph and footnote numbers in the Final Report have changed due to these revisions. The numbering of paragraphs and footnotes referred to below is the numbering used in the Interim Report unless otherwise indicated, and differences *vis-à-vis* the Final Report are indicated in parentheses where appropriate.

2 REQUESTS CONCERNING SECTION 7.2 (PRODUCT SCOPE)

2.1 Paragraphs 7.12, 7.13, and 7.15

2.1. At paragraphs 7.12, 7.13, and 7.15, Turkey requests the addition of fuller references to the submissions where the relevant arguments are made.[1] The European Union does not object, and suggests referring in particular to section 2.2 of its first written submission.[2]

2.2. We note that paragraphs 7.12, 7.13, and 7.15 provide a general introduction to the entire group of claims and arguments presented by the parties in relation to product scope. In that context, we had only provided references to where Turkey had indicated the universe of claims in support of which it was making those arguments. We then set out those same arguments in more detail at paragraphs 7.38-7.41, 7.67-7.68, and 7.71, and in that context, we provided references to relevant passages of both parties' written submissions. Nonetheless, we have also added the references to the parties' first and second written submissions requested by Turkey in the footnotes to paragraphs 7.12, 7.13, and 7.15.

2.2 Paragraph 7.38

2.3. Turkey asks us to provide a more detailed description of its arguments in paragraph 7.38, by specifying three grounds on the basis of which Turkey argued that the European Union had imposed a separate safeguard on each product category.[3]

2.4. First, Turkey asks us to identify in paragraph 7.38 its argument that the fact that the European Commission calculated the size of the TRQ at the level of individual product categories demonstrates that the European Union applied distinct safeguards on these product categories. We note that this argument was reflected in paragraph 7.57, with the underlying facts set out in paragraphs 7.51 and 7.56. In light of Turkey's comment, we have expanded paragraph 7.57 (paragraphs 7.57-7.59 of the Final Report) to specify that the argument we address there has been made by Turkey. For consistency, we have also expressly mentioned the European Union's response in a footnote (footnote 107 of the Final Report); this response was also reflected in our disposition of this argument in paragraph 7.57 (paragraph 7.59 of the Final Report) ("to better match traditional trade flows").

2.5. Second, Turkey asks us to identify in paragraph 7.38 its argument that the fact that the European Union excluded developing country Members with *de minimis* exports at the level of each product category also demonstrated that the European Union applied distinct safeguards on the

[1] Turkey's request for interim review, paras. 1-3.
[2] European Union's comments on Turkey's request for interim review, para. 2. Section 2.2 corresponds to paragraphs 25-58 of the European Union's first written submission.
[3] Turkey's request for interim review, para. 4.

various product categories. We note that this argument was reflected in paragraph 7.57 (paragraph 7.59 of the Final Report) in almost the same terms as requested by Turkey, and we therefore make no change to our report.

2.6. Third, Turkey asks us to identify in paragraph 7.38 its argument that the fact that the European Commission (also) assessed the increase in imports at the level of product categories supports the view that the European Union applied a distinct safeguard on each product category. In full, Turkey's argument was in fact that this, and the resulting exclusion of certain product categories from the application of measures, supported the view that there were distinct safeguards on the various product categories.[4] This argument and the European Union's response were partly reflected in paragraph 7.40, with the underlying facts set out in paragraphs 7.48-7.50(a).[5] In light of Turkey's comment, we have added a new paragraph (7.58) to clarify our view regarding this argument.

2.3 Paragraph 7.38, footnote 63 (footnote 65 of the Final Report)

2.7. Turkey asks us to include a reference to paragraphs 42-48 of its first written submission, bearing Turkey's description of the facts.[6] We have included this reference. In light of this request together with Turkey's request concerning paragraph 7.12 of the Interim Report, we have also included in the same footnote a fuller reference to Turkey's second written submission.

2.4 Paragraph 7.44

2.8. Turkey asks that we clarify the basis for our finding, at paragraph 7.44, that the notice of initiation "specified that there was sufficient evidence to initiate the investigation both for the product concerned as a whole and for some or all product categories". Turkey notes that the notice does not use the terms "product concerned as a whole".[7]

2.9. The European Union objects to Turkey's comment, and points out that "[t]he Panel is not quoting the notice of initiation … otherwise it would have put inverted commas". Instead, the European Union notes, the Panel is using its own words for "the distinction made by the EU between the product concerned (all categories together) and individual product categories". The European Union recalls its answer to Panel question No. 3, noting that the notice of initiation and the amended notice of initiation provided data on the increase in imports for the product concerned as a whole.[8]

2.10. We note that in footnote 67 to paragraph 7.44 of our Interim Report (footnote 74 of the Final Report) we specified that our finding was based on the "notice of initiation, p. 29 [of the relevant issue of the Official Journal of the European Union] and annex". As explained at paragraph 7.44 of our Interim Report, the notice described the "products" subject to the investigation as "certain steel products (the 'products concerned') … listed in Annex I", and "used interchangeably the phrases 'products' and 'product categories'". As also explicitly explained in our Interim Report, the European Commission used the two phrases interchangeably not just in the notice of initiation but more broadly during the investigation, and for the reasons set out in our report "we do not consider that that the use of either of these phrases decides the outcome of Turkey's claims".[9] With this background in mind, we note that the page of the notice we cited describes evidence for the "products concerned" taken collectively (e.g. "total imports of the products concerned increased from 17,8 million tonnes to 29,3 million tonnes in the period 2013-2017"), as well as evidence at the level of product categories (or "products"). From

[4] Turkey's first written submission, para. 57; second written submission, paras. 32 and 44-45; and opening statement at the first meeting of the Panel, para. 12.

[5] In addition, at paras. 7.60, 7.62, and 7.66, and section 7.2.2.2 of the Interim Report, we explained why we did not consider that the choice not to apply the safeguard to certain product categories gave rise to the inconsistencies claimed by Turkey.

[6] Turkey's request for interim review, para. 5.

[7] Turkey's request for interim review, para. 6.

[8] European Union's comments on Turkey's request for interim review, para. 3.

[9] Paras. 7.37 and 7.53 of the Interim Report.

that, on the following page, the notice concludes that "there is sufficient evidence to justify the initiation of an investigation".[10]

2.11. We therefore do not consider that an addition or change to our report is warranted.

2.5 Paragraph 7.45

2.12. Both parties make several requests for changes to paragraph 7.45.

2.13. The European Union asks us to reflect, in our findings of fact, certain contents of two notes to the file prepared by the European Commission and made available to the parties shortly after issuing the notice of initiation and its amendment, respectively.[11] Turkey objects to this request, noting that the addition does not relate to the questionnaires, which are the subject of this paragraph.[12]

2.14. We note that the approach taken in these two notes to the file is akin to that taken by the European Commission in the record documents we had described in our Interim Report, and we had chosen not to reflect these two additional documents, which make no difference to our analysis. Nonetheless, in light of the European Union's request, we have now reflected these two notes to the file in footnote 68 (footnote 75 of the Final Report), although with wording different from that requested by the European Union.

2.15. The European Union also asks us to reflect, in our findings of fact, that the cover letter accompanying the questionnaire for domestic producers "referred to 'global data'".[13] Turkey considers that the language proposed by the European Union is not accurate and suggests alternative language.[14]

2.16. We have reflected the point requested by the European Union in new footnote 78 with language reflecting more closely the cover letter at issue rather than the text proposed by either the European Union or Turkey.

2.17. Turkey asks us to modify the description of the facts in paragraph 7.45 in three ways.[15]

2.18. At paragraph 7.45 we find that the European Union's questionnaires required respondents to "provide certain data 'separately for each of the products concerned'". First, Turkey asks us to modify "certain data" to read "the relevant data regarding import volume and injury factors". The European Union comments that the notice of initiation provided *figures* on the evolution of imports only for the product as a whole, and that the cover letter accompanying the questionnaire for domestic producers referred to "global data".[16] We have added a footnote to this paragraph listing the items on which the questionnaires requested data by product category.

2.19. Second, Turkey asks us to add that "[i]nterested parties thus provided their comments on the criteria for the imposition of safeguard measures for each of the products concerned separately", and to cite in support of this statement the European Commission's questionnaires. We have added a new footnote 77 indicating that Turkey has submitted to us a questionnaire response showing that a responding domestic producer provided data on injury factors at the level of product categories.

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[10] As we also explained, the notice indicated that "[t]he investigation [would] examine the situation of the products concerned, including the situation of each of the product categories individually". (Interim Report, para. 7.44 (referring to Notice of initiation, (Exhibit TUR-1), p. 29)).

[11] European Union's request for interim review, p. 1 (referring to Note to the file (11 April 2018), (Exhibit TUR-18); and Updated note to the file (2 July 2018), (Exhibit TUR-19)).

[12] Turkey's comments on European Union's request for interim review, para. 1.

[13] European Union's request for interim review, p. 1 (referring to Cover letter (11 April 2018), (Exhibit EU-10)). The European Union asks us to cite the phrase "global data", which is taken from the following sentence: "[i]n order [*sic*] assist the Commission in establishing global data relating to the Union steel industry, you are requested to provide the information requested in the questionnaire". (Cover letter (11 April 2018), (Exhibit EU-10), p. 1).

[14] Turkey's comments on European Union's request for interim review, para. 1.

[15] Turkey's request for interim review, para. 7.

[16] European Union's comments on Turkey's request for interim review, para. 4.

2.20. Third, Turkey asks that we add the following language:

> Turkey noted that in its previous safeguard investigation on imports of certain steel products in 2002, the European Union analysed the criteria for the imposition of a safeguard measure for each product category separately (Turkey's second written submission, para. 27; Commission Regulation (EC) No 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 261, 28 September 2002, pp 1-123, Exhibit TUR-39).

2.21. The European Union responds that the "2002 investigation is … irrelevant in the present proceedings".[17]

2.22. Turkey's argument was that "[t]he understanding that there were 26/28 products concerned was further informed by the European Union's previous safeguard investigation on imports of certain steel products in 2002, where the European Commission correctly analysed the criteria for the imposition of a safeguard measure for each product category separately".[18] We do not see what this reference to the approach taken by the European Union in a separate domestic proceeding establishes regarding the consistency with WTO rules of the measure before us. Starting at paragraph 7.43 of the Interim Report, we review the notice of initiation, its amendment, the questionnaires, and the published determinations in the proceedings that led to the measure before us, in order to assess the parties' arguments on the consistency of that measure with WTO rules. In that context, the approach to product scope taken by the European Union in a separate investigation is irrelevant. We therefore decline to make the suggested addition.

2.6 Paragraph 7.49

2.23. The European Union asks us to refer to a "group of product categories" rather than a "collection of product categories".[19] We see this change as of no substance but we have no objections to making it, and we have therefore edited the paragraph accordingly.

2.7 Paragraph 7.51

2.24. Turkey asks us not to refer to the elements enumerated at paragraph 7.51 as the "form" that the safeguard takes.[20] We have edited that paragraph accordingly.

2.8 Paragraph 7.53

2.25. At paragraph 7.53 of our Interim Report, we explained that an authority is not barred from choosing to investigate and apply a safeguard on a range of products, taken together, and that as a result, the mere fact that domestic determinations or other record documents might refer to "products" or "product categories" is not dispositive of the question whether there was one or multiple safeguards.

2.26. Turkey appears to think that we have misunderstood its argument, which, Turkey reiterates, was that the European Commission repeatedly referred to "product**s**" in the plural.[21] That was precisely the argument that we addressed in paragraph 7.53, as reflected by our explanation that Article XIX and the Agreement on Safeguards do not bar an authority from investigating and applying measures on a range of product**s** taken together. Nonetheless, for greater clarity, we have made some limited adjustments to the wording of paragraph 7.53.

2.27. Turkey also asks us to reflect its argument that the references in the provisional and definitive determinations to safeguard "measures", in the plural, further supports the conclusion that the European Commission was imposing multiple safeguards.[22] It is not unusual to describe a single

[17] European Union's comments on Turkey's request for interim review, para. 4.
[18] Turkey's second written submission, para. 21. See also ibid. para. 27.
[19] European Union's request for interim review, p. 1.
[20] Turkey's request for interim review, para. 8.
[21] Turkey's request for interim review, para. 9.
[22] Turkey's request for interim review, para. 9; first written submission, para. 58.

safeguard as "safeguard measures", and Turkey's argument elevates form over substance.[23] In assessing Turkey's contention that there were 26 distinct safeguards, we have reviewed the approach taken by the European Commission throughout the investigation and adoption of the challenged measures, and it is on that basis that we have made our assessment. The use of the wording "safeguard measures", in record documents that document the conduct of a single investigation into a group of products taken together and the adoption of a system of tariff-rate quotas based on historical trade by product categories and a single out-of-quota tariff, is immaterial. Nonetheless, given Turkey's request, we have added a footnote to paragraph 7.53 reflecting this point (footnote 98 of the Final Report).

2.9 Paragraph 7.56

2.28. First, Turkey asks that we specify which data the European Commission collected for all product categories taken together.

2.29. The European Union observes that sections C, D, E.11, E.12, and F of the questionnaire for domestic producers (Exhibit TUR-15) "address general/global data, i.e. not related to product categories", and adds that "the objective of collecting data individually for product categories had the purpose of being able to properly consolidate it to reach findings at the level of the product concerned (i.e. all product categories together)".[24] The European Union also refers to the language of the cover letter accompanying the questionnaire for domestic producers, which indicated that the purpose of the questionnaire was to "assist the Commission in establishing global data relating to the Union steel industry".[25]

2.30. We have modified the footnote to this paragraph in response to Turkey's request for review.

2.31. Second, Turkey asks us to add, at paragraph 7.56 or in a separate paragraph, that the European Commission excluded from the scope of the definitive safeguard the product categories for which it had found no increase in imports between 2013 and June 2018.[26]

2.32. The European Union comments that this addition is not necessary because the point is already discussed at paragraph 7.68 (paragraph 7.70 of the Final Report).[27]

2.33. As the particular fact that Turkey is asking us to reference in paragraph 7.56 has been included in paragraphs 7.49 and 7.50(a) of our Interim Report, we decline Turkey's request.

2.10 Paragraph 7.67 (paragraph 7.69 of the Final Report)

2.34. Turkey takes issue with the followings statement[28], at the end of paragraph 7.67 (paragraph 7.69 of the Final Report), and asks us to delete it:

> As for the claims under Article XIX:1(a) and Articles 2.1, 4.1(c), and 4.2(b), Turkey has not explained in which way its arguments on "consistency" differ from its arguments on the alleged mismatch between the products subject to measures and the investigated products. We have examined and rejected the latter in the previous section, and therefore, in this section, we do not further consider the claims under Article XIX:1(a) and Articles 2.1, 4.1(c), and 4.2(b).

[23] We note for example that the definitive safeguard is entitled "Commission implementing regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measure**s** against imports of certain steel product**s**" (emphasis added), and yet its section 2.1, entitled "A single group definition", responds to comments according to which there were several "products" concerned and explains that "the reference to 'products concerned' should be understood as the product categories examined together as part of a single product concerned". (Definitive determination, (Exhibit TUR-5), title and section 2.1).

[24] European Union's comments on Turkey's request for interim review, para. 5.

[25] European Union's comments on Turkey's request for interim review, para. 5 (referring to ibid. para. 4, in turn referring to Cover letter (11 April 2018), (Exhibit EU-10)).

[26] Turkey's request for interim review, para. 10.

[27] European Union's comments on Turkey's request for interim review, para. 5.

[28] Turkey's request for interim review, para. 11.

2.35. In its review request, Turkey explains to us how its mismatch argument, *in general* (i.e. without reference to each of Turkey's particular claims), differs from its consistency argument, *in general*. We have understood this distinction and have explained it at paragraphs 7.36, 7.38, and 7.67 (7.69 of the Final Report).

2.36. The point we make at the end of paragraph 7.67 (7.69 of the Final Report) is that *with respect of four of the seven claims that Turkey wishes to support with this argument*, Turkey has given no explanation as to how the consistency argument supports these claims in a manner different from the mismatch argument, which we have rejected.

2.37. Turkey makes a blanket argument in support of seven claims. For three of these claims (Articles 3.1, 4.2(a), and 4.2(c)) it provides some – limited – articulation of why it considers that the alleged lack of consistency leads to the claimed violations. For the other four claims, nothing is offered, and the ultimate premise of the claims is that the European Commission set out to investigate 26 products separately[29] and that it was not acceptable for the European Commission to investigate certain conditions at the level of product categories or families in addition to the examination for all product categories taken together.[30] This is the same premise that we have rejected in examining the mismatch argument.

2.38. We therefore decline Turkey's request to delete the last two sentences of paragraph 7.67 (paragraph 7.69 of the Final Report).

2.11 Paragraph 7.69 (paragraph 7.71 of the Final Report)

2.39. At paragraph 7.69 (paragraph 7.71 of the Final Report), we describe how we consider that "in essence", Turkey's contention that the European Commission acted inconsistently with Articles 3.1, 4.2(a), and 4.2(c) "differs from" its mismatch argument. Turkey asks that we add six lines to our description of that "essence" in order "to more accurately reflect its arguments".[31] The requested six additional lines would indicate in particular that the European Commission set out to investigate 28 products separately, and that it should have therefore investigated the conditions for imposing a safeguard for the 28 products separately.

2.40. We do not consider that the suggested addition of six lines helps better capture "the essence" of the difference between the consistency argument and the mismatch argument. Further, the points that Turkey asks us to add are already reflected in our report. We therefore decline Turkey's request.

2.12 Paragraph 7.71 (paragraph 7.73 of the Final Report)

2.41. The European Union asks us to add, at the end of paragraph 7.71 of our Interim Report (paragraph 7.73 of the Final Report), that not excluding product categories that do not meet a particular condition would lead to more restrictive measures.[32] Turkey objects to the European Union's request.[33]

2.42. This observation is not necessary for our disposition of the matter and we therefore decline to add it.

2.13 Paragraph 7.72 (paragraphs 7.74 and 7.75 of the Final Report)

2.43. Both parties request us to review elements of this paragraph.

2.44. We begin with the European Union's review request. At paragraph 7.72 (paragraphs 7.74 and 7.75 of the Final Report), we observe that "that the European Commission … explained its approach to the product under investigation in some detail". The European Union asks us to delete the

[29] See e.g. Turkey's first written submission, paras. 70 and 73.
[30] See e.g. Turkey's first written submission, paras. 71-72 and 74.
[31] Turkey's request for interim review, para. 12.
[32] European Union's request for interim review, pp. 1-2.
[33] Turkey's comments on European Union's request for interim review, para. 2.

adjective "some".[34] The current text accurately describes our appreciation of the facts and we decline to change it.

2.45. Turning to Turkey's review request, we recall that among the claims that Turkey brings on the basis of its consistency argument are claims under Articles 3.1 and 4.2(c) of the Agreement on Safeguards, which require the authority to publish "reasoned conclusions" and a "detailed analysis", respectively. Therefore, before reaching our ultimate conclusion on this group of claims – which, based on our analysis up to then, would have been a rejection of the claims[35] – we also examined whether the European Commission had failed to provide an explanation for its approach to the product scope. We observed that that was not the case. Turkey asks us to reflect that, in answer to a question from us, it had indicated that it did not agree with *the merits* of one element[36] of the explanation provided by the European Union.

2.46. We have added a new footnote 133 reflecting that answer provided by Turkey.

2.47. In light of that addition, we consider it important to make it clear that Turkey's consistency argument was not based on the merits of the reasoning provided by the European Union when explaining why it considered it appropriate to investigate the various product categories taken together.[37] When we asked Turkey for its views on this reasoning, Turkey answered that it had not expressed a view on it because: "*these findings are irrelevant in the context of Turkey's claims*".[38] Turkey added that "in any event", it did not agree that there were an important interrelation and strong competition between product categories[39], i.e. it did not agree with the merits of the European Commission's reasoning. Thus, Turkey disagreed with the merits of the reasoning of the European Commission but that was not the basis on which Turkey was arguing that the definitive safeguard was inconsistent with the Agreement on Safeguards.

2.48. For clarity, we have also separated paragraph 7.72 into two paragraphs (new paragraphs 7.74 and 7.75), and we have inverted the order of two sentences in the new paragraph 7.75 to reflect the order of our analysis.

3 REQUESTS CONCERNING SECTION 7.3 (UNFORESEEN DEVELOPMENTS)

3.1 Paragraph 7.73 (paragraph 7.76 of the Final Report)

3.1. In this paragraph, we give a brief statement of the various arguments that Turkey makes on unforeseen developments. The purpose of this statement is to introduce the subsequent discussion. We then describe Turkey's arguments in more detail in the remainder of the section.

3.2. In this brief statement, we identified Turkey's first group of arguments as being that "the European Commission did not identify unforeseen developments". Turkey suggests that we change this to "the European [*sic*] failed to identify the events which constituted the 'unforeseen developments' and their timing".[40] We note, first, that our short statement of the argument is not inaccurate and, second, that at paragraph 7.85 we spell out the points that Turkey would like us to add at paragraph 7.73 (paragraph 7.76 of the Final Report). We therefore decline to make the requested change.

3.3. Turkey makes the same request for heading 7.3.2.1, and for the same reasons we decline to make the requested change to that heading.

[34] European Union's request for interim review, p. 2.
[35] Interim Report, para. 7.67 (for Article XIX:1(a) and Articles 2.1, 4.1(c), and 4.2(b)) and paras. 7.70-7.71 (for Articles 3.1, 4.2(a), and 4.2(c)).
[36] This is the element reflected in the following language of para. 7.72 of the Interim Report: "the European Commission explained why it considered it appropriate to examine the product categories concerned taken together". The merits of that explanation are reflected at paras. 7.46-7.47 of the Interim Report.
[37] Turkey mentions the reasoning at issue but does not argue that it gives rise to the "consistency" violations. (See in particular Turkey's first written submission, paras. 47, 71, and 73-75).
[38] Turkey's response to Panel question No. 8, para. 27. (emphasis added)
[39] Turkey's response to Panel question No. 8, para. 28.
[40] Turkey's request for interim review, para. 14.

3.2 Paragraph 7.91 (paragraph 7.94 of the Final Report)

3.4. The European Union requested that we add that its determinations indicated that the increase of trade restrictive measures not only took place "since 2014/2015" (as indicated in the Interim Report) but continued "throughout 2017".[41] We are making the requested adjustment but as a result, we must now address trade defence measures in a separate sentence, to which we have moved material that was previously in footnote 158 (footnote 174 of the Final Report).

3.3 Paragraph 7.94 (paragraph 7.97 of the Final Report)

3.5. In this paragraph, we wrote:

> Turkey submits that steel overcapacity existed for decades and predated the Uruguay Round, and therefore was not unforeseen.

3.6. Turkey asks us to replace this with the following language:

> Turkey submits that steel overcapacity existed for decades and predated the Uruguay Round. Turkey thus submits that periods of global overcapacity in commodities cannot be characterised as an unexpected development that was unforeseen by the European Union during the Uruguay Round.[42]

3.7. We note that the substance of the two formulations is almost identical, with the formulation proposed by Turkey being longer. The difference is the explicit reference to "*periods of* overcapacity", which however is implicit in the statement that "overcapacity existed for decades". We therefore do not consider that the change would be helpful in the body of the text, but we have included the additional text in footnote 160 of the Interim Report (footnote 175 of the Final Report).

3.4 Paragraph 7.96 (paragraph 7.99 of the Final Report)

3.8. Turkey has asked us to add the following at paragraph 7.96 of the Interim Report (paragraph 7.99 of the Final Report):

> According to Turkey, the European Commission's findings and explanations that "[post-2011] it was expected that total crude steel capacity would decrease or at least remain stable", do not constitute such a reasonable and detailed explanation, as this statement is provided without evidence.[43]

3.9. The European Union has expressly stated that it does not object to this addition, provided that it does not go beyond the content of Turkey's submission[44] (which it does not).

3.10. We have made the requested addition.

3.5 Paragraph 7.98 (paragraph 7.101 of the Final Report)

3.11. Turkey makes two requests for review of paragraph 7.98 (paragraph 7.101 of the Final Report).

3.12. First, Turkey asks that we add certain language to a sentence of that paragraph, as follows:

> Turkey relies on the fact that overcapacity in the steel sector has existed for a long time and, on that basis, submits that periods of global overcapacity in commodities cannot be characterised as an unexpected development that was unforeseen by the European Union during the Uruguay Round.[45]

[41] European Union's request for interim review, p. 2.
[42] Turkey's request for interim review, para. 15.
[43] Turkey's request for interim review, para. 16.
[44] European Union's comments on Turkey's request for interim review, para. 6.
[45] Turkey's request for interim review, para. 17. The requested addition is underlined.

3.13. The European Union has expressly stated that it does not object to the proposed addition but notes that the point is reflected elsewhere in the report.[46]

3.14. We have included this language in full in a footnote to paragraph 7.94 (paragraph 7.97 of the Final Report).[47] In paragraph 7.98 (paragraph 7.101 of the Final Report), whose focus is our assessment of the published determinations, we have made a shorter addition ("and argues that therefore periods of overcapacity were not unforeseen when concluding the Uruguay Round").

3.15. Second, Turkey asks us to review the sentence stating that "Turkey has not directly contested the European Commission's assertions that overcapacity had continued to increase, with capacity having more than doubled since 2000, and that it was contrary to economic logic for it to continue to increase".[48] Turkey notes that it has contested the European Commission's reasoning relating to the relevance of the decrease in overcapacity in 2009-2011.[49]

3.16. The European Union objects that Turkey's review request essentially "substitutes Turkey's own views for the Panel finding over the continued increase in overcapacity … and … is not borne out by the record" because Turkey merely stated that steel overcapacity had "reverted to its previous, predictable upward trend after the 2009-2011 corrective period".[50]

3.17. At paragraph 7.98 (paragraph 7.101 of the Final Report), we find that in its published determinations, the European Commission did not assert that overcapacity *per se* was unexpected. Instead, the European Commission explained that what was unexpected was that "overcapacity would continue to increase, reaching 'unprecedented' levels, contrary to economic logic and efforts to contain the increase".[51] Turkey did not contest that overcapacity had greatly increased, more than doubling since 2000, and thus reaching unprecedented levels.[52] Turkey did not contest that the increase took place despite measures taken to contain it.[53] Turkey also did not contest that overcapacity was already excessive in 2011 and that not increasing capacity further would "improve capacity utilization and cost efficiency".[54] As reflected in paragraph 7.96 of our Interim Report (paragraph 7.99 of the Final Report), Turkey took issue with the significance of overcapacity decreasing from 2009 to 2011 before increasing again after 2011. Turkey noted that the financial crisis had caused a steep decline in production and consumption from 2007 to 2009, leading to a rapid increase in overcapacity, and as production and consumption recovered in 2009-2011, there had been a dip in overcapacity. Turkey therefore argued that by increasing again after 2011, overcapacity was merely resuming its previous upward trend.[55] We do not view this as "directly contest[ing]" that the continued increase in overcapacity was contrary to economic logic. However, in light of Turkey's review request, we have revised paragraph 7.98 (paragraph 7.101 of the Final Report) for greater clarity.

3.6 Paragraph 7.101 (paragraph 7.104 of the Final Report)

3.18. Turkey asks that we make certain additions to paragraph 7.101 (paragraph 7.104 of the Final Report), shown as underlined text below.[56] We have marked the requested additions with "i" to "iv" for ease of reference.

> Turkey responds to the European Union that the data it has provided are intended to show that the use of trade defence measures [i] in general, and for the "steel-related" sector, "follows cycles of varying intensity" and has done so both before and after the

[46] European Union's comments on Turkey's request for interim review, para. 7.
[47] See para. 3.7 above.
[48] Emphasis added.
[49] Turkey's request for interim review, para. 18 (referring to Turkey's first written submission, paras. 95-96; second written submission, paras. 66-67; and response to Panel question No. 9).
[50] European Union's comments on Turkey's request for interim review, paras. 8-9.
[51] Interim Report, para. 7.98 (referring to Provisional determination, (Exhibit TUR-3), recital 31; and Definitive determination, (Exhibit TUR-5), recitals 49 and 52).
[52] Provisional determination, (Exhibit TUR-3), recital 31.
[53] Provisional determination, (Exhibit TUR-3), recital 31; Definitive determination, (Exhibit TUR-5), recital 49.
[54] Definitive determination, (Exhibit TUR-5), recital 52.
[55] Interim Report, para. 7.96; Turkey's first written submission, paras. 95-96; second written submission, paras. 66-67; and request for interim review, para. 18.
[56] Turkey's request for interim review, para. 19.

Uruguay Round.[173] [ii] Turkey explains that this is confirmed by the data it submitted in Figure 4 which demonstrate that the number of anti-dumping initiations rose sharply several times after the Uruguay Round.*1 [iii] Those data also demonstrate that there has been a decrease in the number of anti-dumping investigations initiated in 2014 and again in 2017 and thus that there has been no "steady" increase between 2011 and 2016 as asserted by the European Commission.*2 [iv] Turkey also argues that European Commission's analysis fails to address the substantial decrease in the number of anti-dumping and countervailing initiations in 2017 and fails to explain how a "slight increase" in the number of trade defence initiations, when comparing the number of initiations in 2017-2018 with the number in 2011-2013, amounts to an "unforeseen development".*3

[173] Turkey's second written submission, paras. 68-75. Turkey also reiterates its earlier arguments and notes that reliance by the European Union on an OECD presentation is an ex post explanation. (Ibid. para. 75).

*1 Turkey's second written submission, para. 69.

*2 Turkey's second written submission, para. 70.

*3 Turkey's second written submission, para. 71.

3.19. The European Union has indicated that it does not object but that if we make the requested additions, we should then also refer to the corresponding EU arguments set out in paragraphs 95-96 of the European Union's first written submission.[57]

3.20. We have made addition "i" ("in general, and for the 'steel-related' sector").

3.21. Addition "ii" would read: "Turkey explains that this [i.e. that the use of trade defence measures follows cycles of varying intensity] is confirmed by the data it submitted in Figure 4 [of the first written submission] which demonstrate that the number of anti-dumping initiations rose sharply several times after the Uruguay Round". We note that this point is already reflected in paragraph 7.99 (paragraph 7.102 of the Final Report), where, with reference to the first written submission, we explained that Turkey had argued that data on the use of anti-dumping measures since 1995 "also show that there are periodic peaks in the number of anti-dumping investigations, both generally and for 'base metals and articles'".[58] To reflect the fact that the second written submission repeats certain arguments made in the first written submission, such as this one, we also specified in a footnote to paragraph 7.101 of the Interim Report (paragraph 7.104 of the Final Report) that "Turkey also reiterates its earlier arguments".[59] We therefore do not consider that addition "ii" is necessary.

3.22. Addition "iii" would read: "[t]hose data also demonstrate that there has been a decrease in the number of anti-dumping investigations initiated in 2014 and again in 2017 and thus that there has been no 'steady' increase between 2011 and 2016 as asserted by the European Commission". This refers to a point first made in Turkey's first written submission in the context of its arguments to the effect that the increase in trade defence measures was not unforeseen. Specifically, Turkey noted that in comparing the number of initiations in 2015-2016 to the number of initiations in 2011-2013, the European Commission had not mentioned the fact that the number of anti-dumping initiations had decreased in 2014 as compared to 2013, and had also decreased in 2017-2018 as compared to 2015-2016, so that the number initiations in 2017-2018 was only slightly higher than in 2011-2013.[60] We note that Turkey did not contest that from 2015 to 2016 there had been an average of 117 steel-related anti-dumping initiations per year whereas there had been, on average, 77 initiations per year from 2011 to 2013.

[57] European Union's comments on Turkey's request for interim review, para. 10.

[58] Figure 4 of the first written submission, which addition "ii" refers to, relates to base metals and articles.

[59] Interim Report, fn 173.

[60] Turkey's first written submission, para. 105; second written submission, paras. 70-71; and request for interim review, para. 19.

3.23. To this, the European Union responded that the slight decrease of anti-dumping initiations in 2014 as compared to 2013 was immaterial because the number of anti-dumping initiations had increased again in 2015 and the slight decrease in anti-dumping initiations in 2014 had been compensated by an increase in countervailing initiations the same year.[61] Regarding the decrease in the number of initiations in 2017-2018, the European Union responded that it did not call into question the unforeseen nature "of the overall significant increase of the use of trade defence instruments"; the European Union added that even in 2017-2018, the number of anti-dumping and countervailing duty initiations was still slightly higher than in 2011-2013.[62]

3.24. We have found that the European Commission "did not assert that any uptick in trade defence measures would constitute an unforeseen development", and that instead:

> [T]he published determinations place the increase in trade defence measures in the broader context of increased overcapacity and the US Section 232 measures, and cite an increase in steel-related investigations from 77 in 2011-2013 to 117 in 2015-2016 and the fact that the United States had, in February 2018, 169 anti-dumping and countervailing (AD/CV) orders in place on steel and 25 ongoing investigations.[63]

3.25. Thus, the basis for the European Commission's determination was not whether anti-dumping initiations for base metals and articles were slightly higher or slightly lower in an individual year, but the situation of an overall increase in trade defence and other restrictive measures on steel, in the broader context of increased overcapacity and the US Section 232 measures. The fact that the peak of initiations of anti-dumping investigations of base metals and articles took place in 2015-2016 does not call into question the European Commission's assessment that there was an overall increase in trade defence and trade restrictive measures on steel, in the broader context of overcapacity and US Section 232 measures, that was unforeseen at the time of concluding the Uruguay Round.

3.26. In light of Turkey's comment, we have included an explicit description and discussion of the relevant arguments, as new paragraphs 7.105 and 7.111. Following the same logic, we have also explicitly discussed the parties' exchange regarding the number of anti-dumping orders in place on steel in the United States, at new paragraphs 7.106 and 7.111, respectively. As a result, we have also made certain other additions, for clarity, to paragraphs 7.99-7.103 of the Interim Report (paragraphs 7.102-7.112 of the Final Report).

3.27. Addition "iv" would read: "Turkey also argues that European Commission's analysis fails to address the substantial decrease in the number of anti-dumping and countervailing initiations in 2017 and fails to explain how a 'slight increase' in the number of trade defence initiations, when comparing the number of initiations in 2017-2018 with the number in 2011-2013, amounts to an 'unforeseen development'". We have already discussed this point as part of addition "iii" and we make no further addition.

3.7 Paragraph 7.103 (paragraph 7.108 of the Final Report)

3.28. In paragraph 7.103 of the Interim Report (paragraph 7.108 of the Final Report) we consider Turkey's argument that an increase in trade defence measures cannot be unforeseen because the use of trade defence measures follows cycles. In that context, we point out that the European Commission "did not assert that any uptick in trade defence measures would constitute an unforeseen development". Turkey asks that we add the following text to that paragraph:

> Turkey submitted that the data demonstrates that the number of anti-dumping initiations with regard to "base metals and articles" rose *sharply* several times after the Uruguay Round and this confirms that the use of trade defence instruments follows cycles or varying intensity. Turkey further noted that the European Commission's statement that recourse to trade defence instruments has steadily increased based on an average of 77 in 2011-2013 to 117 in 2015-2016 is misleading. When the data are examined in context, they demonstrate that there has been a decrease in the number of anti-dumping investigations initiated in 2014 and again in 2017, thereby showing that there has been no "steady" increase between 2011

[61] European Union's first written submission, para. 95.
[62] European Union's first written submission, para. 96.
[63] Interim Report, para. 7.103.

> and 2016. Finally, Turkey submitted that the European Commission's analysis fails to address the substantial decrease in the number of anti-dumping and countervailing initiations in 2017, noting that the European Union itself noted that the number of anti-dumping and countervailing initiations in 2017-2018 are only "slightly higher" than in the period 2011-2013.[*1]

[*1] Turkey's second written submission, paras. 69-71.[64]

3.29. These points are reflected at new paragraphs 7.105-7.106 and 7.110.

3.8 Paragraph 7.114 (paragraph 7.123 of the Final Report)

3.30. Turkey asks that we add in paragraph 7.114 (paragraph 7.123 of the Final Report) that Turkey argued that the European Union's references to record evidence were biased, because the European Union did not refer to the 22nd Global Trade Alert Report, which stated that the trade effects of overcapacity were systemically unimportant.[65]

3.31. The European Union indicates that it does not object but that if we make this addition, we should also refer to its response provided in answer to our question No. 9.[66]

3.32. We have accordingly reflected both parties' positions.[67]

3.9 Paragraph 7.130 (paragraph 7.139 of the Final Report), footnote 238 (footnote 269 of the Final Report)

3.33. Turkey requests additional references to its relevant submissions, namely answers and comments on answers.[68] We have added those references.

3.10 Paragraph 7.135 (paragraph 7.144 of the Final Report)

3.34. At paragraph 7.135 (paragraph 7.144 of the Final Report), we wrote that data on monthly imports into the United States and the European Union following the introduction of the Section 232 measures on steel "showed some negative correlation between trends in imports into the European Union and the United States, although not for all months". The European Union asks us to specify that "not for all months" means not in April 2018.[69]

3.35. April 2018 is the only month during which there was an increase in both US and EU imports. However, during the other months, the difference between the amount of the decreases in imports into the United States and the amount of the increases in imports into the European Union varied considerably.[70] As an alternative to the requested adjustment, we have therefore modified the sentence in question as follows:

> [T]he European Commission relied … on six months of data … that showed some negative correlations between trends in imports into the European Union and the United States~~, although not for all months~~.

3.11 Sections 7.3.2.3.2 and 7.3.2.3.3

3.36. Turkey argued on a number of grounds that the European Commission had not established that the increase in imports occurred "as a result of" unforeseen developments. Based on some of

[64] Turkey's request for interim review, para. 20. (emphasis original)
[65] Turkey's request for interim review, para. 21 (referring to Turkey's second written submission, para. 85).
[66] European Union's comments on Turkey's request for interim review, para. 12 (referring to European Union's response to Panel question No. 9, paras. 26-36).
[67] We note that Turkey's reference to the statement in the 22nd Global Trade Alert Report that the trade effects of overcapacity are systemically unimportant was already reflected in the previous paragraph (7.113) of the Interim Report, as was a reference to the European Union's response to Panel question No. 9.
[68] Turkey's request for interim review, para. 22.
[69] European Union's request for interim review, p. 2.
[70] Definitive determination, (Exhibit TUR-5), tables 12 and 14.

those grounds, we found that Turkey had indeed established that the definitive safeguard was inconsistent with Article XIX:1(a) because the European Commission had not established that the unforeseen developments had resulted in the increase in imports. We then declined to examine certain further arguments of Turkey, i.e. that the unforeseen developments related to steel in general and therefore could not result in the increase in imports of the product concerned into the European Union, and that the US Section 232 measures had been introduced after the increase in imports had been observed and therefore could not have resulted in that increase.

3.37. Turkey asks us to reconsider our choice and examine all of its arguments, with a view to implementation as well as the possibility of an appeal.[71] Turkey points out that the two arguments that we chose not to decide upon had not been presented as conditional or alternative. Turkey argues that "the failure to address these two arguments in this case would fail to constitute an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[72] The European Union argues that the choice we made falls within our discretion.[73]

3.38. We recall that subject to certain conditions, panels are not required to examine every argument put before them. In particular, if a panel has already found in favour of the complainant under a particular claim based upon certain arguments, it is not required also to examine every other argument of the complainant under the same claim. We therefore decline to modify our decision as requested by Turkey.

4 REQUESTS CONCERNING SECTION 7.5 (INCREASE IN IMPORTS)

4.1 Paragraph 7.171 (paragraph 7.180 of the Final Report)

4.1. The European Union requests the Panel to revise paragraph 7.171 of the Interim Report (paragraph 7.180 of the Final Report) such that the reference to "between 2013 and 2016" is replaced with "between 2013 and 2017".[74] According to the European Union, the peak of imports for flat products and tubes occurred in 2017, not in 2016. Turkey requests the Panel to decline the European Union's request on the basis that paragraph 7.171 (paragraph 7.180 of the Final Report) correctly refers to 2016 as the relevant year.[75]

4.2. We have decided not to grant the European Union's request. The passage of the European Commission's determination cited in paragraph 7.171 of the Interim Report (paragraph 7.180 of the Final Report) refers explicitly to "the period 2013-2016" as when "the most significant increase took place" with respect to flat products and long products.[76] The main point for the European Commission was that subsequent decreases or decelerations in the import levels of these product families did not negate the fact that imports continued to be present at elevated levels (and, for long products, subsequently increased again in the MRP). The relevant sentence in paragraph 7.171 (paragraph 7.180 of the Final Report) accurately reflects this aspect of the European Commission's determination.

4.2 Paragraph 7.177 and 7.179 (paragraphs 7.186 and 7.188 of the Final Report)

4.3. Turkey requests the Panel to reflect, in paragraphs 7.177 and 7.179 of the Interim Report (paragraphs 7.186 and 7.188 of the Final Report), its argument that the bulk of the increase in imports took place at the beginning of the POI and subsequently decelerated, and that this kind of increase in imports could not lead to a situation of threat of serious injury.[77] The European Union requests the Panel to decline Turkey's request because Turkey simply seeks to substitute the Panel's finding with its own views.[78]

4.4. We have decided to grant Turkey's request by including an additional sentence in paragraph 7.179 (paragraph 7.188 of the Final Report) reflecting Turkey's argument that "the bulk

[71] Turkey's request for interim review, para. 26.
[72] Turkey's request for interim review, paras. 23-26.
[73] European Union's comments on Turkey's request for interim review, para. 13.
[74] European Union's request for interim review, p. 2.
[75] Turkey's comments on European Union's request for interim review, para. 3.
[76] Definitive determination, (Exhibit TUR-5), recital 36.
[77] Turkey's request for interim review, para. 28.
[78] European Union's comments on Turkey's request for interim review, para. 14.

of the increase in imports found by the European Commission took place at the beginning of the period of investigation and subsequently decelerated".[79] We note that this adjustment does not affect our reasoning or findings in section 7.5.2.2 of the Report.

5 REQUESTS CONCERNING SECTION 7.6 (THREAT OF SERIOUS INJURY)

5.1 Section 7.6 as a whole

5.1. Turkey requests the Panel to make findings under Article 4.2(a) of the Agreement on Safeguards in addition to Article 4.1(b) in section 7.6 of the Interim Report. Turkey argues that its claim was "based on Article 4.2(a) which must be read together with Article 4.1(b) which provides further details to the meaning of 'threat of serious injury' for the purposes of the determination to be made pursuant to Article 4.2(a)".[80] For Turkey, Article 4.1(b) is a definitional provision and thus "require[s] findings to be made under the other provisions, in particular under Article 4.2(a)".[81] The European Union requests the Panel to decline Turkey's request because the Panel has discretion to determine the claims it needs to address to resolve the dispute.[82]

5.2. We have decided not to grant Turkey's request. Turkey's request is based on an incorrect premise. Article 4.1(b) is not merely a definitional provision that is incapable of alone sustaining a finding of inconsistency under the Agreement on Safeguards. Rather, its plain text makes provision for how "threat" determinations are to be reached:

> "[T]hreat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility[.]

5.3. As Turkey notes, other provisions in the Agreement on Safeguards such as Article 4.2(a) likewise make provision for certain procedural or substantive aspects of "threat" determinations. However, the presence of such provisions does not render Article 4.1(b) incapable of alone sustaining a finding of inconsistency.

5.4. The aspects of Turkey's claim that we evaluate in section 7.6 fall squarely within the subject matter of Article 4.1(b). Indeed, in its first and second written submissions, Turkey framed its case on these aspects through the lens of Article 4.1(b).[83] We note that Turkey made other arguments that were more clearly connected to Article 4.2(a)[84], but we considered it unnecessary to consider those arguments to resolve the present dispute.[85] For the foregoing reasons, we have not modified section 7.6 in response to Turkey's request to reach findings under Article 4.2(a) regarding the European Commission's "threat" determination.

5.2 Paragraph 7.192 (paragraph 7.201 of the Final Report)

5.5. Turkey requests the Panel to include additional recitations of its arguments in paragraph 7.192 of the Interim Report (paragraph 7.201 of the Final Report).[86] Turkey states that these additions would "accurately reflect [its] arguments". The European Union requests that, if the Panel grants Turkey's request, it should likewise include elaborations of the corresponding arguments made by the European Union in paragraph 7.193 of the Interim Report (paragraph 7.202 of the Final Report).[87]

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[79] Turkey's request for interim review, para. 28.
[80] Turkey's request for interim review, para. 30.
[81] Turkey's request for interim review, para. 29.
[82] European Union's comments on Turkey's request for interim review, para. 15.
[83] Turkey's first written submission, paras. 230-231, 244-245, 248, and 251-253; second written submission, para. 187.
[84] Turkey's first written submission, paras. 249-250 and 254; second written submission, paras. 188-190.
[85] Interim Report, fns 315 and 424. See also ibid. para. 7.223.
[86] Turkey's request for interim review, para. 32.
[87] European Union's comments on Turkey's request for interim review, paras. 16-17.

5.6. We have decided not to grant Turkey's request. The two aspects of paragraph 7.192 (paragraph 7.201 of the Final Report) that Turkey proposes to delete and replace with other language are as follows (underlined): "Turkey claims that the European Commission failed to provide a reasoned and adequate explanation for its finding that the domestic industry was 'in a fragile and vulnerable position', given that the data indicate that the industry's performance had improved towards the end of the POI"; and "Turkey argues that the very fact of this improved performance precludes a 'threat of serious injury' determination". Turkey has not explained how these aspects do not accurately reflect its case, nor is this self-evident from the revisions proposed by Turkey. Given that section 7.6.2.1 provides only a brief overview of the parties' main arguments, we do not consider it appropriate or necessary to recite these arguments at length in this section.

5.3 Paragraph 7.196 (paragraph 7.205 of the Final Report)

5.7. Turkey requests the Panel to include additional recitations of its arguments in paragraph 7.196 of the Interim Report (paragraph 7.205 of the Final Report) "in order to accurately reflect Turkey's argument regarding the existence of serious injury that is clearly imminent".[88] The European Union requests that, if the Panel grants Turkey's request, it should likewise include elaborations of the corresponding arguments of the European Union in paragraph 7.196 of the Interim Report (paragraph 7.205 of the Final Report).[89]

5.8. We have decided not to grant Turkey's request. The aspect of paragraph 7.196 (paragraph 7.205 of the Final Report) that Turkey proposes to delete and replace with other language is as follows (underlined): "Turkey argues that the fact that the domestic industry improved towards the end of the POI demonstrates that serious injury was not 'clearly imminent', irrespective of the reasons underlying the improvement". Turkey has not explained how this aspect of paragraph 7.196 (paragraph 7.205 of the Final Report) does not accurately reflect its position, nor is this self-evident from the revisions proposed by Turkey. Section 7.6.2.1.1 addresses the general position advanced by Turkey that "improvements in the situation of the domestic industry towards the end of the investigation period should make a finding of threat of serious injury unlikely, regardless of the reasons therefor"[90], whereas the replacement language proposed by Turkey relates to the particular facts and circumstances of the European Commission's determination.[91]

5.4 Footnote 332 to paragraph 7.200 (footnote 365 to paragraph 7.209 of the Final Report)

5.9. Turkey requests the Panel to include certain additional citations to Turkey's submissions during the proceedings in the footnote appended to the sentence of paragraph 7.200 of the Interim Report (paragraph 7.209 of the Final Report) that states: "[t]he determination also sets out data indicating that the domestic industry improved its position relative to imports from 2016 to 2017 in terms of the respective rates at which it captured new demand and stemmed the loss of market share to imports".[92] The European Union did not comment on Turkey's request.

5.10. We have decided not to grant Turkey's request. Our review of the additional citations that Turkey requests be included in footnote 332 (footnote 365 of the Final Report) do not reveal why those additional citations would be useful or necessary in relation to the corresponding sentence in paragraph 7.200 (paragraph 7.209 of the Final Report). The proposed citations reference certain data but do not specifically link this data to the matters being addressed in paragraph 7.200 (paragraph 7.209 of the Final Report).

5.5 Paragraph 7.209 (paragraph 7.218 of the Final Report)

5.11. The European Union requests the addition of the following sentence to paragraph 7.209 of the Interim Report (paragraph 7.218 of the Final Report): "[t]he EU argues that the list of products with improved profitability (product categories 1, 2, 4, 7, 8, 9, 12, 13, 14, 15, 16, 26) overlaps significantly with the list of products covered by recent trade defence measures (product

[88] Turkey's request for interim review, para. 33.
[89] European Union's comments on Turkey's request for interim review, paras. 18-19.
[90] Turkey's response to Panel question No. 26, para. 13.
[91] Turkey's request for interim review, para. 33.
[92] Turkey's request for interim review, para. 34.

categories 1, 2, 4, 7, 9, 12, 13, 24)".[93] Turkey requests the Panel to decline the European Union's request because it relates to matters that are absent from the European Commission's determination.[94]

5.12. We have decided not to grant the European Union's request. Paragraph 7.209 (paragraph 7.218 of the Final Report) primarily recounts certain findings, observations, and inferences of the European Commission. By contrast, the European Union's proposed addition would introduce substantive reasoning that is not found in the European Commission's determination. Accepting the European Union's proposed addition would thus risk giving the impression that this substantive reasoning was somehow implicitly part of the European Commission's determination. As we observe in paragraph 7.208 of the Interim Report (paragraph 7.217 of the Final Report), "the [European Commission's] analysis does not provide any information about the product coverage of a given AD/CV measure, the proportion of a given category that was impacted by that measure, the point in time at which that measure was imposed, and the subsequent improvements in trends for that category".

5.6 Paragraph 7.210 (paragraph 7.219 of the Final Report)

5.13. The European Union requests the inclusion of a clarification that only one of the ten CN codes included in product category 6 was covered by the adoption of anti-dumping measures in 2016.[95] Turkey requests the Panel to decline the European Union's request on the basis that this point was not raised during the proceedings by either party.[96]

5.14. We have decided not to grant the European Union's request. We agree with Turkey that the European Union did not explicitly raise this point before its comments on the Interim Report. Rather, as we explain in footnote 360 the Interim Report (footnote 392 of the Final Report), Turkey provided a table setting out the AD/CV measures applied by the European Commission and "[i]n the absence of any objections by the European Union as to its accuracy, we are guided by the contents of that table in understanding which product categories were affected by these measures, and when". The European Union has now asserted, at the interim review stage, that a particular anti-dumping measure applied only partially to category 6 because it covered only one of the ten CN codes which comprise that category. However, this fact alone does not in and of itself warrant any further inference. Specifically, in the absence of any information on the volume of imports under product category 6 that were subject to the relevant anti-dumping measure, and given the late stage at which this issue is being raised, we do not consider that the change proposed by the European Union to paragraph 7.210 (paragraph 7.219 of the Final Report) is justified.

5.7 Footnotes 401, 402, and 403 to paragraph 7.224 (footnotes 433, 434, and 435 to paragraph 7.233 of the Final Report)

5.15. Turkey requests the Panel to include certain additional citations to Turkey's submissions during the proceedings in footnotes 401, 402, and 403 (footnotes 433, 434, and 435 of the Final Report) that are appended to a series of sentences in paragraph 7.224 of the Interim Report (paragraph 7.233 of the Final Report).[97] The European Union did not comment on Turkey's request.

5.16. We have decided not to grant Turkey's request. Paragraphs 249-250 of Turkey's first written submission, which Turkey seeks to be added to footnotes 401, 402, and 403 (footnotes 433, 434, and 435 of the Final Report), appear to contend that it is impermissible for "threat" determinations to consider future import increases (see also Turkey's first written submission, para. 301). This is not a matter dealt with in section 7.6.2.2. Rather, at footnote 411 (footnote 443 of the Final Report), we take note of Turkey's clarification that, in its view, "the competent authorities are permitted to, and actually should, consider the expected rate and amount of the increase in import levels as part of the threat and/or causation analysis".[98] In the absence of any substantiation for its review request

[93] European Union's request for interim review, p. 3.
[94] Turkey's comments on European Union's request for interim review, para. 4.
[95] European Union's request for interim review, p. 3.
[96] Turkey's comments on European Union's request for interim review, para. 5.
[97] Turkey's request for interim review, para. 35.
[98] Interim Report, fn 441 (quoting Turkey's response to Panel question No. 39, para. 64).

on this point, we see no basis for making Turkey's requested revisions to footnotes 401, 402, and 403 (footnotes 433, 434, and 435 of the Final Report).

6 REQUESTS CONCERNING SECTION 7.7 (CAUSATION)

6.1. Turkey requests the Panel to reconsider its decision to decline to address Turkey's causation-related claims.[99] Turkey contends that the Panel's findings of inconsistency in relation to the European Commission's "threat" determination do not provide a basis for declining to address Turkey's causation-related claims. This is because the European Commission could conceivably comply with the findings of inconsistency relating to the "threat" determination in a way which does not remedy the inconsistencies arising from the European Commission's "causation" determination.[100] Turkey also contends that findings on its causation-related claims are necessary to enable the Appellate Body to complete the analysis in the event that it overturned the Panel's findings of inconsistency relating to the "threat" determination.[101] The European Union requests the Panel to decline Turkey's request on the basis that panels enjoy discretion to make the findings necessary to resolve a dispute and to decline to address claims for which findings are unnecessary.[102]

6.2. We have decided not to grant Turkey's request. Having found that the European Commission did not properly establish a threat of serious injury, it would be illogical for us to continue and consider whether it demonstrated a causal link between a threat of serious injury not demonstrated to exist and increased imports.[103]

7 REQUESTS CONCERNING SECTION 7.8 (EXTENT NECESSARY TO PREVENT INJURY)

7.1 Paragraph 7.247 and footnote 449 (paragraph 7.256 and footnote 482 of the Final Report)

7.1. Turkey requests the Panel to amend the language of paragraph 7.247 and footnote 449 (paragraph 7.256 and footnote 482 of the Final Report) to reflect that (a) the focus of Turkey's argument was not on the European Union's assessment concerning a sudden, sharp, and significant increase in imports, but was instead on the European Commission's conclusion that there was a threat of serious injury that was based, among other things, on a further increase in imports during the first six months of 2018; and (b) Turkey did not mention in its submissions that the European Commission should have determined the applicable safeguard based on data from the period from January 2013 to June 2018, but only argued that the period used for this purpose should also have included data from the first six months of 2018.[104]

7.2. The European Union did not comment on Turkey's request.

7.3. We have modified the language of paragraph 7.247 and footnote 449 (paragraph 7.256 and footnote 482 of the Final Report) to account for Turkey's comments.

7.2 Paragraph 7.250 (paragraph 7.259 of the Final Report)

7.4. Turkey makes one explicit and one implicit request concerning this paragraph. First, Turkey requests the Panel to modify certain language in paragraph 7.250 (paragraph 7.259 of the Final Report) to reflect that Turkey did not mention in its submissions that the European Commission should have determined the applicable safeguard based on data from the period from January 2013 to June 2018, but only argued that the period used for this purpose should also have included data from the first six months of 2018.[105] Second, Turkey suggests that while the Panel found that Turkey did not explain why TRQs established based on a period that included the first six months of 2018 would be connected to a state of the domestic industry below which the industry will experience

[99] Turkey's request for interim review, paras. 37-38.
[100] Turkey's request for interim review, para. 37.
[101] Turkey's request for interim review, para. 38.
[102] European Union's comments on Turkey's request for interim review, para. 20.
[103] Panel Report, *Argentina – Preserved Peaches*, para. 7.135.
[104] Turkey's request for interim review, para. 39.
[105] Turkey's request for interim review, para. 40.

serious injury but TRQs based on the period used by the European Commission are not, Turkey did provide such explanation in paragraph 330 of its first written submission.[106]

7.5. The European Union did not comment on Turkey's request.

7.6. We have modified the language of paragraph 7.250 (paragraph 7.259 of the Final Report), to account for Turkey's first request. However, we have not further modified paragraph 7.250 (paragraph 7.259 of the Final Report) to account for Turkey's implicit suggestion that paragraph 330 of Turkey's first written submission directly contradicts the "explanation-related" finding that the Panel makes in paragraph 7.250 (paragraph 7.259 of the Final Report). The sentences that Turkey references in paragraph 330 do not constitute an explanation of the sort that we noted was not provided by Turkey. We also note that the argument that is raised in the two sentences in paragraph 330 to which Turkey draws our attention is addressed in paragraphs 7.248 and 7.249 of the Interim Report (paragraphs 7.257 and 7.258 of the Final Report).

7.3 Paragraph 7.261 (paragraph 7.270 of the Final Report)

7.7. Turkey comments that the Panel's statement that Turkey's position is "internally contradictory" is not explained and requests the Panel to explain that statement.[107]

7.8. The European Union did not comment on Turkey's request.

7.9. We consider paragraph 7.261 (paragraph 7.270 of the Final Report) to be sufficiently clear about the nature of the internal contradiction that the Panel points to, namely that on the one hand Turkey suggests that the application of the full amount of the pre-existing AD/CV duties may not be inconsistent with Article 5.1 of the Agreement on Safeguards, but on the other hand contends that the partial suspension of those duties was inconsistent with that provision. We therefore have not modified paragraph 7.261 (paragraph 7.270 of the Final Report) to account for Turkey's request.

8 REQUEST CONCERNING SECTION 7.10 (RESTRICTIVENESS OF THE MEASURE)

8.1 Paragraph 7.321 (paragraph 7.330 of the Final Report)

8.1. Turkey suggests that the Panel incorrectly concluded that Turkey did not explain how the modifications that were made to the definitive safeguard made as part of the first and the second review regulations made the safeguard more restrictive. Turkey asserts that it did, in fact, explain the introduction of "quantitative caps on the volume of the TRQs" at paragraph 366 of its first written submission and paragraphs 260 to 264 of its second written submission. Turkey therefore requests the Panel to refer to and address this explanation.[108]

8.2. The European Union did not comment on Turkey's request.

8.3. Paragraph 366 of Turkey's first written submission states:

> [T]he European Union also violated Article 7.4 since it modified the definitive safeguard measures so as to make them more trade restrictive than originally determined. Indeed, among others, the European Union imposed quantitative caps on the use of the global and residual TRQs for certain product categories, and restricted imports under product category 4.B to those exporters that could demonstrate an end-use in the automotive sector. Through those modifications, the European Union made the applied definitive safeguard measures stricter, in violation of Article 7.4 of the Agreement on Safeguards.

8.4. A portion of the second sentence of this paragraph alludes to the imposition of "quantitative caps on the use of the global and residual TRQs for certain product categories". However, the paragraph does not shed light on the manner in which these "quantitative caps" made the definitive safeguard more restrictive in a manner inconsistent with Article 7.4 of the Agreement on

[106] Turkey's request for interim review, para. 41.
[107] Turkey's request for interim review, para. 42.
[108] Turkey's request for interim review, para. 43.

Safeguards. The paragraph also does not identify the product categories on which the European Commission applied the "quantitative caps" pursuant to the first and the second review regulations. The modifications to the definitive safeguard that the first and the second review regulations made in respect of various product categories differed factually from one another. Given this, the general and unsubstantiated assertion that Turkey makes in paragraph 366 related to "quantitative caps" does not constitute an explanation sufficient to establish a *prima facie* case that any of the specific modifications of the definitive safeguard that form the basis of Turkey's claim were inconsistent with Article 7.4 of the Agreement on Safeguards.

8.5. We note that in paragraphs 361 and 363 of its first written submission, Turkey lists certain modifications that the first and the second review regulations made to the definitive safeguard. However, we also note that Turkey acknowledges that these lists "merely described the various changes brought pursuant to the two review", not all of which were included within the scope of Turkey's claim under Article 7.4 of the Agreement on Safeguards.[109] Therefore, notwithstanding such lists in paragraphs 361 and 363 of its first written submission, Turkey's first written submission did not explain how the "quantitative caps" that Turkey referred to in paragraph 366 of its first written submission made the definitive safeguard more restrictive in a manner inconsistent with Article 7.4 of the Agreement on Safeguards.

8.6. Paragraph 260 of the second written submission repeats the assertion that Turkey makes in paragraph 366 of its first written submission that "the European Union imposed quantitative caps on the use of the global and residual TRQs for certain product categories". Paragraph 261 of Turkey's second written submission further states that "by making this adjustment, which further restricts access to the relevant TRQs, the European Union increased the restrictiveness of the challenged measures in violation of Article 7.4 of the Agreement on Safeguards". Nothing in either paragraph 260 or 261 of Turkey's second written submission explains the manner in which the "quantitative caps" made the definitive safeguard more restrictive in a manner inconsistent with Article 7.4 of the Agreement on Safeguards. The paragraphs also do not identify the product categories on which the European Commission applied the "quantitative caps" pursuant to the first and the second review regulations. Therefore, for the same reasons as those set out in paragraph 8.4 above, we consider that paragraphs 260 and 261 do not constitute an explanation sufficient to establish a *prima facie* case that any of the specific modifications of the definitive safeguard that form the basis of Turkey's claim were inconsistent with Article 7.4 of the Agreement on Safeguards' claim. Paragraphs 262 to 264 of Turkey's second written submission do not speak to "quantitative caps".

8.7. We therefore have not modified paragraph 7.321 (paragraph 7.330 of the Final Report) in response to Turkey's request.

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[109] Turkey's closing statement at the second meeting of the Panel, para. 8.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

1. Turkey challenges the provisional and definitive safeguard measures imposed by the European Union on certain steel products.

2. On 26 March 2018, the European Commission published a "Notice of initiation of a safeguard investigation concerning imports of steel products".[1] In its Notice of Initiation, the European Commission identified 26 product categories of steel that were listed together with their relevant tariff codes in Annex I to the Notice. On 28 June 2018, the European Commission published a Notice whereby it extended the scope of the investigation by including two additional product categories.[2]

3. On 17 July 2018, the European Union adopted a regulation imposing provisional safeguard measures ("EU Provisional Measures Regulation") on the imports of 23 out of the 28 product categories concerned.[3] No provisional measures were imposed on product categories 10, 11, 19, 24 and 27 given that, according to the European Commission's preliminary analysis, no absolute increase in imports could be observed over the period considered (i.e. 2013-2017) for those five product categories.

4. For the injury analysis, the European Commission examined the situation of the Union steel industry for all product categories together but also reported the data for each of the 23 product categories. The European Commission concluded that, although the Union steel industry had partially recovered for some product categories, the Union steel industry was in a situation of threat of serious injury and that the situation was likely to develop into actual serious injury in the foreseeable future. Given the critical circumstances, the European Commission considered that provisional safeguard measures should be taken.

5. A distinct safeguard measure in the form of a tariff-rate quota ("TRQ") was imposed on each of the 23 product categories. The TRQ for each product category was calculated on the basis of the average of the annual level of imports in the years 2015, 2016 and 2017. In the event that a quota in a given product category would become exhausted, an additional duty of 25% on imports of that product category had to be paid. The provisional safeguard measures were applied for a duration of 200 days from the date of their entry into force.

6. On 31 January 2019, the European Union adopted a regulation imposing definitive safeguard measures for a period of three years, including the period of imposition of the provisional measures (the "EU Definitive Measures Regulation"). The measures were therefore set to expire on 30 June 2021.[4]

7. A definitive safeguard measure was imposed on 26 out of the 28 product categories, product categories 11 and 23 being excluded from the scope of the measures due to the European Commission's finding that imports of these two product categories had decreased in absolute terms from 2013 to the most recent period ("MRP"), i.e. July 2017 – June 2018.

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[1] Notice of initiation of a safeguard investigation concerning imports of steel products, Official Journal of the European Union, C 111, 26 March 2018, pp. 29-35 ("Notice of Initiation").

[2] Notice amending the Notice of initiation of a safeguard investigation concerning the imports of steel products, Official Journal of the European Union, C 225, 28 June 2018, pp. 54-56 ("Amended Notice of Initiation").

[3] Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products, Official Journal of the European Union, L 181, 18 July 2018, pp. 39-83.

[4] Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 31, 1 February 2019, pp. 27-74.

8. The serious injury analysis was made by the European Commission on a combined basis as well as at the level of three product families, namely flat products, long products and tubes, for the period 2013 - 2017. The European Commission concluded that the Union industry was in a situation of threat of serious injury and that the situation was likely to develop into actual serious injury in the foreseeable future, in the absence of safeguard measures.

9. A distinct safeguard measure in the form of a TRQ was imposed on each of the 26 product categories. The TRQ for each product category was calculated on the basis of the average of the annual level of imports in the years 2015, 2016 and 2017 plus 5%.

10. The European Union provided for a progressive liberalisation of the definitive measures, by providing for an increase in the level of the TRQs by 5% after each year of application of the measures.

11. On 3 September 2019, the European Commission published a regulation so as to put in place measures to prevent the concurrent application with the safeguard measures of existing anti-dumping and/or countervailing measures.[5] Finally, the European Union adopted, pursuant to two reviews, two regulations adjusting the definitive measures in a number of respects: the first one was adopted on 26 September 2019 ("EU First Reviewed Definitive Measures Regulation") and the second one was adopted on 29 June 2020 ("EU Second Reviewed Definitive Measures Regulation").[6] Among others, the European Union decided that the liberalisation rate of the TRQs would be decreased from 5% to 3%.

II. THE MEASURES AT ISSUE

12. The measures at issue in this dispute are the provisional and definitive safeguard measures imposed by the European Union on the imports of certain steel products and the investigation leading to the imposition of those measures. They include any amendments, supplements, reviews, replacements, renewals, extensions, implementing measures and any other related measures taken by the European Union in relation to the investigation and/or the safeguard measures at issue.

III. THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

A. The European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards in relation to its determination and analysis of the products under investigation and for the purposes of the imposition of the safeguard measures

1. The European Union failed to examine the circumstances and conditions for the imposition of a safeguard measure for each individual product category while a distinct safeguard measure was imposed on the imports of each different product category.

[5] Commission Implementing Regulation (EU) 2019/1382 of 2 September 2019 amending certain Regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures, Official Journal of the European Union, L 227, 3 September 2019 ("EU Double Remedy Regulation"), pp. 1-25.

[6] Commission Implementing Regulation (EU) 2019/1590 of 26 September 2019 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 248, 27 September 2019, pp. 28-64 and Commission Implementing Regulation (EU) 2020/894 of 29 June 2020 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L 206, 30 June 2020, pp. 27-62.

13. In providing that a Member may apply a safeguard measure "to a product" only if it has determined that the conditions to impose a safeguard measure are met for "such product", Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 require that the product on which the safeguard measure is applied is the same as the product with respect to which the competent authorities have determined that it is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Thus, where safeguard measures are applied on distinct products, competent authorities must demonstrate that the circumstances and conditions set out in Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards are met for *each product* subject to a safeguard measure.

14. In the present case, the European Union imposed, at the provisional and definitive stages, distinct safeguard measures on the imports of each product category. More specifically, the European Union imposed a specific TRQ on each product category, the level of the TRQ being determined specifically for each product category on the basis of the average of imports of that product category during the period 2015-2017. The TRQs were allocated to Members having a substantial interest determined on a product-specific category basis. The fact that the European Union imposed distinct safeguard measures on each product category is supported by the fact that developing country Members were excluded from the scope of the safeguard measures per product category and by the fact that the European Commission analysed whether there had been an increase in imports for each product category separately.

15. Given that the European Union did not examine the circumstances and conditions for the imposition of a safeguard measure for each product category – something which the European Union acknowledges – it therefore acted in violation of its obligations under the GATT 1994 and the Agreement on Safeguards.

16. The European Union claims that there was only one product under investigation. However, this argument is contradicted by the facts and evidence on the record.

17. At the initiation of the investigation, the European Commission itself determined the scope of the investigation as including 26 (and later on 28) distinct products under investigation. It repeatedly referred to the "products concerned" in the plural throughout the Notice of Initiation and added two product categories to "the list of products subject of that investigation" in the Amended Notice of Initiation. The European Union's argument that the references to the "products concerned" in the Notice of Initiation and in the questionnaires were terminology errors amounts to an *ex post* explanation which must be rejected by the Panel.

18. Furthermore, the European Commission requested interested parties to respond to questionnaires by distinguishing "between the different 'products concerned'", defined as each product category. Thus, the way in which the European Union sought and received the data from the interested parties confirms that there were 28 distinct products under investigation.

19. The fact that the European Commission intended to conduct its analysis for 28 products under investigation is further supported by the explanation provided in the EU Provisional Measures Regulation in which the European Commission justified why an analysis for all the product categories together was necessary. Such justification would have been unnecessary if the investigation had been initiated for a single product in the first place.

20. As the European Union imposed different safeguard measures on individual product categories, it should have determined that each of the conditions and circumstances to impose a safeguard measure was met for each product category. However, the European Union did not assess whether, as a result of unforeseen developments, *each product category* subject to a safeguard measure was being imported into its territory in such increased quantities and under such conditions as to cause, or threaten to cause, serious injury to the Union industry.

21. By failing to assess whether the conditions and circumstances to impose a safeguard measure as laid down in Article XIX:1(a) of the GATT 1994 and in the Agreement on Safeguards were met for each of the product categories on which it imposed a distinct provisional and a definitive safeguard measure, the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c), 4.2(a), 4.2(b) and 6 of the Agreement on Safeguards.

2. The European Union failed to examine the products under investigation in a consistent manner throughout the investigation

22. Competent authorities must examine the products under investigation in a consistent manner throughout the investigation. In particular, where a safeguard investigation includes different products, those products cannot be grouped together differently for the purposes of examining certain circumstances or conditions and for the purposes of the application of the measures. This consistency requirement also follows from the requirement of "objectivity" which can be found in Article 4.2(a) of the Agreement on Safeguards and the need to provide reasoned conclusions with regard to the determinations being made, in accordance with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

23. The European Union erred by failing to examine the products under investigation in a consistent manner throughout the investigation.

24. Having determined in its Notice of Initiation that the investigation covered "certain steel products" (i.e. the "products concerned") identified in Annex I as 26 (and later 28) product categories, the Commission was required to keep this definition of the products under consideration throughout its investigation. The European Commission should therefore have analysed, consistently with that definition of the products under investigation, whether the conditions for the imposition of a safeguard measure were met for each product category individually.

25. However, the European Commission failed to examine the products under investigation in a consistent manner. Indeed, sometimes it examined all product categories together; sometimes it examined each of the product categories separately, and sometimes it followed a mixed approach. It did not provide any compelling explanation as to why adopting such inconsistent methodology was reliable.

26. Furthermore, the European Union acted in a biased manner. At both the provisional and definitive stages, the European Commission analysed the volume of imports per product category and excluded the product categories for which it had found no increase in absolute terms. It then examined the level of imports for the product categories (for which it had found an increase) taken together. For the injury analysis, it also excluded the data concerning the product categories which it had found no increase in imports. This approach led to a biased evaluation as it is more likely to find an increase in imports and a threat of serious injury.

27. In conclusion, by failing to examine the products under investigation in a consistent manner throughout the investigation, the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards.

B. The European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determinations on unforeseen developments

1. The European Union failed to demonstrate the existence of unforeseen developments

28. Turkey submits that the European Union erred in its determination of unforeseen developments because: (i) it failed to identify the events which constituted the "unforeseen developments" and their timing; and (ii) the elements it identified do not constitute "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994.

29. Pursuant to Article XIX:1(a) of the GATT 1994, competent authorities must identify the "unforeseen developments" that resulted in the increase in imports causing or threatening to cause serious injury to domestic producers. Although the EU Provisional Measures Regulation and the EU Definitive Measures Regulation include a section entitled "unforeseen developments", the European Union failed in those sections to clearly and precisely identify which events constituted the "unforeseen developments".

30. The European Commission identified the steel making overcapacity, the increased use of trade restrictive practices and trade defence instruments as well as the US Section 232 measures as "factors" constituting "the sources" of the "unforeseen developments". If those elements are factors which constitute the "sources" of the unforeseen developments, it is unclear which events constitute the unforeseen developments themselves. The failure to clearly identify the events constituting the unforeseen developments allegedly resulting in the increase in imports is compounded by the failure to clearly state when or during which period of time the factors identified would have occurred.

31. Moreover, the elements identified by the European Union do not constitute "unforeseen developments".

32. First, global overcapacity in the steel sector is far from being a recent issue. Overcapacity is a structural and cyclical problem in the steel industry which was already present before the Uruguay Round. Therefore, periods of global overcapacity in commodities cannot be characterised as an unexpected development that was unforeseen by European Union during the Uruguay Round. Furthermore, while the extent and timing of changes in production and demand and their impact on the competitive situation in a particular market can be unforeseen, any determination by the competent authorities regarding fluctuations in production, stocks and prices must be accompanied by a *reasonable and detailed explanation* regarding exactly *how* such changes, including their extent and timing, *are* "unforeseen". The European Union has failed to provide such a reasonable and *detailed* explanation. The European Union claims that the already existing overcapacity in the steel sector became "unforeseen" when it continued increasing after 2011, despite being already excessive, and continued persisting, despite the important number of measures taken to reduce it. The European Union in particular refers to the fact that after 2011 "it was expected that total crude steel capacity would decrease or at least remain stable".[7] There is, however, no evidence supporting that statement and, thus, no basis to conclude that a *continued* increase in overcapacity was unforeseen.

33. Second, the European Commission also referred to the increased use of restrictive trade practices and trade defence instruments in the steel sector. The number of trade defence measures that have been imposed or that may be imposed by other WTO Members does not constitute an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994. Indeed, the adoption of trade defence measures is contemplated by WTO rules. Moreover, increases in the use of trade defence instruments did take place prior to the conclusion of the Uruguay Round in 1995. The use of trade defence measures follows cycles of varying intensity and an increase in the use of trade defence measures can therefore not be considered as an "unforeseen" event. Even if it could, there is no evidence supporting the European Commission's conclusion that there is an "overall significant increase" of trade defence measures or alleged increase in "steel-related" trade defence measures, especially given the *decrease* in the number of investigations initiated in 2017-2018, which the European Union attempts to ignore.

34. The European Commission also refers to certain restrictive trade practices by some WTO Members without, however, identifying the measures it refers to. It is difficult to understand how – and the European Union has failed to show that – an increase in tariffs whether adopted as a trade defence measure or as an increase of the country's MFN import duty, can constitute an unforeseen development. The European Union has failed to point to any explanation of how the allegedly increasing use of trade-restrictive practices by certain Members has "exacerbated" the effects of the alleged increased use of trade defence instruments.

35. Third, the European Commission refers to the Section 232 measures adopted by the United States claiming that "given their level and scope, [those] are likely to cause substantial trade diversion of steel products into the Union".[8] The European Union fails to explain how the imposition of a duty through the Section 232 measures constitutes an unexpected development taking into account that Section 232 existed in US legislation long before the Uruguay Round. In particular, the European Union failed to substantiate how the imposition of a duty constitutes a development that was unexpected within the meaning of Article XIX:1(a) of the GATT 1994.

[7] EU Definitive Measures Regulation, recital 52.
[8] EU Provisional Measures Regulation, recital 35.

36. It follows that the alleged overcapacity in the steel sector, the increased use of trade defence measures and trade restrictive practices by other countries, and the adoption by the United States of the Section 232 measures on imports of steel and aluminium do not constitute "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994.

2. The European Union failed to demonstrate a logical connection between the unforeseen developments and the increase in imports

37. The European Union has failed to demonstrate a "logical connection" between the alleged unforeseen developments and the alleged increase in imports because (i) the European Commission failed to explain how the alleged unforeseen developments resulted in increases in imports into the European Union; (ii) the European Commission failed to explain the result that the unforeseen developments had on the specific products concerned (iii) the Section 232 measures taken by the US could not have resulted in the increase in imports since they have been adopted *after* the alleged increases in imports.

a. The European Commission failed to explain how the alleged unforeseen developments resulted in increases in imports into the European Union

38. As the panel noted in *US – Steel Safeguards*, while, in some cases, the explanation of how the unforeseen developments resulted in the increase in imports "may be as simple as bringing two sets of facts together", in other situations, it may "require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury".[9] The extent of the explanation that is necessary depends on the nature of the facts, including their complexity.

39. The facts of the present case are complex. Indeed, they concerned 28 distinct categories of steel products which included various types and grades of steel products with very different prices and end-uses. The volume of imports and the number of exporting countries and producers subject to the measures are also considerable. Moreover, the European Commission's reference to different alleged unforeseen developments (or factors leading to unforeseen developments), over a number of years, adds further complexity to the facts.

40. In light of the complexity of the facts and the complexities deriving from the confluence of unforeseen developments, the European Commission should have provided a detailed explanation of how the alleged unforeseen developments resulted in increases in imports. However, the European Commission has failed to do so.

b. The European Union failed to explain the impact of the unforeseen developments on the specific products concerned

41. The European Union failed to explain the impacts of the events referred to in the EU Provisional Measures Regulation and in the EU Definitive Measures Regulation had on the *specific* products concerned. Indeed, the European Commission referred to events concerning "steel" in general but failed to consider how those events were related to the specific products at issue.

42. By referring to unforeseen developments concerning "steel" in general, the European Union could not establish the necessary link between those alleged unforeseen developments and the increase in imports of the specific products at issue which did not cover all steel products.

c. The Section 232 measures taken by the United States could not *have resulted* in the increase in imports since they have been adopted *after* the alleged increase in imports

43. For an increase in imports to have occurred *as a result of* unforeseen developments, the unforeseen developments must have occurred *prior to* the start of the increase in imports.

[9] Panel Report, *US – Steel Safeguards,* para. 10.115.

44. In the present case, the European Commission referred to the Section 232 measures adopted by the United States, by stating that "given their level and scope, [they] *are likely to cause substantial trade diversion* of steel products into the Union".[10] Thereby, the European Commission acknowledged that they did not and could not have any impact on imports of steel products for the period before the adoption of the provisional measures. The European Commission, however, claimed that "the mere initiation of the investigation did undoubtedly create uncertainty on the market and caused effects on steel trade flows".[11] It failed, however, to specify what these "effects on steel trade flows" constituted or to present any evidence of such effects. The European Union failed to specify how or why these alleged effects would have led to an increase in imports into the European Union. The European Union should have demonstrated that imports into the European Union increased *from countries* whose exports to the United States fell *as a consequence* of the Section 232 measures. It failed to do so.

45. The European Union also referred to the attractiveness of its market without substantiating in any way such assertion, and in any event did not do so in the published report. Moreover, the *ex post* evidence provided by the European Union during these Panel proceedings does not demonstrate that the EU market is an attractive market. In any case, even if the EU market is an attractive market, this is not in itself sufficient to establish a "logical connection" between unforeseen developments and the alleged increased imports into the European Union.

46. On the basis of the above, the European Union has failed to provide a reasoned and adequate explanation of how the unforeseen developments resulted in an increase in imports for each of the concerned product categories, and therefore acted inconsistently with Article XIX:1(a) of the GATT 1994.

C. The European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its determinations as to the effect of the obligations incurred under the GATT 1994

47. The European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 as it failed to demonstrate the effect of the obligations incurred under the GATT 1994 and to establish a logical connection between the effect of the GATT obligations and the increase in imports threatening to cause serious injury to the domestic industry.

48. Indeed, the European Commission did not identify in the EU Provisional Measures Regulation nor in the EU Definitive Measures Regulation the obligations the European Union incurred under the GATT 1994 with respect to the products concerned nor the effects of such obligation(s). In particular, the European Union did not identify the tariff bindings regarding the products concerned that it has undertaken under the GATT 1994, nor the effects of such obligations.

49. The European Commission also (and *a fortiori*) did not explain, in its published report, how the effect of the obligation(s) it has incurred under the GATT 1994 constrained its ability to react to the import surge causing or threatening to cause serious injury to its domestic industry.

50. The European Union's argument that, since the rates imposed are above its tariff bindings, there is no requirement to demonstrate the existence of the effect of the relevant GATT obligations is inapposite and must be rejected. Competent authorities must adequately identify in the published report the applicable GATT obligations and their effects. By failing to do so, the European Union violated Article XIX:1(a) of the GATT 1994.

[10] EU Provisional Measures Regulation, recital 35.
[11] EU Definitive Measures Regulation, recital 58.

D. The European Union acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of increase in imports

51. The European Union failed to make a determination regarding the increase in imports which is consistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because (i) it failed to examine the imports in relation to each product category; (ii) it erroneously made an end-point-to-end-point analysis and failed to make a trend analysis; (iii) it failed to make a reasoned and adequate explanation of its finding of "increased imports" in light of the decrease observed in the most recent past; (iv) it failed to demonstrate an increase in imports that is sharp enough, significant enough, sudden enough and recent enough.

1. The European Union failed to examine the imports in relation to each product category

52. The European Union, both at the provisional and definitive stages, acknowledged the importance of making a determination of the increase in imports at the level of product categories since, as a first step of its analysis, it examined whether there had been an absolute increase in imports for each product category. However, the European Commission did not stop its analysis there. Instead, it excluded from the scope of the investigation the product categories for which it found no increase during the period examined. It then examined the imports of the remaining product categories taken together and, at the definitive stage, at the level of product families.

53. Thereby, the European Union failed to make an appropriate analysis of the imports. Having identified 28 distinct product categories, the European Union was required to examine the import data for each product category separately and to end its analysis there.

54. The European Union claims that there is a single product under investigation ("meaning all 28 product categories taken together") and that "it followed a consistent approach between the definition of the product concerned and the analysis of the increase in imports". This defence must be rejected. First, there is not a "single product under investigation", but 28 distinct products under investigation. Second, the European Union erroneously argues that it followed a consistent approach. Indeed, to the extent that it made a determination for all product categories taken together, it did not do so for the single product "meaning all 28 product categories taken together", as the alleged "single product" examined in the context of that analysis only included 23 and 26 product categories respectively at the provisional and definitive stages.

2. The European Union erroneously made an end-point-to-end-point analysis and failed to make a trend analysis over the period of investigation

55. The European Union failed to examine *the trends* in imports over the period of investigation as it made an end-point-to-end-point analysis. Indeed, in its analysis per product category, the European Commission merely compared the figure of the first year of the period (i.e. 2013) with the figure of the last year of the period (i.e. 2017 at the provisional stage and the MRP at the definitive stage). The European Commission did not examine the trends during the period of investigation, that is how imports evolved throughout the period of investigation.

56. By merely comparing the end-points of the period and by failing to analyse the trends in imports over the period of investigation, the European Commission failed to make a determination concerning imports which is consistent with the requirements of Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

3. The European Union failed to provide a reasoned and adequate explanation of its finding of "increase in imports" in light of the decrease observed in the most recent past

57. The European Union failed to provide a reasoned and adequate explanation of its finding of increase in imports in light of the decrease observed in the most recent past with regard to certain product families and with regard to a number of product categories.

58. With regard to the product families, the European Commission failed to explain why it could make a finding of "increased imports" despite the decreases observed between 2017 and the MRP for flat products and tubes (product families 1 and 3). For long products (product family 2), the European Commission did not address the decrease in imports that occurred between 2016 and 2017.

59. With regard to the individual product categories, the European Commission failed to provide a reasoned and adequate explanation of its finding of "increased imports" in view of the decrease observed in the most recent past for a large number of the product categories concerned. In light of this decrease, the European Commission was required to provide a *reasoned and adequate* explanation as to why, notwithstanding the decrease, it could make a finding of "increased imports". Thereby, the European Union acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

4. The European Union failed to demonstrate an increase in imports that is sharp enough, sudden enough, significant enough and recent enough

60. The European Commission failed to demonstrate an increase in imports that is sharp enough, sudden enough, significant enough and recent enough, at all levels (the products taken together, per product family and per product category).

61. At the level of the product categories taken together, while the European Commission asserts that "the increase in imports was sharp and sudden", it did not provide any explanation as to how it reached that finding. In this regard, by making an end-point-to-end-point analysis (comparing 2013 with the MRP) and by failing to examine the trends over the period of investigation, the European Commission ignored the fact that increase in imports was gradual throughout the period of investigation. In addition, the Commission failed to provide in its published report an explanation why, despite the fact that the increase in imports essentially took place during the first two years of the period of investigation, it could reach a finding that the increase in imports was recent enough. It should have explained how it could reach a finding that the increase in imports was sharp enough, sudden enough and recent enough while the data shows that imports increased continuously throughout the period of investigation with the most substantial increase taking place during the first years of the period of investigation.

62. With regard to the product families, the European Commission only refers to the end-point-to-end-point increase between 2013 and the MRP which was "between 60% and 97% when grouped into product families". This does not, however, constitute a reasoned and adequate explanation of its determination of increased imports for the three product families, taking into account that for the first product family, imports substantially increased between 2013 and 2016, but did not increase further since then, for the second product family, imports decreased between 2016 and 2017 and for the third product family, imports fluctuated throughout the period of investigation with a decrease in the period 2017-MRP.

63. With regard to the product categories, the European Commission failed to explain for each of the product categories, how the alleged increase in imports was sudden enough, sharp enough and recent enough, taking into account that imports for most of these product categories fluctuated from 2013 to the MRP and that, for a majority of them, imports even showed a decrease from 2017 to the MRP.

64. By failing to demonstrate increases in imports that are sharp enough, sudden enough, significant enough and recent enough at all levels (all products together, per product family or per product category), the European Union failed to make a determination of "increased imports" that is consistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

E. The European Union 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 a threat of serious injury to the domestic industry

1. The European Union failed to make a threat of serious injury analysis with respect to each product category

65. At the provisional stage, the European Commission provided the data concerning the injury factors for each product category individually, thereby acknowledging the importance of making such a determination at the level of the individual product categories.

66. However, when conducting its serious injury analysis at the definitive stage, the European Commission did not carry out its analysis for each product category individually. Instead, the European Commission conducted its analysis for all product categories taken together, supplemented by an analysis for each of the three product families.

67. The European Commission should have determined that each of the conditions to impose a safeguard measure was met for each product category separately. Accordingly, the European Union was required to determine that a threat of serious injury was present for each of the 28 different product categories. By failing to make such an analysis, the European Union 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.

2. The European Union failed to provide a reasoned and adequate explanation of its determination of threat of serious injury

68. The European Union failed to demonstrate the existence of a significant overall impairment that is clearly imminent. In particular, the European Union failed to provide a reasoned and adequate explanation of its determination that the industry was "in a fragile and vulnerable position". Moreover, the European Union's determination is not based on the "recent past".

a. The European Union does not provide a reasoned and adequate explanation of its determination that the industry was in a "fragile and vulnerable position"

69. The European Union does not explain how it could conclude, at the level of the product categories taken together, that while most of the relevant injury factors analysed recorded their best level of performance for the whole period of investigation in 2017, the industry was in a fragile or vulnerable position. In fact, the improvements in 2017 which continued into the first semester of 2018 indicate a full recovery of the industry. While three injury indicators show a decrease in 2017, these are the *only* factors for which the Union industry did not outperform in 2017.

70. The European Union's argument regarding the alleged delicate situation of the Union industry appears to focus mainly – if not solely – on the increase in imports in the first semester of 2018. However, evidence of an increase in imports cannot, in itself, prove that the Union industry was in a fragile and vulnerable situation. Moreover, the European Union's argument that even though some factors improved in 2017, the 2013-2016 period indicates that the Union industry is vulnerable to an increase in imports must be rejected. Indeed, the fact that imports increased between 2016 and 2017 while most injury factors substantially improved over the same period clearly invalidates that argument.

71. Regarding the analysis made at the level of the product families, many injury factors for each product family saw their best performance in 2017, a year in which imports increased. The European Union claims that certain factors did not improve in 2017 for some of the product families. Turkey notes that the European Commission itself noted at the definitive stage that "the Union industry – both globally and *for each of the three product families* … partially recovered in 2017".[12] While the European Union attempts to focus on certain factors which did not improve in 2017, this ignores, and does not give proper weight to, all of the factors which *did* show improvement in 2017.

72. At the level of product categories, the evaluation of the relevant injury factors also shows that the situation of the Union industry substantially improved during the period of investigation, in particular in 2017.

[12] EU Definitive Measures Regulation, recital 87.

73. Furthermore, the European Union does not take into account or explain the factors which account for the domestic industry's improved performance in 2017. In this regard, Turkey notes that the significant increase in the costs of production between 2016 and 2017 invalidates the European Union's assertion that a decrease in such costs between 2013 and 2017 explained the improvement of the situation of the Union industry. Turkey further notes that this cost increase was fully compensated by an increase in sales prices of 18%. This trend clearly illustrates the Union industry's improved ability to deal with increased costs and to pass any increase onto its customers. Regarding trade defence instruments, the recently imposed anti-dumping and countervailing measures cannot explain by themselves the improvement of the situation of the Union industry as an improvement in the situation of the Union industry can also be noticed for product categories not recently made subject to anti-dumping and countervailing measures. Moreover, to the extent that the recovery of the Union industry in 2017 is due to the imposition of trade defence measures, this indicates that the alleged negative situation of the Union industry prior to that was in fact caused by dumped or subsidies imports, and that the alleged serious injury or threat thereof suffered by the Union industry has been dealt with successfully through the adoption of anti-dumping and anti-subsidy measures.

b. The European Union failed to make a determination that is based on the "most recent past"

74. Importantly for this dispute, "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury".[13] Thus, "within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry".[14]

75. In the present case, the data concerning most injury factors show a clear positive trend over the period of investigation and the data concerning 2017 demonstrate, in fact, the best performance for the entire period of investigation. The European Commission itself acknowledged the improvement of the situation of the domestic industry in 2017, when stating that the Union industry "was in a difficult economic situation until 2016" but "recovered in 2017".[15] The European Commission further noted that the data concerning the first semester of 2018 "confirmed" the trend of 2017 showing a recovery of the Union industry.[16]

76. If the data of the most recent past provide the strongest indication of the likely future state of the domestic industry and that such data are clearly good, in particular when examining those data in light of the data of the entire period of investigation, they do not support a finding of "threat of serious injury".

77. While the European Union seems to suggest that Turkey places *too much* emphasis on the recent past, Turkey in fact submitted and demonstrated that when the data of 2017 is assessed in the light of the longer-term trends for the whole period of investigation, they show a substantial improvement. Indeed, the data from 2017 demonstrates, for a number of factors, the Union industry's best performance over the entire period of investigation. Turkey notes that two out of the five factors which, according to the European Union, supposedly show a decline between 2013 and 2017, in fact indicate a *recovery* in 2017: prices and profitability. The fact that both price and profitability increased markedly in the second half of the period of investigation is a strong indicator of the positive situation of the Union industry. Thus, only three injury indicators show a decrease at the end of the period of investigation.

78. The relevant question for this Panel is whether the European Commission could find that "a significant overall impairment in the position of a domestic industry" was "on the very verge of occurring", on the basis of the facts on the record. When viewed in light of the long-term data trends over the whole period of investigation, the data regarding the different injury indicators from the most recent past demonstrates a recovery of the industry, and thus does not support a finding of threat of serious injury.

[13] Appellate Body Report, *US – Lamb*, para. 137.
[14] Appellate Body Report, *US – Lamb*, para. 137.
[15] EU Definitive Measures Regulation, recital 87.
[16] EU Definitive Measures Regulation, recital 89.

3. The European Union failed to establish, on the basis of facts, that there is a high degree of likelihood of serious injury to its domestic industry in the very near future

79. The European Union failed to demonstrate, on the basis of facts, that there is a high degree of likelihood of serious injury to the Union industry in the very near future. The European Union's determination of threat of serious injury is not based on "facts" but on conjecture. In fact, the European Union did not establish the existence of a threat of serious injury, but rather of a possible threat of serious injury that "might" occur in the future.

80. The language in Article 4.2(a) of the Agreement on Safeguards is clear: it must be established that increased imports have caused or "*are threatening to cause*" serious injury. Thus, the effects of the imports must be noticeable on the situation of the domestic industry during the period of investigation, creating a situation of "threat of serious injury" during that period, even if it is not yet possible to conclude that the domestic industry is suffering from serious injury. However, the European Commission established a possible threat of serious injury in the future "if imports continue to increase". This finding of "threat of serious injury" is not actual but relates to the future if and to the extent that imports continue to increase.

81. The European Union seems to conflate the fact that imports into the European Union may increase in the future with the notion of threat of serious injury. Even if imports were set to increase in 2018, this does not automatically lead to the conclusion that there is a significant overall impairment in the position of the domestic industry which is clearly imminent.

82. Furthermore, the argument that the fact that the Union industry will be in a vulnerable situation if imports continue to increase "simply reflects that a threat determination is by definition 'future-oriented' and whose actual materialization cannot, in fact, be assured with certainty", must be rejected. Indeed, what must be likely to materialise is not the "threat of serious injury", but the "serious injury". The threat of serious injury must exist at the time the determination is made and must be caused by imports which have increased. By concluding that it has established "a threat of serious injury if imports continue to increase", the European Union failed to demonstrate that the Union industry suffers from a threat of serious injury. At best, the European Union may have established that there is a possibility that, in the future, there *might* be a threat of serious injury to the Union industry.

83. Finally, even assuming that the European Union has made a determination of actual threat of serious injury, such a determination has been established on the basis of conjecture or a remote possibility, as such a finding is conditional upon imports continuing to increase. Even to the extent that its determination would be based on increased imports in 2018, the European Union has not elaborated on the impact of those imports on the relevant injury indicators. The European Commission provides no projection as to the likely developments in the relevant injury factors in the very near future. Even if it did so, these projections would need to be supported by evidence, which it has not provided.

84. Thus, the European Union established that there was a threat of serious injury to its domestic industry only on the basis of conjecture and remote possibility rather than facts, in violation of Article 4.1(b) of the Agreement on Safeguards.

4. The European Union failed to analyse each of the injury factors listed in Article 4.2(a) for the product categories

85. In making a determination of threat of serious injury, competent authorities must examine "at a minimum" each of the factors listed in Article 4.2(a). The European Union failed to do so.

86. First, in the EU Provisional Measures Regulation, the European Commission provided the data per product category regarding the situation of the Union industry for the following factors: level of imports in absolute and relative terms, capacity utilisation, production, sales volume, market, unit sales price, profitability, employment, stock, cash flow and return on capital employed, but only for the product categories on which it imposed provisional safeguard measures, that is all product categories except product categories 10, 11, 19, 24 and 27. The definitive safeguard measures, however, were also imposed on product categories 10, 19, 24 and 27 (which had been excluded from the scope of the provisional measures). The European Commission, however, did not provide – and *a fortiori* failed to analyse – the data regarding the situation of the Union industry for these 4 product categories which were not included in the scope of the provisional safeguard measures.

87. Second, although the European Commission provided the data relating to the different injury factors in the EU Provisional Measures Regulation, it did not analyse them per product category, but at an aggregate level. Thereby, the European Commission failed to evaluate the *overall position* of the domestic industry per product category, in light of all the relevant factors having a bearing on a situation of that industry.

88. For the foregoing reasons, the European Union 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.

F. The European Union acted inconsistently with Articles 2.1 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 threat of serious injury to the domestic industry

1. The European Union failed to establish the existence of a causal link between the increased imports and the threat of serious injury

89. The European Union failed to establish a causal link between the alleged increased imports and the alleged threat of serious injury because (i) there was no coincidence in time between the movements in imports and the movements in injury factors; (ii) the European Commission did not provide a compelling explanation as to why, notwithstanding the lack of such a coincidence, a causal link nonetheless existed; and (iii) the European Commission established that a risk of further increase in imports threatens to cause serious injury to the Union industry.

90. The causal link must be established by reference to the period of investigation, even in the case of a threat of serious injury. In other words, the competent authorities must establish that there is a causal link between imports which are increasing over the period of investigation and a domestic industry which is in a situation of threat of serious injury during the period of investigation. It cannot be established by reference to the remote possibility that imports will increase in the future and that such a potential increase may lead to a situation of threat of serious injury.

91. Turkey submits that the European Commission's findings do not establish a coincidence in time between movements in imports and movements in injury factors. In that regard, the European Union erred in focusing on the period 2013-2016 while data from the most recent past "provide the strongest indication of the likely future state of the domestic industry". Thus, the European Commission should have focused its analysis of causation on data relating to 2017. The analysis of the data of imports on the one hand and of the injury factors on the other hand shows a lack of coincidence between an alleged upward trend in imports and alleged downward trends in the injury factors.

92. The European Commission did not examine the *overall* trends in serious injury factors pertaining to the *overall* situation since its causation analysis focused on only three injury factors, namely market share, prices and profitability. Moreover, even when focusing on the trends in market share, prices and profits, there is no coincidence in time between the upward trend in the imports and the trends in those three injury factors over the period of investigation, at the level of the product categories taken together, at the level of the product families and at the level of the product categories.

93. In the absence of a coincidence in time between the alleged increase in imports and the alleged threat of serious injury, the European Commission should have provided a compelling analysis as to why causation is still present. In particular, it did not explain why, despite increasing imports, the Union industry's sales prices and profitability increased and why, despite increasing costs of production, the Union industry was in a position to raise prices without suffering from price suppression from imports. Turkey notes that the European Commission did not identify any factor affecting the conditions of competition between imports and domestic products which would explain how the lack of coincidence in time did not negate a causal link.

94. Finally, the European Commission did not conclude that the increased imports have caused or are threatening to cause serious injury to the Union industry but instead reasoned that a possible further increase of imports might threaten to cause serious injury to the Union industry. However, the causal link must be established by reference to the period of investigation between imports which have increased over the period of investigation and a domestic industry which is in a situation of serious injury or threat thereof.

95. Accordingly, the European Union failed to establish the existence of a causal link between the alleged increased imports and the alleged threat of serious injury in accordance with Articles 2.1 and 4.2(b) the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

2. The European Union failed to demonstrate that the alleged threat of serious injury to the domestic industry caused by factors other than the increased imports, was not attributed to increased imports

96. The European Union also violated Article 4.2(b) of the Agreement on Safeguards since it failed to ensure that the alleged serious injury or threat thereof caused by factors other than the increased imports was not attributed to the increased imports.

97. First, various interested parties claimed during the investigation that the injury had been caused by dumped and/or subsidized imports concerning the same products. The European Commission rejected that claim, stating that anti-dumping and anti-subsidy measures on the one hand and safeguard measures on the other hand "do not follow the same logic" and have "different objectives".

98. However, after the entry into force of the definitive safeguard measures, the European Union adopted the EU Double Remedy Regulation. In that Regulation, the European Commission noted that "the effect of safeguard measures arise only once the relevant level of the tariff-rate quota is exhausted (specific or *erga omnes*) and the applicable above-quota tariff duty is imposed" and that "[u]ntil that moment, the Commission considers that the full level of the applicable anti-dumping/anti-subsidy measures continues to be necessary and justified, in order to remedy the effect of unfairly dumped/subsidized imports".[17]

99. Although safeguard measures and anti-dumping/countervailing measures have different objectives and address different types of actions ("fair" trade actions *versus* "unfair" trade actions), they all address actions which are causing or threatening to cause material/serious injury. The nature of safeguard measures "were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'".[18] They should not be used to address "events in routine commerce" since they are "clearly, and in every way, an extraordinary remedy".[19]

100. The injurious effects of dumped/subsidised imports must be distinguished from those of the increased imports resulting from the unforeseen developments and obligations incurred under the GATT. However, the European Union erred as it failed to identify the nature and extent of the injurious effects of that factor and since it failed to distinguish those effects from the injurious effects of the increased imports.

101. The obligation to distinguish the injurious effects from dumped or subsidized imports is particularly important in the present dispute where several anti-dumping and anti-subsidy investigations were carried out by the European Union during the period of investigation of the safeguard investigation. Many of these investigations examined the existence of material injury during an identical or overlapping period.

102. Thus, the European Union, in its non-attribution analysis, should have distinguished the injurious effects of imports resulting from dumping/subsidisation from those of the increased imports.

[17] EU Double Remedy Regulation, recital 11.

[18] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 93-95; Appellate Body Report, *Korea – Dairy*, paras. 86-88.

[19] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 93-95; Appellate Body Report, *Korea – Dairy*, paras. 86-88.

103. Second, with regard to the export performance of the Union industry, the European Commission concluded that it was not "a major threat of serious injury to the Union industry"[20] as export prices remained at the same level during the period of investigation and that the exports represent only a limited share of the Union industry's sales volume.[21] The European Union failed to provide a reasoned and adequate explanation for its conclusion, taking into account the continuous decrease in the volume of exports from 2014 to 2017. In fact, exports decreased between 2014 and 2017 by 11%. Furthermore, by noting that it was not a "major threat", the European Commission acknowledged the injurious effects caused by the export performance but failed to explain how it separated those injurious effects from those of the increased imports.

104. Third, while the European Commission claimed that there was no legal requirement to exclude imports made by Union producers or their related traders, Turkey submits that the European Union failed to provide a reasoned and adequate explanation that those imports did not have injurious effects, and merely stated that they were low. The mere fact that the imports by Union industry were between 0.3% and 0.7% of total imports does not mean that the imports cannot have had injurious effects, and the European Union has failed to establish this as a matter of fact.

105. The European Union did not clearly indicate that there were no other factors causing injury to the Union industry but found, instead, that these factors were not as such as to "weaken" or "break" the causal link. Having established that other factors affected the situation of the Union industry, the European Union should have distinguished their effects from those of the increased imports. It should also have assessed how these other factors would affect the situation of the Union industry in the near future. The European Union failed to do so.

106. Thus, by failing to carry out a proper non-attribution analysis, the European Union acted inconsistently with Article 2.1, Article 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

G. The European Union acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its application of the safeguard measures

107. The European Union acted inconsistently with Article 5.1, first sentence, and Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 as it applied safeguard measures beyond the extent and duration necessary to prevent serious injury and to facilitate adjustment.

108. First, the European Union set the safeguard measures in the form of TRQs, the imports being subject to a duty of 25% when exceeding a quota. The quotas have been calculated for each safeguard measure on the basis of the import volumes of each relevant product category for the period 2015-2017 plus 5%. Turkey submits that the TRQs are not applied "only to the extent necessary to prevent serious injury" as they lack the required *rational connection*[22] with the objective of preventing serious injury, given that the European Commission's analysis was partly based on data relating to 2018. The European Union should have determined the applicable safeguard measures on the basis of the import volumes including the first six months of 2018.

109. Second, the requirement that the safeguard measure must be limited "to the extent necessary to prevent or remedy serious injury" is to be read as requiring that safeguard measures be applied only to the extent that they address serious injury *attributed* to increased imports. It follows that the violation of Article 4.2(b) constitutes a sufficient basis for a *prima facie* case that the safeguard measures have not been applied "only to the extent necessary to prevent or remedy serious injury" as required by Article 5.1 of the Agreement on Safeguards. Given that the European Union failed to conduct a proper causation analysis as required by Article 4.2(b) in two respects, the European Union therefore also acted inconsistently with Article 5.1 of the Agreement on Safeguards.

[20] EU Definitive Measures Regulation, recital 123.
[21] EU Definitive Measures Regulation, recital 123.
[22] Panel Report, *Chile – Price Band*, para. 7.183.

110. Turkey submits that for the same reasons, the European Union also violated Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Since the European Union failed to make a proper causation analysis in accordance with Article 4.2(b), it was unable to ensure that the safeguard measures were applied only for such a period of time necessary to address the serious injury attributed to increased imports. Consequently, the period of 3 years does not represent the period of time necessary to address the serious injury caused by increased imports.

111. Third, the European Union applied the definitive safeguard measures beyond the extent necessary to prevent serious injury and to facilitate adjustment because the safeguard measures address the serious injury caused by dumped and subsidized imports. The European Union's Double Remedy Regulation provided that, for products subject to anti-dumping or countervailing duties, the part of the anti-dumping and countervailing duties on the products concerned that overlaps with the safeguard out-of-quota duty should be suspended once the TRQs are exhausted.

112. Turkey submits that regardless of the reasons that motivated the European Union to suspend the part of anti-dumping and countervailing duties overlapping with the safeguard measures at issue, the result of this action is that the safeguard measures address the injury caused by dumping and subsidisation. It follows from Article 5.1 that safeguard measures can only be applied to the extent necessary to prevent or remedy serious injury caused by the increased imports, not injury caused by dumping and/or subsidisation. This is confirmed by Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Agreement on Subsidies and Countervailing Measures.

H. The European Union acted inconsistently with Article XIII:2 chapeau and paragraph (d) of the GATT 1994 as well as with Article 5.2(a) of the Agreement on Safeguards

113. The European Union acted inconsistently with Article XIII:2(d) of the GATT 1994 since it failed to allocate the country-specific quotas to Members having a substantial interest in supplying the product based upon the proportions, supplied by such Members during a previous representative period, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

114. For the purposes of the definitive measures, the European Union allocated the shares of the TRQs for all product categories except product category 1 to the countries having a substantial interest in supplying the product concerned (more than 5%) on the basis of their imports during the period 2015-2017. Turkey submits that the European Union should have used for that purpose, data from the most recent period, i.e. including the first six months of 2018. The use of those data was necessary since a number of trade remedies had gradually been imposed by the European Union on imports from several exporting countries and this resulted in a significant change in the shares of imports from a number of countries. In particular, imports from countries not being subject to anti-dumping and countervailing measures increased to the detriment of imports from countries subject to such measures. In order to allocate the TRQs in accordance with Article XIII:2(d), the European Union was required to use the "most recent period not distorted by restrictions", which in the present case includes the first six months of 2018.

115. Furthermore, only by taking into account the data relating to the first six months of 2018 would TRQs have been allocated such as to serve the aim of a distribution of trade approaching "as closely as possible" the shares that various Members may be expected to obtain in the absence of the tariff rate quotas, pursuant to Article XIII:2 chapeau of the GATT 1994.

116. Moreover, even if it were to be concluded that there was no obligation for the European Union to have included the first six months of 2018 into the representative period, the European Union should have taken into account the change in the share of imports from the exporting countries following the newly imposed trade defence measures observed during the first half of 2018 as a "special factor" that justified adjustments of the tariff-rate quotas allocation.

117. Turkey submits that the European Union acted inconsistently with Article 5.2 of the Agreement on Safeguards for the same reasons it acted inconsistently with Article XIII:2 of the GATT 1994. The text of Article 5.2(a) is to a large extent identical to the text of Article XIII:2(d). In Turkey's view, while Article 5.2(a) refers to "quotas", its application to, not only quotas in the narrow sense, but also to TRQs, makes sense, in the same way as Article XIII:2(d) also applies to tariff quotas. Indeed, the rule laid down in Article 5.2(a) relates to the allocation of a quota, meaning a quantitative limit. That quantitative limit also exists in a "tariff quota" which constitutes a quantitative limit on the availability of a specific tariff rate. Therefore, Article 5.2(a) is to be applied to "tariff quotas".

I. The European Union acted inconsistently with Articles 7.4 and 5.1 of the Agreement on Safeguards by reducing the pace of liberalization and by making the safeguard measures more trade restrictive

118. The European Union acted inconsistently with Article 7.4 and Article 5.1, first sentence, of the Agreement on Safeguards since it made the safeguard measures more trade restrictive following the first and the second reviews of the measures and since it reduced the pace of liberalization of the measures.

119. First, it follows from Article 7.4 of the Agreement on Safeguards that, once the progressive liberalization is set, there is no possibility for the Member imposing the safeguard measure to reduce the pace of the progressive liberalization.

120. By reducing the pace of liberalization of the TRQs from 5% to 3%, the European Union thus violated Article 7.4 of the Agreement on Safeguards. To "progressively liberalize" a safeguard measure means that such measure must become less restrictive by stages or, in other words, must be gradually relaxed and this must take place at uniform intervals. This means that, once the competent authorities have determined a schedule of liberalization, it cannot decrease the pace of liberalization. Turkey's interpretation of Article 7.4, pursuant to customary rules of interpretation, guarantees that Members continue to progressively liberalize their safeguard measures, as required by that provision. The interpretation proposed by the European Union would allow for a *degressive* liberalization not apt to facilitate adjustment of the domestic industry by increasing its exposure to foreign competition.

121. Second, the European Union also violated Article 7.4 since it modified the definitive safeguard measures so as to make them more trade restrictive than originally determined. Indeed, among others, the European Union imposed quantitative caps on the use of the global and residual TRQs for certain product categories, and restricted imports under product category 4.B to those exporters that could demonstrate an end-use in the automotive sector. Through those modifications, the European Union made the applied definitive safeguard measures stricter, in violation of Article 7.4 of the Agreement on Safeguards.

122. Turkey submits that because the adjustments to the challenged safeguard measures, following the review investigations, rendered those measures more trade restrictive, by making those adjustments the European Union acted inconsistently with Article 7.4 of the Agreement on Safeguards.

123. Thereby, the European Union also acted inconsistently with Article 5.1 since the amended definitive measures are not applied so as "to facilitate adjustment". Indeed, by making the measures more restrictive and by reducing their pace of progressive liberalization, the amended measures are not applied only to the extent necessary to facilitate the adjustment of the domestic industry by exposing it to greater foreign competition. Instead, the modifications to the safeguard measures create a disincentive for the domestic industry to undertake appropriate efforts at adjustment. Furthermore, the amended definitive measures are also not applied only to the extent necessary to prevent or remedy serious injury. Indeed, the assessment of serious injury or threat thereof having not changed, there is no basis to justify that the amended measures are applied only to the extent necessary to prevent or remedy serious injury.

J. The European Union imposes other duties or charges in excess of those provided in its Schedule contrary to the second sentence of Article II:1(b) of the GATT 1994

124. Through the measures at issue, the European Union imposes other duties or charges in violation of Article II:1(b), second sentence, of the GATT 1994.

125. The 25% out-of-quota duties imposed on imports exceeding the quotas constitute "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994.

126. The duties of 25% are not recorded in the European Union's Schedule of Concessions as other duties or charges for any of the products concerned, that were applied on the date of entry into force of the GATT 1994 or which had to be applied directly and mandatorily under legislation in force on that date.

127. Therefore, by applying on imports of the products concerned duties of 25% which constitute "other duties or charges", the European Union is acting inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

128. Given that the measures at issue are inconsistent with the European Union's obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards, they did not result in any valid suspension of the European Union's obligation under Article II:1(b), second sentence. It follows that the European Union violates Article II:1(b) of the GATT 1994.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1. INTRODUCTION

1. Turkey challenges the provisional and definitive safeguard measures imposed by the European Union on the product defined as certain steel products belonging to over 20 steel product categories. Turkey alleges that these safeguard measures are inconsistent with several obligations of the European Union under the GATT 1994 and the Agreement on Safeguards.

2. First, Turkey digs into a terminology issue, attempting to show that *the* definitive safeguard measure is in fact a group of distinct safeguard measures and that *the* product concerned is in fact a multitude of products concerned. The European Union vigorously rebuts this claim, which the Panel should clearly reject. There is only one product concerned on which a single definitive safeguard measure was applied. The competent authority examined the product under investigation in an objective and unbiased manner.

3. Then, Turkey takes issue with the existence of unforeseen developments and the identification of the obligations it has incurred under the GATT 1994. The European Union explains why these claims should fail, as it duly complied with the respective obligations in Article XIX:1(a) of the GATT 1994.

4. Third, Turkey alleges that the European Union erred in its determinations concerning the increase in imports, threat of serious injury and causal link between the two. The European Union explains how the evidence on the record and the applicable case law overwhelmingly support the conclusion that the legal conditions are met with respect to each of the three mentioned issues. The competent authority offered a reasoned and adequate explanation in each instance.

5. Turkey then contends that the European Union applied the safeguard measure beyond the extent and time necessary to prevent serious injury and to facilitate adjustment, and that it failed to progressively liberalize it. The European Union explains why Turkey's claim must fail, as it complied with its respective obligations.

6. Fifth, contrary to what Turkey alleges, the safeguard measure applied by the European Union in the form of tariff rate quotas is consistent with Article XIII:2 of the GATT 1994 and Article 5.2(a) of the Agreement on Safeguards, as the tariff rate quotas have been allocated using a previous representative period.

7. Finally, as the safeguard measure at issue validly suspends the European Union's obligations, the out-of-quota duty it is not a violation of Article II:1(b) of the GATT 1994.

8. For all the reasons explained through the European Union's submissions, Turkey's claims must be rejected by the Panel in their entirety.

2. THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLE XIX:1(A) OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS IN RELATION TO ITS DETERMINATION AND ANALYSIS OF THE PRODUCT UNDER INVESTIGATION

2.1 There is only one product concerned on which the safeguard measure was applied. The European Union was not required to examine the circumstances and conditions for the imposition of a safeguard measure for each individual product category

9. Turkey's underlying premise is flawed, because it claims that there are different steel products subject to the EU measures. This is not correct. There is only one product at issue (the product

concerned). Thus, the European Union was not obliged to conduct separate assessments of the circumstances and conditions for the imposition of a safeguard measure for each individual product category.

10. Indeed, the product concerned, on which the safeguard measure is applied, is the same as the product with respect to which the competent authority has determined that it is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry, consistently with Article XIX of the GATT 1994 and the Agreement on Safeguards. It is the same specific product with respect to which the investigation is initiated, the investigation is carried out and the safeguard measure is imposed: the scope is the same.

11. In answering the Panel's questions, the European Union provided a table indicating, for every step undertaken by the competent authority (including initiation, fact-gathering, each step in the analysis of the conditions for imposing safeguard measures, and the measure's application) that (a) the step was undertaken for a single product concerned; and (b) the specific evidence supporting the respective affirmations.

12. The fact that the Notice of Initiation refers to 26 product categories in the plural has no bearing on the legality of the definitive safeguards measure. Once having a better understanding of the specific terminology, the competent authority confirmed its approach from the Notice of Initiation and defined the product concerned, which is not different from the sum of the product categories from the Notice of Initiation. Thus, Turkey cannot be right for several reasons.

13. First, the dictionary definition of the term "product" is rather flexible and depends on the context. It can apply to one particular item sold, to a group of items, or to a class of items. In almost every situation in which items may be referred to as a "product", it is possible to discern both a broader "product" of which that product is a subset, and a subset of that product that itself may be referred to as a "product".

14. Second, the Agreement on Safeguards does not impose any specific obligations with respect to the definition or the scope of the product under investigation and does not contain any guidelines with respect to this matter, as confirmed by the panel in *Dominican Republic – Safeguard Measures*. Indeed, a safeguard measure may be applied to a product, imports of which have increased; however, a disaggregated analysis for all cases in which the definition of the product under investigation comprises more than one product is not required. Accordingly, it is the competent authority that defines the product under investigation, as well as the way in which the relevant data should be analysed in the investigation. In whichever product under investigation, there may be multiple subcategories, even within the same CN code.

15. Third, as it is only one product concerned, the competent authority was not under an obligation to determine that each of the conditions and circumstances to impose a safeguard measure was met for each product category. The European Union did not impose different safeguard measures on individual product categories, but one comprehensive safeguard measure on all product categories, grouped as the product concerned.

16. Fourth, Turkey claims that "the present case is similar to the *US – Steel Safeguards* case where the US competent authorities had imposed distinct safeguard measures on distinct steel products".

17. This is not true. In *US – Steel Safeguards* the United States offered two contradictory responses to what constituted the "imported products" or the "subject imports". First, the United States admitted that the USITC did not identify the specific imported product concerned and denied such a legal obligation. Then, the United States subsequently attempted "to sell the USITC's domestic industry definition as identification of the specific imported product".

18. To recall, in the present case, the European Union clearly defined the product concerned as "the 28 product categories", "certain steel products belonging to the 28 steel product categories".

19. The European Union reiterates its position that, "although WTO Members are not obliged to regulate the scope of complaints or requests to start a safeguard investigation, they must ensure that their competent authorities identify the imported product concerned for the purpose of the determination". The European Union has precisely done so.

20. Indeed, the European Union notes that initially Turkey did not take issue with the competent authority's findings on the important interrelation and strong competition between products classified in different product categories. The competent authority provided concrete examples of such interrelations. It also pointed out that many Union producers were active on the production of most of the product categories (showing that steel makers could adapt their production to various types of product categories). The authority further took into account the fact that the US Section 232 measures applied to all steel products "without distinction of their shape, size or composition", so that the authority's analysis was carried out both globally for all 28 product categories, as the product concerned (i.e. steel in various shapes and forms) and also at individual level for each product category.

21. This latter point is important because in the EU Provisional Measure Regulation the authority examined the increase in imports globally but also having regard to the product categories individually. The authority had made clear that: "In addition to the global analysis of the situation for the product concerned overall, which the Commission considers to be the appropriate standpoint for the appraisal of the necessity of safeguard measures in this investigation, the Commission has also assessed the situation at the level of the individual product categories in order to confirm the above trends at a disaggregated level". In fact, the authority excluded five product categories (categories 10, 11, 19, 24 and 27) from the application of the EU Provisional Measure Regulation and two product categories (categories 11 and 23) from the application of the EU Definitive Measure Regulation because the import data showed that there were no absolute increases during the period considered (this did not change the overall conclusions, as the quantities were very small). When examining the situation of the Union industry, the Commission also examined the global situation of the Union steel industry, as well as the situation at the level of the individual product categories.

22. If anything, the supplementary analysis of the individual 28 product categories (treated as a single group throughout the investigation) and of the "three steel product families" (flat products, long products and tubes) at definitive stage confirmed the soundness of the competent authority's conclusions on increased imports and threat of serious injury. In fact, the authority conducted such a complementary assessment precisely in order to address the comments made by interested parties against the global approach followed at the provisional stage.

23. With regard to the increase in imports, in the EU Definitive Measure Regulation the competent authority confirmed the absolute and relative increases during the period of analysis having regard to the "26 remaining product categories under assessment" as well as the three product families.

24. With respect to the threat of serious injury, in the EU Definitive Measure Regulation the competent authority conducted an examination on a global basis, namely for the product concerned (thereby including the 26 product categories where it was found an increase in imports). The competent authority supplemented its analysis with an assessment for each of the three product families. The above analysis showed that the Union industry – both globally and for each of the three product families – was in a difficult economic situation until 2016, and only partially recovered in 2017. The competent authority considered that the Union industry, despite the temporary improvement, was still in a fragile situation and under the threat of serious injury if the increasing trend in imports continued with the ensuing price depression and profitability drop below sustainable levels.

25. The causation analysis also took into account the global approach (because of the strong interrelation between the product categories that make up the product concerned) and also considered the effects of the increased imports at the level of the three product families.

26. The European Union was not required to assess whether, as a result of unforeseen developments, each product category subject to a safeguard measure was being imported into its territory in such increased quantities and under such conditions as to cause, or threaten to cause, serious injury to the Union industry. Its global analysis addressed this issue, as explained in this submission.

27. Turkey's concern as expressed by its reference to the Appellate Body Report in *US – Steel Safeguards* (the risk is that a Member "make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase") was addressed by the analysis for each product category, and by excluding certain product categories.

28. Thus, in order to impose a safeguard measure on the product concerned, the competent authority has established that the substantive conditions to impose that measure on that product are met with regard to that specific product.

29. In light of the above, Turkey's claims must be dismissed, as the European Union acted consistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c), 4.2(a), 4.2(b) and 6 of the Agreement on Safeguards.

2.2 The competent authority examined the product under investigation in an objective and unbiased manner

30. Turkey submits that "the competent authorities cannot group together different products or product categories for the purpose of examining certain aspects in a safeguard investigation while grouping them differently for the purpose of examining other aspects and/or imposing the measures".

31. Turkey places the weight of its argument on the fact that the Notice of Initiation referred to "products concerned" in the plural, while the provisional and definitive measures address a product concerned.

32. The European Union has already explained that the product categories have remained the same throughout the investigation. Some long products were not mixed with certain flat products and some tubes in the middle of the investigation. Each product category guarded its specificity.

33. In light of those findings, the product concerned, in the singular, was defined as the totality of the product categories. This is logical and follows from the understanding of the specificities of the steel sector and of the product at issue throughout the investigation.

34. To recall, the competent authority supplemented its examination by an analysis per product category regarding the imports. In the Definitive Regulation, the analysis was further supplemented by an assessment of three "product families" (flat products, long products and tubes).

35. Turkey points to the fact that in *Dominican Republic – Safeguard Measures* the panel considered that the definition adopted by the competent authority was that which governed the definition of the product under investigation. If anything, the statement Turkey refers to supports the European Union's position. It confirms the margin enjoyed by the competent authority in defining the product concerned. Differently from other cases, in the present case the competent authority has defined the product concerned. Can an investigating authority be faulted for the mere fact that some terminology used in the Notice of Initiation did not accurately reflect its content, as long as throughout the whole investigation the definition of the product concerned was reasonably clear? A rational and reasonable answer can be only in the negative.

36. What is the "consistency requirement" that Turkey relies on? If we have a closer look at the construction of its legal arguments, all that Turkey says is that:

(i) "[a]lthough Article 4.2(a) does not provide any guidance regarding the methodology for evaluating the increase in imports, the evaluation made by the competent authorities must be objective and unbiased" and

(ii) Article 3.1 of the Agreement on Safeguards requires the competent authorities to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

37. The European Union could not agree more.

38. However, Turkey infers from those provisions and case law statements that they "support" its idea of a "consistency requirement".

39. The so-called "consistency requirement" is not treaty language. It is a self-serving Turkish construction, as applied by Turkey to the facts of this case.

40. The European Union agrees with the principle that the methodology used by the competent authorities must lead to an evaluation that is objective and unbiased. Indeed, for all the reasons explained in detail above, the application of the chosen methodology in the present case permits an adequate, reasoned and reasonable explanation of how the facts on the record support the determination made.

41. In conclusion, Turkey's claims must be rejected, as the European Union acted consistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), (b), (c) and 6 of the Agreement on Safeguards by examining in an objective and unbiased manner the product concerned and its constituent categories of products.

3 THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT 1994

42. The circumstance "of the effect of the obligations" means in this case that the obligation under the GATT 1994 to not impose any tariffs above 0% (or quantitative restrictions) constrained the European Union's freedom of action to prevent the threat of serious injury caused by the increase in imports. These obligations are self-evident, go beyond the European Union's tariff bindings and do not require any additional explanation in the published report.

43. By contrast, the measures in *India – Iron and Steel Products* and *Dominican Republic – Safeguard Measures* cases required further explanations because the safeguard rates were below those Members' respective tariff bindings.

4 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLE XIX:1(A) OF THE GATT 1994 WITH RESPECT TO ITS DETERMINATION ON UNFORESEEN DEVELOPMENTS

4.1 The existence of unforeseen developments

44. The EU Definitive and Provisional Measure Regulations found that three factors constitute unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994.

45. First, the steel sector is facing a persisting and unprecedented overcapacity leading many steel producers to flood third country markets, such as the EU, with their products. This increasing and persistent overcapacity was unforeseen because it continued increasing after 2011 despite being already excessive and despite the important number of measures taken to reduce it. It must be noted that the panel in *India – Iron and Steel Products* also found that a significant increase in global production capacity for steel constitutes an unforeseen development.

46. Second, the recourse to trade restrictive and trade defence instruments has steadily increased. Data shows a significant increase of steel related investigations compared to 2011-2013 and amounts to an unforeseen development. Statistics show a significant increase in the number of antidumping and countervailing investigations in the steel sector in the US starting with

2013. The EU adopted or was targeted by a small number of trade defence measures compared to the worldwide increased use of trade defence measures in the steel sector.

47. Third, the competent authority found that, amid the persistent worldwide overcapacity, the US Section 232 measures, given their level and scope, were likely to cause substantial trade diversion of steel products into the Union.

48. Generally, even though changes in production capacity or demand are not necessarily extraordinary circumstances, and can occur as part of normal business cycles, the extent and timing of such changes as well as the degree of their impact on the competitive situation in a particular market can be unforeseen. The same applies to the use of trade defence instruments. The jurisprudence established that a competent authority must consider was not actually "foreseen", rather than what might or might not have been theoretically "foreseeable". Well-known prior facts, such as the possibility to use trade defence instruments, may develop into a situation initially unforeseen. While it is theoretically foreseeable that Members would use trade defence measures, the specific increase and persistence of such measures after 2011 was not foreseen when the EU negotiated its tariff concessions.

49. The unforeseen developments overlap in time. Global overcapacity doubled since 2000 and remained at a very high level in 2017. The use of trade defence instruments increased since 2014/2015 and continued throughout 2017. The investigation that led to the adoption of the US Section 232 measures was already initiated in April 2017 and the underlying report was issued in January 2018.

4.2 The European Union demonstrated the existence of a logical connection between the unforeseen developments and the increase in imports

50. According to WTO jurisprudence, in some cases, the logical connection between the alleged unforeseen developments and the alleged increase in import may be as simple as bringing two sets of facts together.

51. In this case, the competent authority found that in situations where spare capacity is available after supplying their domestic market, steel producers will seek other business opportunities on export markets and thus generate an increase in import volumes on such markets. Therefore, it is sufficient to put together the persistent global overcapacity, compounded by the increase in trade defence and trade restrictive measures, with the increase of imports in the EU, an attractive market by size and prices and also the world's largest, to show the existence of a logical connection between them. Import prices that have in general undercut Union industry prices in 2017 and the existence of EU trade defence measures against dumped or subsidized exports in the context of global overcapacity confirm, *inter alia*, the attractiveness of the EU market.

52. The US Section 232 measure has sped up the increase in imports by adding further trade diversion flows to the prevailing prior increasing trend. Some of the main exporters to the US are also traditional steel suppliers to the Union and it is certain that the countries concerned, as well as others whose exports and production will be affected by the US measures, will redirect their exports to the Union. The EU Definitive Measure Regulation explained that, except for April 2018, monthly imports of steel into the US became consistently lower than their corresponding months in 2017. The Section 232 measure had also an impact on trade flows even before its adoption in March 2018 as shown by the significant decrease of monthly imports of steel into the U.S. in 2018 compared to their corresponding volume in 2017. The imports of steel products into the US continued to decrease after the EU opened its own investigation.

53. The imports from the countries exempted from the US Section 232 measures are too small to affect the findings of the competent authority. In addition, US authorities started granting product exclusions to certain importers only after the adoption of the challenged measures and, in any event, Turkey failed to show any quantitative extent of any product exclusions granted.

54. The existence of several overlapping unforeseen developments reinforces the likelihood of an increase in imports into the EU.

55. The jurisprudence has established that a competent authority is required to analyse only the product under investigation that it had defined and not the individual products included in the former. Therefore, in this case, the competent authority correctly analysed the existence of unforeseen development in relation to the single product concerned.

56. The unforeseen developments regarding the steel market in general are relevant for the single product concerned. The latter includes a wide range of steel product categories ranging between 69,22 and 75,64% of all (finished and semi-finished) steel products imported into the EU. The evidence underlying the persistent global overcapacity in the steel sector does not reveal any product unaffected by overcapacity while the U.S. Section 232 measures cover all the products included in the single product concerned.

57. Finally, the European Union considers that if the Panel finds that the existence of one of the unforeseen developments was insufficiently proven, this does not necessarily give rise to an inconsistency with Article XIX:1(a) because the determination of unforeseen developments is sufficiently established by the other factors.

5 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLES 2.1 AND 4.2(A) OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994 WITH RESPECT TO ITS DETERMINATION OF INCREASE IN IMPORTS

58. The GATT 1994 and the Agreement on Safeguards do not require competent authorities to analyse separately each product category composing the product concerned. The competent authority's definition of the product under investigation, unchallenged by Turkey, governs the determination of the increase in imports. Since, in this case, the European Commission has competence to define the product concerned, it also entitled to analyse whether to exclude certain product categories from the scope of the single product concerned.

59. While Turkey claims that the European Union failed to provide a reasoned and adequate explanation of its finding of increase in imports in light of the most recent past with regard to certain product families and with regard to a number of product categories, it fails to criticise the relevant determination, namely the one concerning the product concerned. The European Commission's determinations about the three product families were made only for completeness of the main analysis regarding the single product concerned.

60. In any event, while data from the most recent past regarding the increase in imports has special importance, it should not be considered in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. There is nothing in the text of Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards to indicate that the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is rising and positive only if every percentage increase is greater than the preceding increase.

61. The European Union took into account the recent past when analysing the increase in imports for each product families. There were very small decrease in imports between 2017 and the most recent period (MRP) for flat products and tubes and between 2016 and 2017 for long products. When examined in the context of the entire period of investigation, these small decreases cannot undermine the determination that imports increased for the three product families and also, importantly, cannot detract from the conclusion of the global analysis on increased imports with regard to the single product concerned.

62. Further, the European Union demonstrated, on the basis of an end-point to end-point and a comprehensive trends analysis across the period of investigation, an increase in imports that is sharp enough, sudden enough, significant enough and recent enough to cause the threat of serious injury. Imports increased in absolute terms by 71% during the period of analysis, and in relative terms with market shares increasing from 12,7% to 18,8%. The valid determination

of the existence of a threat of serious injury and of a causal link demonstrate that the increase in imports was recent enough, sudden enough, sharp enough and significant enough to cause the threat of serious injury.

63. The sharp increase in imports by 59% between 2013 and 2016 to reach 71% overall until the MRP qualifies as "is being imported in … increased quantities". This increase is steep and unexpected enough to meet the requirements of Article 2.1 of the Agreement on Safeguards. Imports followed an uninterrupted upward trend, increasing every year both in absolute and relative terms. While the rate of imports continued to increase at a slower pace after 2016 before picking up again in the MRP, this does not undermine this determination.

64. The same applies to the three product families. The increase in imports was also recent enough, sudden enough, sharp enough and significant enough to cause the threat of serious injury with respect to product families. For flat products, the increase in imports after 2016 remained stable but at a much higher level than the 2013-2015 period. For long products and tubes, the slight decreases in certain years do not undermine the final conclusion given the constant upward trend of imports and the steeper increase at the end of the period of investigation.

6 THE EUROPEAN UNION ACTED CONSISTENTLY 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 A THREAT OF SERIOUS INJURY TO THE DOMESTIC INDUSTRY

65. The European Union found that although the domestic industry partially recovered in 2017 it was still in a fragile situation and under threat of serious injury.

66. Turkey's emphasis on the developments in 2017 fails to consider the significant deterioration during 2013-2016, the vulnerable situation of the Union industry in 2017 that was partially recovering after significant deterioration, the most recent developments in the MRP and the threat of serious injury caused by the most recent increase in imports.

67. While some factors improved in 2017, a number of injury factors were in a poor state: there was significant price depression on the Union market until 2016, prices recovering to their 2013 level only in 2017; the Union producers lost 5.4 percentage points in market shares from 2013 to 2017; profitability decreased during 2013-2015 and the industry "achieved a marginal profit level in 2016 and increase it to a more sustainable level in 2017 (5,6%)"; stocks grew by 19%; employment which decreased by 4%.

68. The significant deterioration during the period 2013-2016 indicates that the Union industry is vulnerable to an increase in imports: unit sales prices decreased by 15% and profitability overall remained at a very low level during the period 2013-2016 (between -1,0% and 2.2%). The improvement in 2017 could rapidly be reversed if imports would continue to increase (or surge, as a result of *inter alia*, the US Section 232 measures).

69. Turkey incorrectly claims that unfair trade practices have caused injury to the EU industry and that any injurious effects have been eliminated by EU's AD/CV measures. The European Union acknowledged the extent to which the EU's recent trade defence measures eliminated injurious effects. However, the recovery of the EU industry was only partial, several injury factors being in poor state and the EU industry was still in a vulnerable situation.

70. The profitability improvement of several product categories not subject to AD/CV measures does not contradict the European Union's position. This improvement is explained, *inter alia*, by the general recovery of the industry, lower raw material prices and the recent trade defence measures adopted during 2016-2017. Out of these factors, the European Union considers that its recent trade defence measures benefitted only to domestic products. The product categories not subject to EU's trade defence measures still had low levels of profitability, below what is generally considered as a healthy level in the steel sector.

71. The factors behind the partial improvement of the EU domestic industry were not capable of tackling a further increase in imports: products subject to recent AD/CV measures were being

replaced by imports from other origins/exporters; the raw material prices have actually increased at the end of the investigation period; the increase of the Union consumption has already slowed down at the end of the period of investigation. Moreover, the increase in EU prices in 2017 also fuelled further imports into the European Union in 2018.

72. Turkey incorrectly asserts that the competent authority found a mere threat of increased imports. The competent authority found a threat of serious injury as the vulnerable state of the Union industry shows. The evidence set out in the challenged measures shows that the future increase in import is established and not mere conjecture.

73. Imports remained at high levels in 2017. In 2018, for each month, import volumes into the Union were higher than import volumes in the corresponding months of 2017. The further increase in imports in 2018 – in particular from those countries or exporters not subject to trade defence measures – was likely to prevent the industry from a full recovery and from benefiting from these measures. This further increase was caused by the increasing EU prices in 2017 and the increasing EU consumption, the global and persistent overcapacity, the dramatic increase of global exports, the unprecedented wave of unfair trading practices and the effects of the US Section 232 measure.

74. The wide-reaching US Section 232 measure has caused a clear and steady trend of a decrease in imports into the US. This progressive decrease is already causing and was going to further generate trade diversion that is liable to speed up the increase trend of imports into the European Union. Some of the main exporters to the US are also traditional steel suppliers to the European Union. The European Union itself was not exempted from the Section 232 measure. It is more than likely that these countries, as well as others, will to a large extent be willing to redirect their exports to the Union. The EU market is indeed generally an attractive market for steel products both in terms of demand and prices. The European Union is, after China, but before the US, one of the main markets for steel, where demand has increased in the last years and prices have also now recovered. According to the economic model proposed by the Union industry, 72% of current US imports of steel would be diverted to the EU market, which corresponds to 55% of total Union imports of steel in 2017.

75. Moreover, prices were declining in the third quarter of 2018.

76. The European Union considers that the determination of the threat of serious injury does not require providing a detailed correlation between the products covered by EU's trade defence measures and those included in the single product concerned. Only some product categories were subject to recent AD/CV measures covering certain origins/exporters. These products were replaced by imports from other origins and exporters. Imports into the EU actually reached the highest absolute levels in the MRP and increased even in the remainder of 2018. In addition, steel prices in the Union started to follow a declining trend as of the third quarter of 2018. Several injury factors were in a continuous poor situation, despite the recent AD/CV measures, while the increase in imports continued to rise. It follows that the effects of the recent AD/CV measures were already reflected in the still vulnerable state of the EU industry.

77. Contrary to Turkeys' claims, the alleged lingering effects of past dumped or subsidised imports fail to explain the still vulnerable state of the EU industry. First, the recent AD/CV measures had a limited scope: they concern only a few origins/exporters for a few product categories. Second, the imports of products/origins/exporters not subject to recent AD/CV measures were replacing those subject to such measures also because of the trade diversion caused by the US Section 232 measure.

78. Finally, the GATT 1994 and the Agreement on Safeguards do not require analysing likely developments in the very near future with respect to each relevant factor. Such analysis would not be of "an objective and quantifiable nature" as prescribed by Article 4.2(a) of the Agreement on Safeguards and, as WTO jurisprudence under the AD and SCM Agreements found, "might result in a degree of speculation in the decision–making process, which is not consistent with the requirement of the Agreements". In this case, in line with the findings of the Appellate Body in *US – Lamb*, the competent authority analysed the "overall state of the domestic industry" and pointed out in particular at likely drops in price depression and profitability.

7 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLES 2.1 AND 4.2(B) 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 THREAT OF SERIOUS INJURY TO THE DOMESTIC INDUSTRY

79. Turkey failed to demonstrate that the European Union acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, since the competent authority demonstrated the existence of a causal link between the increased imports and the threat of serious injury to the domestic industry as required by those provisions.

80. Turkey wrongly alleges that the European Union acted inconsistently with Articles 2.1 and 4.2(b) the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, as it failed to establish the existence of a causal link between the increased imports and the threat of serious injury to the domestic industry. It also contends that the European Union failed to ensure that injury caused by factors other than imports had not been attributed to imports.

7.1 The European Union established the existence of a causal link between the increased imports and the threat of serious injury

81. The European Union starts by noting that the competent authority "has established a threat of serious injury if imports continue to increase. It has not established injury during the investigation due to the increase of imports over the period considered". The meaning of this particular recital seems to be distorted by Turkey. The recital does not say that the causal link between increased imports and the threat of serious injury is established by reference to a different period than the period considered. All it says is that serious injury was not established during the period considered, so it follows that it is the same period that served as benchmark for the threat of serious injury. At the same time, an evaluation of whether serious injury is clearly imminent requires fact-based projections, a future-oriented analysis.

82. The primary objective of the process of establishing the causal link is to determine whether there is a genuine and substantial relationship of cause and effect between the increased imports and the threat of serious injury. It is a projection of what is rational and reasonable to expect if increased imports continue to pour in a similar manner.

83. Throughout the causality part of its submission, Turkey seems to assimilate serious injury to threat of serious injury. This is not a reasonable approach. While serious injury is already materialized, a threat of injury is only about to materialize, it is clearly imminent, and the very purpose of a safeguard measure is to avoid that happening.

84. Thus, when Turkey paints the graphs juxtaposing increased imports and certain injury indicators (e.g. profitability), it must be borne in mind that the situation is one of threat of injury.

85. Turkey's claims with regard to the lack of correlation between the increased imports and different injury factors have to be rejected, as there is a coincidence in time between the upward trend in the imports and the trends in those injury factors over the period of investigation.

86. First, with regard to market share, the competent authority found that imports of the product concerned increased significantly during the period 2013-2017, taking away Union market shares because of price levels lower than those of the EU steel producers. Importantly, the market share of imports grew overall from 12,2% to 17,6% and import prices remained almost systematically lower than the Union sales prices for each individual product.

87. Turkey does not seem to dispute this finding in its submission. Instead, it attempts to downplay its importance and to emphasize alleged mismatches with regard to trends in profitability and prices.

88. Second, with regard to profitability and prices, the Appellate Body found that short-term trends in the data could possibly be a misleading indicator of the likely future state of the domestic industry, when viewed in the context of the data for the entire period of investigation.

89. With that consideration in mind, when looking at the increase in imports and the evolution of the injury factors, the European Union recalls that even if some factors improved in 2017, the period 2013-2016 indicates that the Union industry is vulnerable to an increase in imports.

90. In particular, during the period 2013-2016 there was a significant price depression on the Union market: for example, unit sales prices decreased by 15% and profitability overall remained at a very low level during the period 2013-2016 (between -1,0% and 2.2%).

91. For all product categories, there was significant price depression on the Union market until 2016. Prices recovered to their 2013 level afterwards. The Union steel industry could reduce its cost of production to achieve a marginal profit level in 2016 and increase it to a more sustainable level in 2017 (5,6%).

92. However, the improvement in 2017 could rapidly be reversed if imports would continue to increase (or surge, as a result of *inter alia*, the US Section 232 measures).

93. With regard to the three product families, certain factors did not improve in 2017, when unit sales prices decreased during 2013-2017 for long products (-4%) and tubes (-13%).

94. Finally, even if some factors improved in 2017 for each product family, the difficult economic situation during the period 2013-2016 indicates that the Union industry is vulnerable to an increase in imports in relation to each product family.

95. Thus, the record shows that (i) the Union producers suffered loss of market share and unsustainable levels of profit; (ii) the link between increased imports and the Union situation was especially marked during the interval 2013 – 2016, while imports remained high and undercut Union prices in 2017; and (iii) the economic situation of the Union industry was still vulnerable, even if profits recovered.

96. All these explanations, substantiated by tables and figures, meet the required standard of causality in light of the relevant case-law.

97. Thus, to sum up: at this stage of the legal analysis, Turkey does not seek to take issue with an important injury factor, namely the loss of market share, while it has difficulties in demonstrating its thesis with regard to profitability and prices, as it fails to take into account important evolutions during the whole period of investigation.

98. In any event, as Turkey admits, a competent authority may make a compelling analysis without showing a correlation between the increase in imports and the evolution of certain injury factors.

99. Indeed, the case law confirms the flexibility enjoyed by a competent authority, as long as it is unbiased and objective in its assessment.

100. For instance, even in the case of serious injury, a correlation is not dispositive in a causation analysis. In *Argentina – Footwear (EC)*, the Appellate Body made clear that "the existence of correlation, though indicative, is by no means dispositive of the existence of a causal link. Indeed, the Appellate Body considered that the lack of correlation does not preclude a finding that a causal link exists, provided that a very compelling analysis is provided".

101. With these considerations in mind, the European Union recalls that the competent authority explained that "In the period 2013-2016 there was a significant price depression on the Union market: Unit sales prices decreased by 15%. It should be recalled that imports also increased significantly during this period. The average unit sales price recovered however in 2017 and reached a level comparable to 2013. Profitability overall remained at a very low level during the period 2013-2016. Despite a significant decrease in prices, the Union industry could nevertheless reduce its cost of production in 2016 to such an extent that it managed to make

a small level of profit of 2,2%. The situation temporarily recovered in 2017. Sales prices increased by almost 20% between 2016 and 2017 and reached their 2013 level. The Union industry achieved a level of profit of 6,2% since cost of production (raw material), even if increasing, remained lower than in 2013. The overall cash flow position of the Union industry increased by approximately 60%".

102. Thus, when looking at the totality of the analysis with regard to the relationship between increased imports and the evolution of market shares, profitability and prices, as already explained, it follows that the competent authority provided reasoned and adequate explanations that meet the legal standard required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

103. In light of the above, Turkey failed to demonstrate that the competent authority did not prove the required causality between increased imports and the threat of serious injury.

7.2 With regard to the non-attribution analysis

104. The competent authority examined relevant factors other than increased imports, ensuring that the injury caused by such other factors was not attributed to the increased imports. Following this analysis, it has not identified other factors that would weaken the causal link between the increase in imports and the serious injury to the Union producers.

105. The "other factors" the competent authority has considered in its analysis of possible factors causing injury to the domestic industry are described in the EU Provisional Measure Regulation and in the EU Definitive Measure Regulation.

106. In particular, at the provisional stage the competent authority analyzed the effects of the global overcapacity and found that, albeit facilitating cheap imports it was not of a kind to break the causal link.

107. Similarly, the imports from the EEA countries were not sufficient to affect the situation of the Union industry.

108. At that stage no other factors were identified that could have weakened the causal link between the increased imports and the threat of serious injury.

109. At the definitive stage, the competent authority confirmed the causal link between the increase in imports and a threat of serious injury to the Union industry. On the same occasion, it analysed several possible "other factors".

110. With respect to the development of raw material costs, the competent authority noted that the cost of production trend is similar to the trend in sales prices, with the exception of 2017, when sales prices were exceptionally favourable as compared to costs. It thus concluded that it does not reveal any particular link between raw material cost and profitability development.

111. As to the export performance of the Union steel industry, it was noted that the volumes exported by the Union industry throughout the period considered are relatively small as compared to the volumes sold on the Union market. At the same time, the export price development was rather flat over the period considered, with the exception of 2016 when export prices were overall significantly lower than in the other years.

112. With regard to the role of imports made by Union producers or related traders/distributors, it was noted that those imports were marginal and relatively stable over the period considered, representing 0,3% to 0,7% of total imports depending on the year.

113. On the basis of all this data before it, the competent authority concluded that no other factor was capable of breaking the established causal link between the increased imports and the threat of serious injury.

114. Contrary to what Turkey alleges, dumped/subsidised imports should not be part of the non-attribution analysis.

115. Anti-dumping duties address the injury caused by the dumped imports from a given origin on a given product category. The same idea applies for countervailing duties.

116. A safeguard measure is in place to prevent the injury that resulted from the accumulation of all imports, including those found to be dumped/subsidised at some point and which, as a result of the imposition of the ADDs/CVDs, enter the importing country subject to the payment of an additional duty. Those continuing imports are still imports, and the ADDs/CVDs will presumably make them fewer in number and less injurious in effect than they would have continued to be in the absence of ADDs/CVDs.

117. Only when a tariff-rate quota (TRQ) is exceeded, the out of quota duty applies, and for that, the European Union has the Double Remedy Regulation, which prevents cumulating duties.

118. In order to avoid a double remedy in terms of duties, for the out-of-quota volumes it was decided that only the out-of-quota safeguard tariff applies and not also the ADDs and CVDs. It is precisely this aspect that Turkey seems to be concerned with.

119. A safeguard investigation must take into account, for the purposes of measuring "increased imports", also imports which are subject to anti-dumping and subsidy measures or ongoing investigations. There is no legal basis for their exclusion. On the contrary, if the imports from a country were excluded, then this would result in a breach of parallelism under Article 2 in the event that the exclusion is not carried also into the measures. Until the anti-dumping/subsidy investigations reach the provisional, and then the definitive stage, a competent authority cannot know whether those imports fulfil the conditions in the Anti-Dumping and SCM Agreements.

120. Then, if and when a determination of injurious dumping or subsidisation is made and measures applied (ADDs, CVDs), the effect of dumping/subsidisation is thereby addressed. This normally, although not always, results in trade volumes dropping, and entering the market at higher prices. The actual, often diminished, and more expensive imports coming to the EU market after payment of these duties are still imports and part of the overall imports that may have increased, for the purposes of a safeguard investigation and later of the application of the safeguard measures. In other words, they are a part of the (increased) imports which affect the EU industry. Thus, it would be wrong to not consider these volumes as part of the "increased imports".

121. In conclusion, the fact that certain imports of certain product categories from certain sources are subject to ADDs/CVDs does not make them unqualifiable for being counted as increased imports.

122. In the case of the investigation subject to these proceedings, dumped/subsidised imports fall within the scope of the "increased imports". They are not "factors other than increased imports" within the meaning of Article 4.2(b) of the Agreement on Safeguards. There is no obligation to conduct a non-attribution analysis with respect to such imports, because these imports are actually part of "the 'increased imports'" that have caused threat of serious injury to the EU industry.

123. The measures at issue do not determine that the EU industry was injured in 2015 or 2016. Those years were used in order to assess a trend. The focus for determining the threat of serious injury is on the last year (2017). By then, most of the ADDs/CVDs were already in place.

124. For the purpose of a safeguard investigation, what matters are the trade volumes. Safeguard measures concern fair trade. In contrast, anti-dumping and countervailing measures concern trade considered unfair.

125. Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement ("no specific action against dumping/a subsidy …") are not contradicted by this approach. Anti-dumping duties are imposed only on those imports from those sources which resulted in injurious dumping. Similarly, CVDs are also imposed only to those imports meeting the conditions of the SCM Agreement.

126. In other words, ADDs deal with injury caused by dumping and CVDs deal with injury caused by subsidization.

127. The European Union considers that dumped imports could be a genuine and substantial cause of the injury to the domestic industry in the context of the anti-dumping investigation.

128. At the same time, the subsidised imports could also be a genuine and substantial cause of the injury to the domestic industry (thus making this also at the same time injury caused by the subsidised imports).

129. One can have two causes at the same time, both of which are genuine and substantial causes of a particular situation (here, injury to the domestic industry).

130. This is subject to the observation that one cannot double count ADDs and CVDs. So, if a subsidy of 100 finances dumping by a margin of 100, such that the AD margin and subsidy margin are both 100, only one duty of 100 can be imposed. At the same time, the injury that we see resulting is attributable to both the subsidy and the dumping (they are both genuine and substantial causes).

131. When one adds the safeguard perspective, the European Union notes that there is no express rule against double counting (like Article VI:5 of the GATT 1994), but it is important to bear in mind that safeguard measures may be applied only "to the extent necessary to prevent serious injury and to facilitate adjustment", as per Article 5.1 of the Agreement on Safeguards.

132. An imported product can cause injury because it is being dumped (addressed via ADDs) and because it is taking place in large and increased volumes (although in the latter case, it will have to be assessed together with the evolution of other origins). In that case, the design of the safeguard measure, in line with Article 5.1 of the Agreement on Safeguards, will take account of the fact that (1) dumped/subsidised imports are not, in volume and price, what they would have been had anti-dumping measures not been imposed and thereby automatically also of the fact that (2) the safeguard measure needs only remedy/prevent the serious injury which increased imports are causing/threatening to cause for the domestic industry even after applying the ADDs/CVDs. In the causation analysis, the imports subject to ADDs/CVDs therefore contribute to the threat of serious injury only in the nature and volume in which they exist after the imposition of ADDs/CVDs. To that extent, they are however part of the increased imports and thus not "factors other than increased imports [that] are causing serious injury to the domestic industry at the same time" which under Article 4.2(b) are subject to the non-attribution obligation.

133. What would be wrong, but did not happen in this investigation, would be if the competent authority considered, for the purposes of designing the necessary extent of the safeguard measure (i.e. the necessary restrictiveness) under Article 5.1, the injurious nature of dumped/subsidised imports, as if these were not subject to ADDs/CVDs.

134. It bears reminding that the imposition of ADDs and CVDs is a right of WTO Members under certain conditions, but not their obligation (under the WTO Agreement). A WTO Member is therefore entitled not to impose ADDs/CVDs. That WTO Member would presumably not conduct AD/CV investigations and therefore not even know and certainly not have determined, in accordance with the WTO Agreement, that certain imports are being dumped or subsidised. That WTO Member is still allowed to impose safeguard measures – under the (stricter) conditions of the Agreement on Safeguards. That Member, too, is not obliged, within the safeguards investigation, to enquire whether some of the increased imports are also dumped or subsidised – such an obligation does not exist in the Agreement on Safeguards.

135. It remains thus the situation where there is dumping/subsidisation, investigations are under way, but AD/CV measures not yet imposed. In that case, as also follows from the above, there is again nothing that needs to be conducted in any particular way when the safeguards investigation enquires into the increase, injury and causation. However, when it comes to the design of the safeguard remedy, the question of the parallel investigations must not be ignored. If the AD/CV measures come after the imposition of the safeguard measure, this may mean that the safeguard measure, after its imposition, needs to be adjusted.

136. In the measure subject to this dispute, it is important to recall from a factual point of view, that the vast majority of ADDs/CVDs against product categories belonging to the product concerned were already in place by 2017 (in some cases they had been imposed even before). Therefore, in the increase in imports that took place in 2017 and in the Most Recent Period (July 2017 – June 2018), dumped/subsidised imports not yet covered by measures would have, at best, played a negligible role. Furthermore, in the European Union's view, the imports made from a country under ADDs/CVDs should be treated no differently than those made from a country that was never found to be incurring those unfair trading practices. In fact, by exporting under ADDs/CVDs, imports from that origin are placed at the same level than those imports (fairly traded) from other origins. Treating them differently simply because one is paying a duty (despite contributing to an increase of imported volumes) would be clear discrimination, not grounded on the relevant agreements.

137. Let's now take the following example: dumping from country X is offset with an ADD. But if, despite the ADD, country X increases its sales further, coupled with an overall increase when seen together with all other origins, does that mean that a competent authority cannot address the injury caused by those volumes subject to the ADD under a safeguard investigation?

138. Thus, dumped and subsidised imports can be part of the increased imports for safeguards purposes.

139. In the present case, the competent authority was restrained and reasonable, because even absent any express rule, it applied the ADDs and CVDs only up to a certain volume within the TRQ, while beyond that it applied exclusively the safeguard measure even to the dumped imports. In conclusion, the competent authority did not address the injurious effects of certain imports caused by dumping and subsidisation through a safeguard measure. The approach of the competent authority is consistent with both Article 4.2(b) and Article 5.1 of the Agreement on Safeguards.

140. In light of all the above considerations, Turkey failed to show that the European Union acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 and its claims with regard to causality must be rejected.

8 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLES 5.1 AND 7.1 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT 1994 IN ITS APPLICATION OF THE SAFEGUARD MEASURES

141. Turkey alleges that the European Union acted inconsistently with Article 5.1, first sentence, and Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 as it applied safeguard measures beyond the extent and duration necessary to prevent serious injury and to facilitate adjustment.

142. The European Union disagrees.

143. Indeed, the approach adopted by the competent authority was such as "to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and to facilitating adjustment".

144. To recall, at the provisional stage the competent authority considered that the "openness of the Union market should be preserved and the traditional flow of imports should be maintained". That was a major consideration for the choice of tariff rate quotas.

145. That was confirmed at the definitive stage, as "a tariff-rate quota is indeed the best form of measure to balance the various interests at stake, namely preventing serious injury and ensuring that traditional trade flows are maintained".

146. Thus, the safeguard measure at issue took the form of tariff rate quotas, imports being subject to a duty of 25% when exceeding a quota. The tariff rate quotas have been calculated for each product category, as the average import volumes during the period 2015-2017, plus 5%.

147. What Turkey seems to take issue with within this claim is not the within-the-quota determination, but the out-of-quota 25% duty, which it separates from the former element of the tariff rate quota.

148. The competent authority duly explained with regard to the setting of the level of the out-of-quota 25% duty that "unless the Union imposes an above quota tariff on the relevant steel import of an amount at least equal to the tariff applied by the US, the exporter to the US will gain extra margin or minimise the loss thereof by redirecting sales to the EU".

149. The different elements of the tariff rate quota have to be taken together so as to understand its design and operation. A threat of injury situation by definition involves certain projections. These projections have to meet a stringent legal standard, but their essence remains. Against this background, the competent authority has transparently explained how in an objective and unbiased way, it designed the tariff rate quotas (both the within-the-quota and out-of-quota components), precisely to cater for the various competing interests, and in particular having in mind the requirement that a safeguard measure has to be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

150. Then, as a consequential claim, Turkey contends that "it follows that the violation of Article 4.2(b) constitutes a sufficient basis for a *prima facie* case that the safeguard measures have not been applied 'only to the extent necessary to prevent or remedy serious injury' as required by Article 5.1 of the Agreement on Safeguards". As the European Union has already explained, the competent authority established the existence of a causal link between the increased in imports and the threat of serious injury. Thus, this sub-claim should be dismissed.

151. For the same reasons, Turkey alleges that the European Union also violated Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

152. This contention must similarly be rejected. An initial duration of 3 years, as opposed to a longer period of time, was precisely designed, in an objective and unbiased manner, so as to apply the safeguard measure only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

153. Finally, a third direction of Turkish critiques comes from the fact that European Union applied the definitive safeguard measure allegedly to "address the serious injury caused by dumped and subsidized imports".

154. As the competent authority explained, "in order to avoid the imposition of 'double remedies', whenever the tariff quota is exceeded, the level of the existing anti-dumping and countervailing will be suspended or reduced to ensure that the combined effect of these measures does not exceed the highest level of the safeguard or anti-dumping/countervailing duties in place".

155. Indeed, the rationale of this approach is the avoidance of double remedies for those steel product categories concerned originating from some countries also subject to anti-dumping and/or countervailing duties. As explained by the competent authority, "a cumulation of anti-dumping/anti-subsidy measures with safeguards may lead to a greater effect than desirable" and the "issue of cumulation would only potentially arise once tariff-rate quota ceilings are reached". This cannot be legally characterized as a failure to apply the measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The within-the-quota figures were precisely designed in order to satisfy the very logic of safeguard measures and the legal requirement in Article 5.1.

156. In light of the above, Turkey failed to show that the European Union acted inconsistently with Article 5.1, first sentence, and Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 and its claim should be rejected by the Panel.

9 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLE XIII:2 CHAPEAU AND PARAGRAPH (D) OF THE GATT 1994, AS WELL AS WITH ARTICLE 5.2(A) OF THE AGREEMENT ON SAFEGUARDS

157. Turkey claims that the European Union acted inconsistently with Article XIII:2 chapeau, Article XIII:2(d) of the GATT 1994 and Article 5.2(a) of the Agreement on Safeguards as it failed to allocate the shares of the TRQs by taking into account imports of a previous representative period, due account being taken of any special factors affecting the trade in the product concerned. In particular, Turkey claims that the European Union should have used for the purpose of allocation of the shares of the TRQs data of the most recent period, i.e. including the first six months of 2018.

158. The European Union starts by recalling that Article 5.2(a) of the Agreement on Safeguards does not apply in this case because it does not apply to tariff rate quotas. This is because a tariff-rate quota is the setting of a typically lower import duty that applies for a set quantity of imports after the importation of which a higher import duty applies. In this sense, a tariff-rate quota is the combination of two tariff rates and the setting of a quantity of imports after which the lower duty switches to the higher one. Import duties are tariff measures and not "quantitative restrictions", as confirmed by the panel in *US – Line Pipe* (para. 7.69).

159. This rationale is simple: a tariff rate quota is not a quantitative restriction because it imposes no quantitative limitation on imports, which are allowed subject to duties of different levels. In-quota imports come in at a lower duty, (e.g. zero), and out-of-quota imports come in at a higher duty (e.g. 25%), to the extent this higher duty still makes trade profitable.

160. In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII of the GATT 1994, a Member has to base such shares on an appropriate previous representative period and any special factors would have to be applied on a non-discriminatory basis.

161. In the context of establishing which Members hold a substantial supplying interest, the panel in *EU – Poultry Meat (China)* concluded that "there is no general rule always requiring the use of the most recent three-year period prior to the entry into force of a TRQ".

162. Although the European Union considers that a similar approach is warranted when considering the "previous representative period" for the purpose of the second sentence of Article XIII:2(d), which is not defined, it is also true that there is a widespread practice in the GATT and WTO to resort to recent three-year periods as representative periods. Indeed, the treaty language on the legal standard does not go further than referring to a "previous representative period".

163. The fact that the competent authority used an average of the imports during the period 2015-2017 meets precisely this legal criterion of the "previous representative period". Of note, this period of three years is also a recent one, as the competent authority did not include the year 2014 as part of that period, which would have resulted in different figures.

164. Thus, the tariff rate quotas were distributed in the least trade-distorting manner and in full conformity with the non-discrimination requirements of Article XIII, so as to serve the aim of a distribution of trade approaching "as closely as possible" the shares that various Members may be expected to obtain in the absence of the tariff rate quotas, as required by the chapeau of Article XIII of the GATT 1994. The competent authority precisely achieved that, as the consideration of the average imports during the last three years prior to the initiation of the investigation reflect as closely as possible such historical share.

165. Turkey claims that "the additional ad-hoc 12-month period made of the last 6 months of 2017 and the first 6 months of 2018 ('the most recent period' or 'MRP')", which was considered in order to assess the increase in imports, should also have been used for the purpose of the tariff rate quota calculations.

166. The European Union disagrees. The treaty language is different with regard to increased imports and the previous representative period, and the approach adopted by the competent authority precisely caters for those differences.

167. Safeguard measures are permitted only when a product is being imported in increased quantities, i.e. the increase must still exist when the determination is made and in that sense must be recent. Also, the increase must be such that it caused the threat of serious injury. Indeed, as the very title of Article XIX of the GATT 1994 suggests, a safeguard measure is an "emergency action". This is what requires an investigation period that focuses significantly on the recent past and why investigating authorities add to it months of an uncompleted year when the moment of the investigation warrants that.

168. In contrast, for trade statistics it is important to use representative periods, which for reasons of seasonal variations requires the use of full years, for representativeness purposes also several years (very often, as here, three), which in the averaging are of equal weight, i.e. without special focus on the most recent year.

169. In light of the above, it becomes clear that the EU acted in full conformity with Article XIII of the GATT 1994. Accordingly, Turkey failed to demonstrate that the European Union acted inconsistently with Article XIII of the GATT 1994 and Article 5.2(a) of the Agreement on Safeguards and those claims have to be rejected.

10 THE EUROPEAN UNION ACTED CONSISTENTLY WITH ARTICLES 7.4 AND 5.1 OF THE AGREEMENT ON SAFEGUARDS WITH REGARD TO THE PACE OF LIBERALIZATION

170. Turkey alleges that the European Union acted inconsistently with Article 7.4 and Article 5.1, first sentence, of the Agreement on Safeguards because the safeguard measure became more trade restrictive following the first and second reviews, as the pace of liberalization of the measure was reduced.

171. As per the requirements of Article 7.4, the safeguard measure at issue, exceeding one year, was progressively liberalized, in order to facilitate adjustment of the domestic industry by increasing its exposure to foreign competition.

172. The European Union reviewed the definitive safeguard measure in 2019. As part of that review, the liberalization rate was set at 3% during the second and third year of the application of the measure.

173. This approach complies with the requirements in Article 7.4. In particular, this liberalization is progressive, set at 5% and then 3% and 3% respectively, and occurs at regular intervals of one year. This is a progressive liberalization of the kind of referred to in the *Ukraine – Passenger Cars* panel report.

174. The treaty text does not establish any particular requirement as to the form or concrete pace of liberalisation, other than such liberalisation should occur progressively at regular intervals during the period of application.

175. In this regard, we strongly disagree with Turkey's contention that this requirement implies "that once the competent authorities have determined a schedule of liberalization, it cannot decrease the pace of liberalization". There is no support in the Agreement for this proposition. Moreover, should this proposition be accepted, then a WTO Member that announced at the very beginning a certain pace of liberalization (5% + 5% liberalisation pace) and then revises it (3% and 3% liberalisation pace) would be found to have breached the Agreement whereas if the same WTO Member had not announced the pace of liberalization in advance but after one and two years liberalised it at the 3% and 3% liberalisation pace, it would not be found to have breached the Agreement. This would be a perverse incentive which would have the detrimental effect of encouraging an early announcement of low or minimal liberalisation degrees (to be subject to possible accelerations afterwards) and thus forestalling an early announcement that gives a more demanding signal to the domestic industry as regards how it is expected to adjust. Finally, the requirements of Article 7.4 are to "progressively liberalize" the safeguard measure, which the European Union did.

176. With regard to the claim concerning quantitative caps on the use of the global and residual TRQs for certain product categories, the competent authority explained that "the current annual administration of the country specific quotas would not be effective in preventing the disturbances on the Union steel market identified above, which would be exacerbated by the expected opportunistic behaviour of some exporters".

177. With respect to Turkey's claim that imports were restricted under product category 4.B to those exporters that could demonstrate an end-use in the automotive sector, it is worth noting that those exporting countries selling 4.B (non-automotive) could do it under that category because the relevant CN codes were transferred to category 4.A. So export could continue according to historical trade flows.

178. It is also worth noting that first, this calibration was introduced at the specific request of the EU automotive industry and in consultation with the main automotive steel exporting countries; and second, these very same actors were unable to undertake the necessary steps on their end to benefit from this mechanism which would have facilitated trade.

179. Therefore, because of the inability of the said actors to make it work, what should have been an adjustment leading to a less restrictive measure ended up being more restrictive. Indeed, this end-use mechanism was not supposed to be more trade restrictive. In order to remedy this shortcoming, the measure was adjusted by the amending regulation of 15 January 2020, which revoked the automotive end-use requirement, with retroactive effect.

180. The ameliorated administration of the tariff rate quotas and the specific adjustments to individual product categories, including with regard to category 4.B are not modifications that render the definitive safeguard measure inconsistent with Article 7.4 of the Agreement on Safeguards. The definitive measure continued to be progressively liberalized at regular intervals and the modifications, taken together, are consistent with that requirement.

181. In light of the above, Turkey's claim under Articles 7.4 and 5.1 of the Agreement of Safeguards was not demonstrated and it has to be rejected.

11 THE EUROPEAN UNION'S MEASURES AT ISSUE ARE CONSISTENT WITH ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS AND DO NOT AMOUNT TO A VIOLATION OF THE SECOND SENTENCE OF ARTICLE II:1(B) OF THE GATT 1994

182. Turkey has failed to demonstrate that the measures at issue are imposed in violation of the second sentence of Article II:1(b) of the GATT 1994.

183. In fact, Turkey's Article II of the GATT 1994 claim is consequential to its claims of violation of the Agreement on Safeguards.

184. The European Union has adopted safeguard measures that are consistent with its obligations under Articles II:1 and XIX:1(a) of the GATT 1994 and the Agreement on Safeguards.

185. Having complied with the relevant conditions, this is something that the European Union "shall be free to do". Once the European Union has suspended its obligations, it was entitled to apply duties of the kind of those at issue in the present case.

186. There is no violation of Article II:1(b) that is justified by Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards. A suspension is not a violation in first place.

187. As the European Union has demonstrated throughout the present submission, Turkey has failed to demonstrate that the measures at issue are inconsistent with the European Union's obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards. The measures at issue resulted in a valid suspension of the European Union's obligations under Article II:1(b), second sentence, within the meaning of Article XIX:1(a) of the GATT 1994.

12 CONCLUSIONS

188. Turkey has failed to make a *prima facie* case on any of its claims. For the reasons set out in its submissions, the European Union respectfully requests that the Panel rejects all of Turkey's claims that the European Union's provisional and definitive safeguard measures on steel products are inconsistent with the GATT 1994 and the Agreement on Safeguards.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

I. Turkey's claim under Article XIX:1(a) of GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards regarding the determination and analysis of the "product under investigation".

1. Argentina considers that, first, the Panel should examine the factual question contested by the parties; namely whether the EU analysed distinct products to which distinct safeguard measures were applied or whether, on the contrary, it examined a single product to which a single measure was applied.[1]

2. Should the Panel find that the EU analysed distinct products and applied distinct safeguard measures, the Panel should examine whether the competent authority verified the existence of the conditions listed in Article 2.1 of the Agreement on Safeguards for each of the products investigated. In that regard, Argentina understands that the "principle of parallelism" is particularly relevant and applicable to this case. By virtue of this principle, there should be a parallelism between the imports covered by the scope of a safeguard investigation and the imports subject to safeguard measures.

3. On the other hand, in the event that the Panel finds the EU has investigated a single product that was subject to a single safeguard measure, the Panel should still examine whether the competent authority conducted the investigation in an objective and impartial manner, based on objective factors and evidence, in accordance with the provisions of Article 4.2(a) and (b) of the Agreement on Safeguards.

4. In this regard, Argentina considers that it is difficult to understand how the conditions laid down in Article 2.1 may be considered to exist with respect to the product under investigation if the competent authority modifies the grouping of products or product categories, depending on the different aspects the authority wishes to analyse during the safeguards investigation.[2]

5. Similarly, Argentina considers that, if the investigating authority defines the product under investigation in a relatively broad manner, its analysis and examination must be conducted in line with the inherent complexities resulting from such broad coverage.[3] In particular, in the event of different trends in distinct product categories, the investigating authority must justify and give a reasoned explanation why different trends do not affect the conclusions that underpin the decision to impose safeguard measures. In any case, the competent authority's final conclusions must be properly substantiated, as required under Article 3.1 of the Agreement on Safeguards.

II. Turkey's claim under Article 7.4 of the Agreement on Safeguards.

6. Turkey submits that the EU acted inconsistently with Article 7.4 because, following the first and second review, it made the safeguard measures more restrictive than those imposed after the original investigation, thereby reducing the pace of liberalization.[4]

7. Turkey lists several changes that reduced the aforementioned pace of liberalization.[5] Among the various facts cited, Turkey mentions that the EU amended the list of developing countries with *de minimis* exports excluded from the scope of the original safeguard measures.[6]

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* Original in Spanish.
[1] Republic of Korea's third-party written submission, para. 9.
[2] Switzerland's third-party written submission, para. 11.
[3] Republic of Korea's third-party written submission, para. 9.
[4] Turkey's first written submission, paras. 354 and 380.
[5] Turkey's first written submission, paras. 361 and 363.
[6] Turkey's first written submission, para. 361, fifth bullet point, and para. 363, sixth bullet point.

8. First, as regards the amendment of the list of developing countries, Argentina considers that Article 7.4 of the Agreement of Safeguards should be read together and in a consistent manner with the provisions of Article 9.1.

9. In this connection, Argentina firmly believes that the review of the list of excluded developing countries is inconsistent with the progressive liberalization obligation in cases where countries that were originally exempted from the safeguard measures are then included in their scope as a result of the subsequent review process.

10. Second, Argentina recalls that the obligation set out in Article 7.4 means that, legally, the review process can only have two possible outcomes: the withdrawal of the safeguard measures or their progressive liberalization. In other words, the measure can never, under any circumstances, be made more restrictive (*Argentina – Footwear (EC)*, WT/DS121/R, para. 8.303).

11. For the reasons given it is clear that, once it has been verified that a developing country is subject to the special and differential treatment established in Article 9.1, that exemption must remain in place until the measure expires, even if that country's share subsequently exceeds 3% of total imports. Otherwise, the competent authority would be able to convert the safeguard measure into a more restrictive measure following the review process, something that is manifestly prohibited by Article 7.4 of the Agreement on Safeguards.

III. Argentina's replies to the questions posed by the Panel to the third parties.

- With regard to the question of whether a Member State may exclude a sub-group of products under investigation from the scope of provisional or definitive safeguard measures, Argentina replied that the Agreement on Safeguards does not contain any explicit legal provisions that restrict a Member State's right to do so. However, it noted that, in the hypothetical case that the competent authority excludes a certain sub-group of products from the scope of the safeguard measures, the excluded imports should be considered as "other factors" in the "non-attribution" analysis that must be carried out in accordance with Article 4.2(b) of the Agreement on Safeguards. In short, Argentina understands that the principle of "parallelism" applies in this case.

- Regarding the connection between "unforeseen developments" and the increase in imports in the steel production sector, Argentina replied that it is not enough for the competent authority to demonstrate the connection between "unforeseen developments" and imports of too broad a group of products, instead it must conduct individual analysis for each product involved (*US – Steel Safeguards*, WT/DS248/R, p. 319).

- With reference to whether the "attractiveness" of the market is sufficient to establish causation between the "unforeseen developments" and the increase in imports, Argentina understands that market "attractiveness" may, ultimately, offer a plausible explanation for the casual link. However, a simple claim is not sufficient. It should be established on the basis of objective evidence that this characteristic (market "attractiveness") has triggered specific, observable facts (for example, deviation of trade) that has led to an increase in imports. In addition, Argentina reiterates that, as with any evidence of a causal link, it is particularly important that the elements to be linked together exist concurrently.

- In response to the question on projections of import increases in the future in the context of Articles 2.1 and 4.2 of the Agreement on Safeguards, Argentina said that the investigating authority may give weight to future import projections as the threat of injury analysis was, by nature, particularly forward-looking. However, Argentina recalled that the standard for determining the threat of injury within the WTO framework is rigorous. Accordingly, Argentina highlighted the following criteria: (a) import projections must be based on the most recent information available; (b) projections must be based on market forecasts and/or accredited statistical data, on the basis of proven objective empirical evidence; (c) import projections must not be based on mere conjecture, possibilities, opinions or claims; (d) import projections must be duly linked to the imminence of injury to the industry concerned by a relationship of cause and effect. These criteria are supported by the panel's ruling in *US – Lamb*, (WT/DS178/R, para. 7.129).

- Lastly, on the matter of the safeguard investigation's coverage of imports subject to anti-dumping and/or countervailing duties, Argentina replied that the injurious effects of imports subject to countervailing and/or anti-dumping duties must be examined by the investigating authority during the "non-attribution" analysis to ensure that "other factors" (subsidized imports or dumping), which could cause injury to the industry (and has been offset by other trade defence measures), are not unduly attributed to the increase in imports resulting from "unforeseen developments". It was also stressed that this analysis is necessary to ensure that any future safeguard measures do not exceed the level "necessary to prevent or remedy serious injury and to facilitate adjustment" (Article 5.1 of the Agreement on Safeguards). Argentina specified that analysis of the possible separation of potentially injurious effects offset by countervailing and/or anti-dumping duties must be carried out in the framework of Article 4.2(b) of the Agreement on Safeguards, which establishes the obligation to undertake non-attribution analysis.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1 INTRODUCTION

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

2 ARGUMENTS

A. Article XIX:1 (a) of the GATT 1994 and the determination of unforeseen developments

2. Brazil considers that Article XIX:1(a) of the GATT 1994 requires the investigating authority to explain carefully the logical nexus between an increase in imports and the unforeseen developments it had identified. Increased imports must be the effect of such unforeseen developments, and this nexus cannot be simply presumed or be a hypothetical outcome. It must be reasonably explained by the investigating authority through actual data.

3. Additionally, Brazil sees with particular caution the argument that the adoption of trade defense measures by WTO Members could constitute an "unforeseen development" that would justify the imposition of safeguard measures. Accepting this possibility, without an adequate threshold, could entail risks of unwarranted escalation in trade restrictiveness worldwide. The mere possibility of trade diversion resulting from the use of legitimate trade remedies by other countries should not be enough to justify the imposition of safeguard measures.

4. Brazil also considers that propositions like stating the "attractiveness" of a market is not sufficient to assess the causal link between an unforeseen development and the increase in imports. This correlation cannot be simply presumed due its likelihood, but it requires a demonstration of fact, on a case-by-case basis.

5. Brazil considers that the investigating authority has some flexibility to define the scope of the product under investigation. Nevertheless, the authority must appropriately demonstrate the connection between the unforeseen development(s) and the increase in imports both in respect to the broader category and in relation to the specific products under investigation. If an unforeseen development affects the former, it will likely affect the latter. However, this connection must be demonstrated and cannot be simply presumed, since the supply and demand of certain subcategories of products could be affected differently by the same unforeseen development.

6. Additionally, any exclusion of specific products from the broader category composing the product under investigation must be explained and conducted in an unbiased manner, to avoid distorting the assessment of injury and of the increase in imports. For example, if the investigating authority excludes a certain subset of items at the beginning of an investigation, under the claim that they did not present an increase of imports, but later presents aggregated data regarding the reminiscent categories of products, this could make it more likely to find a general increase of imports or a serious injury to the domestic industry. In such situations, a panel may have to analyze if that exclusion was properly assessed by the investigating authority and if the methodology adopted was conducted in an unbiased manner.

B. Article XIX:1 (a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards and the determination of increase in imports

7. In the assessment of the increase in imports, investigating authorities must analyze trends over the entire period of investigation with a particular focus on the most recent data in order to comply with the requirement expressed by the phrase "is being imported" present in Article 2.1 of the Agreement on Safeguards. A panel should give thorough consideration to the standards

set out by previous disputes, bearing in mind that safeguard measures are an exceptional remedy targeted at fair trade.

C. Articles 2.1, 4.1 (a), 4.1 (b) and 4.2 (a) of the Agreement on Safeguards and the determination of a threat of serious injury to the domestic industry and its causal link with the increase of imports

8. Brazil sustains that the assessment of injury or threat of injury should be carried for each category of products targeted by safeguard measures. This methodology is fundamental to ascertain the causal nexus between injury or the threat of injury and the increase of imports, especially when the investigation targets several tariff lines, which can display different behaviors, oscillations, and trends during the period of investigation. The same causal link cannot be presumed for all categories involved, and, in some cases, the increase of imports may not lead to a finding regarding injury or threat of injury.

9. A "threat of serious injury" contains a prospective element that relates to the state of the domestic industry, not to the increase in imports. Brazil understands that the use of the present tense of the verb phrase "is being imported" in Article 2.1 of the Agreement on Safeguards, as well as the use of the past tense "increased imports" in Article 4.2, together require that increased imports be already occurring during the period of investigation.

10. Nowhere in Article XIX of the GATT 1994 nor in the Agreement on Safeguards is it possible to find any disposition regarding the future likelihood of increased imports as a trigger for safeguard measures. Consequently, possible future import volumes are not determinant of a situation of threat of serious injury. Such emergency measures shall be applied based on the actual trend of imports that have experienced a recent, sharp, sudden, and significative increase and that are thus threatening the integrity of the domestic industry.

11. Moreover, not every listed injury factor needs to show a declining tendency in the most recent period in order to justify the imposition of safeguard measures. The possibility that some important indicators show an upward trend at the end of the investigating period reinforces the need of a detailed and reasoned analysis by the investigating authority of the causal link between the threat of injury and the increase of imports. This is specially the case when the facts show an overall improvement of the situation of the industry in that period.

D. Article 4.2(a) of the Agreement on Safeguards and non-attribution

12. Brazil considers the investigating authority has the obligation to evaluate all issues of fact and law pertinent to the application of a safeguard measure. This requirement includes the evaluation of factors that, at a first glance, may be perceived as insignificant or negligible.

13. Article 4.2(a) of the Agreement on Safeguards presents a minimum standard of evaluation, and all factors listed therein must be properly assessed. Additionally, an investigating authority must give due consideration to all other relevant factors concerning the product under investigation, going beyond the facts raised by the interested parties. This does not mean that an investigation is an endless collection of facts, but rather that an adequate investigation must be sufficiently representative of the situation at hand. This may require, therefore, a proactive conduct of the investigating authority to engage several elements that could impact the determination of a safeguard measure.

E. Article 4.2(b) of the Agreement on Safeguards and the injury caused by dumped or subsidized imports

14. Article 4.2(b) requires that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". Therefore, Brazil understands that an investigating authority must separate the effects of subsidized or dumped imports from the effects of the recent, sharp, sudden, and significant increase of imports that justify the application of safeguard measure.

F. Article XIII of the GATT 1994 and tariff-rate quota safeguard measures

15. Brazil considers that safeguard measures that adopt the form of a tariff-rate quota are subject to the requirements of Article XIII of the GATT 1994 and, therefore, must be administered in a non-discriminatory form.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. DEMONSTRATING THE SUBSTANTIVE CONDITIONS FOR IMPOSING A SAFEGUARD ON A "PRODUCT UNDER INVESTIGATION" THAT CONTAINS MULTIPLE PRODUCTS

1. Nothing in the Agreement on Safeguards or the GATT 1994 prohibits a Member from conducting a safeguard investigation on the basis of a broadly defined "product under investigation". As such, an investigating authority may define the product under investigation such that it includes multiple products or product categories. The investigating authority may also determine the methodology used to assess that product.[1]

2. However, as the substantive conditions for imposing a safeguard under Article 2.1 of the Agreement on Safeguards and Article XIX of the GATT 1994 relate to the specific product targeted by a measure, the investigating authority must clearly explain how each of the substantive conditions has been met for that specific product, as defined.[2]

3. Thus, the methodology selected must allow the investigating authority to demonstrate, on the basis of objective evidence and the consideration of relevant factors, that the substantive conditions have been satisfied with regard to the product under investigation. In accordance with the standard of review in safeguard cases, a panel must assess whether the investigating authority examined all relevant factors and provided "a reasoned and adequate explanation as to how the facts support their determination".[3] As noted by the Appellate Body in *US – Lamb*, if a panel determines that a reasoned or adequate explanation was not provided, the relevant determination "is inconsistent with the specific requirements of [the relevant provision] of the Agreement on Safeguards".[4]

4. Given these requirements, Canada notes that while investigating authorities have discretion to define the product examined and the methodology used, an overly broad product definition may create methodological difficulties. It may also affect the ability of an investigating authority to show that the requirements for imposing a safeguard have been satisfied.

5. Finally, in Canada's view, Members may exclude a subset of products from the application of a safeguard measure so as long as the exclusions do not undermine the conclusions reached by their investigating authorities regarding the satisfaction of each condition for imposing a safeguard.

6. Turning to the case at hand, where Turkey has challenged the appropriateness of a methodology that uses multiple levels of analysis and the European Commission's exclusion of certain product categories, the Panel must assess whether the European Commission provided a reasoned and adequate explanation of how the product under investigation, to which the European Union imposed a safeguard measure, met each of the substantive conditions for imposing that safeguard measure.

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[1] Appellate Body Report, *US – Lamb*, para. 137. The Appellate Body found that the Agreement on Safeguards "provides no particular methodology to be followed in making determinations of serious injury or threat thereof". The Appellate Body also noted that the Agreement on Safeguards did not prescribe a methodology for conducting a non-attribution analysis, however, the Appellate Body noted that "[w]hat the Agreement requires is simply that the obligations in Article 4.2 must be respected when a safeguard measure is applied". See para. 181. Similarly, in *India – Iron and Steel Products*, the panel noted that "Article XIX:1(a) does not provide any methodology for examining the relationship between the unforeseen developments and the increase in imports. Even though a competent authority enjoys a certain latitude in choosing the appropriate method, it must provide a reasoned and adequate explanation of its findings". See Panel Report, *India – Iron and Steel Products*, para. 7.110.

[2] See Appellate Body Reports, *US – Lamb*, para. 86 and *US – Steel Safeguards*, paras. 316-319.

[3] Appellate Body Report, *US – Lamb*, para. 103. See also Appellate Body Reports, *US – Line Pipe*, para. 217 and *US – Steel Safeguards*, paras. 296 and 297.

[4] Appellate Body Report, *US – Lamb*, para. 107.

II. THE DEMONSTRATION OF UNFORESEEN DEVELOPMENTS AND THEIR LOGICAL CONNECTION TO INCREASED IMPORTS

7. Article XIX:1(a) of the GATT 1994 permits Members to impose safeguards where increased imports cause or threaten to cause serious injury to a Member's domestic industry "as a result of unforeseen developments and of the effect of the obligations incurred" under the GATT 1994.[5] The Appellate Body interpreted "unforeseen developments" in *Korea – Dairy* and *Argentina – Footwear (EC)* to mean developments that are "unexpected".[6] The Appellate Body held that unforeseen developments must be circumstances that occurred after the negotiation of the relevant obligations incurred and that could not reasonably have been foreseen, or expected, by the negotiators at the time when the obligations were negotiated.[7]

8. As set out by the Appellate Body in *US – Steel Safeguards*, with regard to any safeguard measure imposed, the investigating authority must explain how the unforeseen development(s) resulted in increased imports of the specific product under investigation, which, as set out above, may include multiple products. The investigating authority need not show that the unforeseen development(s) also resulted in increased imports of a broader category of products simply because the product under investigation makes up a major proportion of that broader product.

9. The European Union argues that situations such as systemic and growing global steel overcapacity and sweeping U.S. Section 232 measures on steel were unforeseen developments that led to increased imports of the product under investigation. In certain circumstances, Canada agrees that global overcapacity and the imposition of sweeping trade restrictive measures in key markets, such as the Section 232 measures, may amount to unforeseen developments. However, given Turkey's claims that the developments were not "unforeseen" and that the European Commission failed to explain how the unforeseen developments resulted in increased imports, the Panel must assess whether the European Commission provided a reasoned and adequate explanation identifying why the developments were unforeseen in this case and how they led to increased imports.

III. application of Article 5.2(a) of the agreement on safeguards and Article XIII:2(d) of the GATT 1994 to tariff rate quotas

10. Canada considers that Article 5.2(a) of the Agreement on Safeguards does not apply to tariff rate quotas but that Article XIII:2(d) of the GATT 1994 does.

11. Article XIII:5 of the GATT 1994 explicitly extends the application of Article XIII to tariff rate quotas. A similar provision does not appear in Article 5 of the Agreement on Safeguards, or anywhere else in that Agreement. As such, in line with previous panel and Appellate Body findings that a tariff rate quota is neither a quantitative restriction nor a quota,[8] tariff rate quotas are not subject to the provisions in Article 5 of the Agreement on Safeguards relating to quantitative restrictions and quotas.

[5] GATT 1994, Article XIX 1(a).

[6] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 91 and *Korea – Dairy*, para. 84.

[7] Appellate Body Report, *Argentina – Footwear (EC)*, para. 96, referring to the GATT Working Party Report in the *Hatters' Fur* case (Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, (*Hatters' Fur*), GATT/CP/106, adopted 22 October 1951).

[8] See, for example, Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 335-336 and *US – Line Pipe*, paras. 6 and 233-235; and Panel Report, *US – Line Pipe*, paras. 7.69-7.75.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. Japan raises three main arguments in its submissions. First, Japan submits that the investigating authority has an obligation to identify "unforeseen developments" that caused the injurious increase in imports triggering a safeguard measure, as required in Article XIX:1(a) of the GATT 1994. Second, Japan submits that Article XIX:1(a) also requires that the increase in imports occur as a result of the effect of the GATT 1994 obligations. The "logical connection" between the relevant obligations and the injurious increase in imports justifying the safeguard measure must be clearly demonstrated by the investigating authority. Third, Japan submits that the investigating authority must provide sufficient information on the specific causes of the injurious imports to assess whether the measures were applied "only to the extent necessary to prevent or remedy serious injury", as required under Articles 5.1 and 7.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

I. OBLIGATIONS RELATED TO "UNFORESEEN DEVELOPMENTS"

2. Japan's first argument concerns the obligation to consider "unforeseen developments" resulting in increased quantities of imports causing or threatening to cause serious injury to the domestic producers of the like or directly competitive products. This obligation is established in Article XIX:1(a) of the GATT 1994.

3. Japan argues that the requirement to determine whether the increase in imports is the result of "unforeseen developments" is an affirmative obligation that is based on the text of the first sentence of Article XIX: 1(a) of the GATT 1994. Given the clarification made by the Appellate Body Report in *Korea – Dairy*, Japan considers that the phrase "as a result of unforeseen developments" indicates that the existence of "unforeseen developments" is one of the express prerequisites imposed by Article XIX:1(a) of the GATT 1994 for a safeguard measure to be applied in accordance with the Safeguards Agreement.

4. In respect of the nature of the claimed "unforeseen developments", Japan considers that the importing Member must demonstrate that it could not foresee the developments that gave rise to the increased quantity of imports at the time a concession was negotiated. An importing Member that foresaw the relevant "developments" at the time of the tariff negotiations would have expected increased imports causing serious injury to the domestic industry. When the importing Member could not have foreseen them, only then is it reasonable to allow it to withdraw or modify the relevant concessions.

5. Japan recalls the finding of the Appellate Body in *US – Lamb* that competent authorities must make affirmative findings as to the existence of "unforeseen developments", based on Articles 3.1 and 4.2(c) of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994. Thus, they must discuss why the alleged "unforeseen developments" were "unexpected" at the time it negotiated the tariff concessions at issue. In particular, competent authorities must provide a "reasoned and adequate explanation" of how the facts in a report support its "unforeseen developments" determination.

6. As explained by the Appellate Body Report in *US – Steel Safeguards*, Japan also argues that the requirement for a "logical connection" between the "unforeseen developments" and the increase in imports means that investigating authorities must show how the unforeseen developments have resulted in the increased imports at issue. Only then is the Article XIX:1(a) requirement that "unforeseen developments" caused the increased imports satisfied in light of Article 4.2(c) of the Safeguards Agreement.

7. Japan also notes that the importing Member must define the increased imports causing or threatening to cause serious injury to its "domestic industry". The standard of "serious injury" set forth in Article 4.1(a) is very high, as seen in the Appellate Body Report for *US – Lamb*. Further, the "domestic industry" is defined in Article 4.1(c) as the domestic producers "of the

like or directly competitive products". Therefore, competent authorities must show *how* "unforeseen developments" have modified the competitive relationship between the imported and "like or directly competitive" domestic products to the detriment of the latter. They must also show how this has resulted in an increase in imports causing, or threatening to cause, serious injury to the domestic industry. Japan argues that where "unforeseen developments" have not modified this competitive relationship, increased imports will not have caused serious injury to the domestic industry as imports will not have replaced sales of the domestic like product in the market competition.

8. Japan recalls that Members negotiating tariffs usually consider their tariff concessions on a product-by-product basis, assessing the international competitiveness of the domestic industry and possible future developments. However, it is impossible to forecast all future events influencing the domestic industry's competitiveness. Without the availability of "emergency action" (Article XIX of the GATT 1994), it would be difficult for Members to persuade their domestic industries to support trade liberalization. Safeguard measures function as a "safety net" to convince interested parties of "the need to enhance rather than limit competition in international markets" (Preamble of the Safeguards Agreement).

9. Concerning the application to the facts and issues before the Panel, Japan recalls the Appellate Body Report in *Argentina – Footwear (EC)*, which stated that the requirement of "unforeseen developments" does not set a separate "condition" for the imposition of safeguard measures, but describes certain "circumstances". In the present case, the Panel should examine whether the EU provided "reasoned and adequate explanations" of how factors cited qualify as unexpected "circumstances" leading to the increase in imports causing or threatening to cause serious injury to the domestic industry.

10. As Turkey rebutted the EU's identification of the "unforeseen developments", Japan recalls the Panel Report in *US – Steel Safeguards*, which concluded that the confluence of several events can form the basis for an "unforeseen development" when taken together. It follows that the EU must demonstrate that the confluence of circumstances was unforeseen and unexpected when the concession was negotiated. Hence, the Panel should analyze whether the EU's explanation in the published reports fulfilled this burden.

11. Concerning Turkey's argument on the appropriateness of the broad steel product category subject to a safeguard measure, Japan recalls that it is not sufficient that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products, as determined by the Appellate Body in *US – Steel Safeguards*. As explained by Japan in response to Panel Question No. 4, it is necessary for competent authorities to demonstrate that "unforeseen developments" resulted in increased imports of "specific products subject to the respective determinations". Otherwise, products could be included the imports of which "did not increase and did not result from the 'unforeseen developments' at issue".

12. Japan maintains that the Panel should carefully examine whether the report of the competent authority explains the logical connection between "unforeseen developments" and the increase in imports causing or threatening to cause serious injury to the domestic industry. In other words, the Panel must be convinced that the alleged "unforeseen developments" resulted in the injurious increase in imports by modifying the competitive relationship between imported and domestic products in the wide range of categories specified by the EU. Japan notes that mere oversupply resulting from the foreclosure of a major foreign market, even if unforeseen, should not necessarily modify that competitive relationship.

II. THE "EFFECT OF THE OBLIGATIONS"

13. The second part of Japan's argumentation relates to the Article XIX:1(a) requirement that the increase in imports occur as a result of the effect of the GATT 1994 obligations. According to this provision, as well as Articles 3.1 and 4.2(c) of the Safeguards Agreement, a Member must not only identify the specific GATT obligations it incurred. It must also explain how the "effect" of these obligations resulted in the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic industry.

14. Japan considers that the "effect" of the GATT obligations should prevent the adoption of WTO-consistent measures to avoid the change in the competitive relationship resulting from the "unforeseen circumstances". In other words, the "effects" of "unforeseen developments" and the obligations are complementary. "Unforeseen developments" must have resulted in the increase in imports. Obligations must prevent the importing Member from taking measures to address increased imports that resulted from those unforeseen developments.

15. If the injurious increase in imports was the result of dumping or subsidization, the importing Member may address such injury by means of antidumping duties or countervailing duties on imports from those sources. This is different from a situation where an increase in imports occurred "as a result […] of the effect" of the GATT obligations and, therefore, should not justify the imposition of a safeguard measures on imports irrespective of sources.

16. Japan also notes that the identified GATT obligations that constrain the importing Member's ability to react to the import surge must be those that needed to be modified or withdrawn to address the injurious increase in imports. Therefore, Japan suspects that the absence of explanation on this point would make it difficult to establish that the safeguard measures chosen are taken "only to the extent necessary to prevent or remedy serious injury".

17. In the present case, Turkey points out that the European Union did not identify the relevant obligations that it incurred under the GATT 1994, nor the effects of such obligations. Thus, the Panel must assess this issue. On this point, Japan underscores that when making tariff concessions, Members know that they will be able to respond to dumping or subsidization through anti-dumping or countervailing duties under Article VI of the GATT 1994.

18. The "obligations incurred", therefore, should limit the ability to respond adequately to the serious injury caused by increased imports due to "unforeseen developments". Unless the Member identifies and separates the relevant injury from aspects of injury arising from dumped or subsidized imports, imposing safeguard measures for the same products as those within the scope of the ongoing anti-dumping or countervailing measures contradicts the "obligations incurred" and "effect" prerequisite. As explained by Japan in its answer to Panel Question No. 7, the injurious effects resulting from dumped or subsidized imports of the relevant products cannot be part of the injurious effects to justify a safeguard measure. Such injurious effects must be differentiated. A safeguard measure intended to address the injurious effects of dumped or subsidized imports would apply beyond what is necessary to prevent or remedy injury within the meaning of Article XIX:1(a) of the GATT 1994.

III. "TO THE EXTENT NECESSARY TO PREVENT OR REMEDY SUCH INJURY"

19. Finally, Japan comments on another issue raised by Turkey: whether the measures were applied beyond "the extent necessary to prevent or remedy serious injury" under Articles 5.1 and 7.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

20. As seen in the Appellate Body Reports for *Korea – Dairy* and *US – Line Pipe*, those provisions impose "an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment". Furthermore, "this obligation applies regardless of the particular form that a safeguard measure might take".

21. The "serious injury" referred to in Article 5.1 is necessarily the same "that has been determined to exist by competent authorities of a WTO Member pursuant to Article 4.2". Further, one of the objectives of "the non-attribution language of the second sentence of Article 4.2(b)" is to establish "a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports", which "informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence".

22. Japan maintains that this requirement should be understood in combination with the first clause of Article XIX:1(a) of the GATT 1994 as well. As analyzed above, import increases addressable through safeguard measures must be those arising from the "unforeseen developments". They must also be those against which the importing Member cannot take appropriate measures as a result of "obligations incurred" under the GATT 1994. A safeguard measure against imports

of one or more products that did not increase and did not result from the "unforeseen developments" at issue would not meet the requirements of Article XIX:1(a) the GATT 1994.

23. Japan submits that safeguard measure must not exceed what is necessary to remedy serious injury, under Article 5.1 of the Safeguards Agreement. The "permissible extent" has to be analyzed on a case-by-case basis. The "injury" caused by the increased imports must be identified. Furthermore, how the increased imports resulted from the "unforeseen developments" and how the Member in question had been prevented from taking actions by its GATT obligations must be considered.

24. Additionally, Japan reiterates that the reasonable explanation of how certain GATT obligations including the applicable tariff concessions prevented the importing Member from taking appropriate measures will indicate that the relevant GATT obligations have been modified or withdrawn "only to the extent necessary to prevent or remedy serious injury".

25. Looking at the relevant facts and issues in this dispute, Japan considers that the Panel should analyze whether the EU's complex approach to safeguards complies with the requirement of applying measures "only to the extent necessary to prevent or remedy serious injury".

26. In this regard, Japan wonders what kind of "injury" the EU has been trying to remedy though this approach, in particular, by the combination of tariff rate quotas. For safeguard measures to be justified, as discussed above, it is necessary to distinguish the injurious effects of the increased imports from those caused by other factors. However, in its non-attribution analysis, the EU did not go further than maintaining that its competent authority had not "identified other factors that would weaken the causal link between the increase in imports and the serious injury to the Union producers".

27. The EU explains that the imposition of tariff rate quotas partly pursued the objective of "ensuring that traditional trade flows are maintained", as well as "preventing serious injury". Looking at the country-specific quotas imposed, the use of the expression "traditional trade flows" appears to imply that the EU seeks to preserve import flows and volumes from each of the exporting countries. On this point, Japan reiterates that "injury" needed to justify safeguard measures must be related to increased imports irrespective of their source (Article 2.2 of the Safeguards Agreement). Neither injurious effects from dumped or subsidized imports nor hindrance to the maintenance or restoration of country-specific "traditional trade flows" may be understood as "injury" within the meaning of the Safeguard Agreement.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE REPUBLIC OF KOREA

THIRD PARTY WRITTEN SUBMISSION

I. INTRODUCTION

1. Korea participates in this dispute because of its systemic interests in the proper interpretation and application of the legal disciplines applying to Members' ability to adopt safeguard measures under Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994 and the Agreement on Safeguards.

2. It is important to underscore at the outset that safeguard measures are "extraordinary remedies" allowed by the WTO covered agreements in "emergency situations", as they restrict imports from other Members in the absence of any allegation of unfair trade practices.[1] Indeed, safeguard measures are intended to provide temporary relief to industries suffering economic harm that has been caused by an unforeseen surge in imports. Safeguards are a form of insurance to Members if unexpected harm is caused by trade liberalization, in particular as a result of lowering import tariffs under the GATT 1994. The unforeseen nature of the developments that result in the increased imports is an essential condition for lawfully invoking this emergency insurance mechanism.

3. Thus, safeguards are of a fundamentally different nature than the unfair trade-related forms of contingent trade protection (i.e. anti-dumping and anti-subsidy/countervailing duty measures). This fundamental difference in nature is not to be ignored. Otherwise, safeguards would effectively become just an easier-to-use form of trade remedy because they would do away with complex dumping and subsidy calculations while allowing for the same remedy. Korea considers that safeguards are – and should remain – the exceptional, temporary adjustment-related insurance remedy that they were intended to be by the drafters of the Uruguay Round.

4. In this submission, Korea focuses on a number of the substantive issues raised in this dispute.

II. DETERMINATION AND ANALYSIS OF THE "PRODUCT CONCERNED" THROUGHOUT THE INVESTIGATION FOR IMPOSITION OF MEASURES

5. Korea notes that Article 2.1 of the Agreement on Safeguards provides that a safeguard measure can be imposed on a specific "product" if certain conditions are met, including that "such product" must be imported in increased quantities causing injury to the domestic industry that produces like or directly competitive products. This does not mean that only *one* product-type can be subject to an investigation. The Agreement is silent on the definition of the product and does not determine how broadly or narrowly defined the product should be. There may even be several imported products covered by an investigation, including variations and sub-categories, as evidenced by the definition of the term "product"[2] and that investigations may cover products falling under two or more HS tariff codes. The main condition is that an imported product covered by an investigation must have injurious effects on "like or directly competitive" domestic products.[3] Put differently, a safeguard measure shall not protect domestic producers of "unlike" products, such as those with "only a remote or tenuous competitive relationship with the imported products".[4]

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[1] Appellate Body Reports, *US – Line Pipe*, para. 80; *Korea – Dairy*, para. 86; *US – Steel Safeguards*, para. 347; and *Indonesia – Iron or Steel Products*, para. 5.53.
[2] EU's first written submission, para. 30.
[3] Appellate Body Report, *US – Lamb*, para. 86.
[4] Appellate Body Report, *US – Cotton Yarn*, para. 98.

6. Of course, for the products covered by an investigation, all legal conditions and factual circumstances must be satisfied before a safeguard measure can be lawfully imposed. These are set forth in Article XIX of the GATT 1994 and the Agreement on Safeguards. For example, Article XIX:1(a) requires, among others, that a safeguard remedy can only be applied to a product that "is being imported in such increased quantities", and that that increase in volume is "as a result" of "unforeseen developments". The Appellate Body has clarified that the increased imports must be an "effect" or "outcome" of the unforeseen developments.[5] Moreover, the definition of the products under investigation must be such that it allows for a meaningful causation determination. In other words, the scope of the product concerned cannot be overly broad since that would risk a non-meaningful analysis of the conditions of competition (i.e. to understand if the imported products caused or threatened to cause injury to the domestic industry).[6]

7. The central question to Korea in relation to Turkey's claim is whether the EU ensured that each of the product categories covered by the investigation satisfied the required conditions under the WTO Agreements. Korea considers that the first question is a factual one: did the EU impose 28 different safeguard measures, as contended by Turkey or rather one measure covering several steel product categories with different applicable tariff-rate quotas ("TRQs")? The next question is a legal one: assuming the EU imposed a single measure, based on an examination that covered a broad group of product categories, was the analysis of the requirements for the imposition of a safeguard measure such that a meaningful analysis and objective examination was undertaken that addressed the inevitable complexities that result from having a broad product definition? The Agreement does not impose a specific methodology. Therefore, in Korea's view, it is not because a measure covers 28 individually defined products that it must examine all of the conditions for the imposition of a safeguard for each of the products. What is important, however, is that the authorities address plausible alternative explanations and that it examines trends for certain product types that point in a different direction in an objective manner and provides a reasoned and adequate explanation of how these trends do not detract from the conclusions reached.

8. If an investigation is carried out based on a broad group of product categories, Korea considers that competent authorities should be allowed to cumulate imports of various product categories to assess whether they satisfy the requirements for imposing a safeguard measure, provided the covered products are assessed against "like or directly competitive" domestic products and that an objective examination is ensured, such as that the cumulative assessment provides a meaningful basis to assess the conditions of competition. The cumulative assessment must be able to answer whether the products are imported under such conditions so as to cause or threaten to cause serious injury to the domestic industry.

9. For example, Korea notes that the panel in *Argentina – Footwear (EC)* found that Argentina was not required to conduct its injury and causation analyses on a disaggregated basis in light of the five product groups used in the investigation, but could make the assessments for the footwear products as a whole.[7] The panel noted that competent authorities could run the assessments based on data on a disaggregated basis, but that Argentina "was not required to do so".[8] Korea agrees that the Agreement on Safeguards does not necessarily oblige Members to perform injury and causation analyses per product category.

10. While Korea does not intend to discuss the specific factual aspects of the EU safeguard measure, it invites the Panel to examine the analysis of the EU's competent authority with the above interpretative guidance in mind.

III. EXISTENCE OF "UNFORESEEN DEVELOPMENTS"

11. Korea notes that establishing that the increased imports were the result of "unforeseen developments" is a fundamental element to justify the imposition of a safeguard measure. This flows from the reference in Article 1 of the Agreement on Safeguards to Article XIX of the

[5] Appellate Body Report, *US – Steel Safeguards*, para. 315.
[6] Panel Report, *US – Steel Safeguards*, para. 10.416.
[7] Panel Report, *Argentina – Footwear (EC)*, paras. 8.135, 8.137.
[8] Panel Report, *Argentina – Footwear (EC)*, para. 8.137.

GATT 1994, which requires that "unforeseen developments" must be demonstrated as a matter of fact in order for a safeguard measure to be applied.[9] The demonstration of "unforeseen developments", therefore, is a prerequisite for the imposition of a safeguard measure.[10]

12. As noted by Turkey, the key condition for a situation to constitute an "unforeseen" development is that it was *unexpected* at the time the imposing Member incurred the relevant GATT obligation.[11] It is particularly important to distinguish the unforeseen developments from the increased imports, since a competent authority must establish that the increased imports are *a result* of the unforeseen developments. Thus, an increase in imports in itself cannot, by definition, constitute the unforeseen developments under Article XIX:1(a). That would be circular and inconsistent with the legal disciplines.[12]

13. Korea notes that the EU has identified three factors that are alleged to constitute the "unforeseen developments" that resulted in the increased imports. Korea considers that both the steel overcapacity issue and the increased use of government restrictions on imports of steel are not new, but are rather part of the market reality in the steel sector. In principle, therefore, Korea considers it doubtful that a prevalent industry problem such as overcapacity and the presumed lawful use of trade remedies to address unfair trade practices can fall within the meaning of "unforeseen developments" in the GATT 1994.

14. Even the EU acknowledges that the three factors alleged to constitute the "unforeseen developments" were "not necessarily extraordinary circumstances".[13] However, the very nature of the safeguard instrument has been described as imposing "extraordinary remedies" allowed by the WTO covered agreements in "emergency situations", as they restrict imports from other Members in the absence of any allegation of unfair trade practices.[14] Absent such circumstances, Korea does not consider that Members can have recourse to the safeguard instrument. Korea also notes that with respect to the Section 232 measures, the EU states that "[e]ven though duties imposed by the United States on the basis of Section 232, and duties in general, are not necessarily extraordinary circumstances, the duties in the circumstances of this case gave rise to an 'unforeseen development'".[15] This suggests that the EU is of the view that the unforeseen development was not the Section 232 measures, but rather something that followed their imposition.

15. In addition to examining whether the EU properly identified relevant "unforeseen developments", the Panel is also to examine if the EU explained how these developments resulted in the relevant increase in imports. Indeed, Members are required to "link" the identified unforeseen developments with the increased imports.[16] Korea notes that the EU has provided an explanation in its determination of how the three factors allegedly resulted in the increased imports. The EU seems to suggest that not much of an explanation was required in this case and that it sufficed for the EU to simply put the two sets of facts together (i.e. unforeseen developments and increased imports).[17] It points to the timing of the developments and refers to a number of exhibits corroborating the conclusion of the EU. Korea considers that the Panel should focus on the explanation of the alleged link, as provided by the competent authority in the report and examine whether it is sufficiently adequate and reasoned to support the conclusion that the alleged increase in imports was the result of the identified unforeseen developments. Especially, Korea views that the Panel should fully consider the fundamental question whether complex phenomena can be reduced to a simple matter of "putting facts together" or pointing to a certain degree of coincidence in time.

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[9] Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; and *US – Lamb*, para. 70.

[10] See, e.g. Appellate Body Report, *US – Lamb*, para. 72.

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

[12] Panel Reports, *Ukraine – Passenger Cars*, para. 7.83; and *Indonesia – Iron or Steel Products*, para. 7.51.

[13] EU's first written submission, paras. 89, 110.

[14] Appellate Body Reports, *US – Line Pipe*, para. 80; *Korea – Dairy*, para. 86; *US – Steel Safeguards*, para. 347; and *Indonesia – Iron or Steel Products*, para. 5.53.

[15] EU's first written submission, para. 110.

[16] Appellate Body Report, *US – Steel Safeguards*, paras. 316, 318.

[17] EU's first written submission, paras. 115, 123.

16. In sum, the Panel should focus its examination on the EU's reasoning and explanation in the determination to confirm whether the three factors were "unforeseen" or unexpected at the time the EU incurred the relevant GATT obligations. It should also closely examine the EU's explanation whether it is sufficiently adequate and reasoned to support the conclusion that the alleged increase in imports was the result of the identified unforeseen developments.

IV. OBLIGATION TO APPLY MEASURES "ONLY TO THE EXTENT NECESSARY"

17. Korea notes that the requirements under Articles 5.1 and 7.1 set the maximum permissible extent and period for the application of a safeguard measure. They require that measures are applied only to the extent necessary and for the period necessary for addressing the serious injury *attributed* to the increased imports, and not also to injury caused by other factors or for periods longer than necessary.[18] For example, a failure by the competent authority to properly separate and distinguish the injury caused by factors other than the imports, while imposing a remedy for all of the injury found to exist even when caused by such other factors would necessarily violate Article 5.1 by going beyond what is necessary.

18. However, in relation to Turkey's argument that the EU violated this obligation by concurrently applying different types of trade remedy measures against the same imports, Korea considers that safeguard measures and anti-dumping/countervailing duty measures are not mutually exclusive and may be applied in combination. In particular, they do not have the same scope of application as they seek to remedy different situations causing injury to a domestic industry. While anti-dumping and countervailing duty measures seek to remedy *unfair* trade practices by imposing duties to neutralize dumping by foreign producers or the effects of foreign governments' subsidization of foreign producers, safeguard measures provide temporary relief against surges in imports under otherwise fair trading conditions.

19. Therefore, even after measures have been imposed to remedy unfair trade practices, there could be a basis to apply a safeguard measure against rapidly increasing imports that is caused by "unforeseen developments" and is the effect of "obligations incurred" by the imposing Member under the GATT 1994. Korea does not consider there could be any violation of WTO obligations *per se* by concurrently applying two or more of these trade-remedy measures, as long as they are applied in a manner that is consistent with their respective requirements as specified in the relevant WTO agreements. There is nothing in the text of the relevant WTO Agreements that prevents the concurrent application of these trade remedy measures.

20. This being said, the presence of unfair trade practices – as addressed by anti-dumping or countervailing measures – is something that may need to be addressed, in particular in the related context of the causation analysis. The question that a competent authority must examine is whether and how much of the injury is attributable to increased imports and how much is attributable to unfairly traded imports. While the presence of such other factors of injury does not prevent a conclusion of causation, the required action of separating and distinguishing these other factors of injury, including unfair trade, is necessary in order to determine the appropriate level of application of the safeguard measures. In that respect, it is not so that the authorities can ignore the existence of anti-dumping or countervailing measures on similar products when additionally imposing safeguard measures.

21. Korea notes that the EU appears to have considered the implication of whether its safeguard measure would remedy the same injury twice in relation to those products subject to an existing anti-dumping or countervailing duty measure and adjusted its measure accordingly. While not expressing a view on the specific facts in this dispute, Korea invites the Panel to examine the matter closely in light of the interpretative guidance above.

V. OBLIGATION TO "PROGRESSIVELY LIBERALIZE" THE MEASURE

22. Korea notes that the obligation to "progressively liberalize … at regular intervals during the period of application" applies to safeguard measures applied for longer than one year. Article 7.4 requires that such measures be progressively liberalized at regular intervals, which

[18] See, e.g. Appellate Body Report, *US – Line Pipe*, paras. 245, 252-260.

has been interpreted to require liberalization at "uniform intervals" over the period of application.[19] The provision does not, however, specify *when* an imposing Member must commence the liberalization of the measure, nor at what *speed* or *amount* such liberalization must follow. In other words, Article 7.4 is largely silent on how Members must ensure that their safeguard measures are progressively liberalized.

23. This suggests to Korea that there are no specific WTO disciplines governing the degree of liberalization that imposing Members must implement. Thus, as long as a safeguard measure applied for longer than one year is liberalized at regular intervals, the degree of each liberalization could vary.

24. Korea also notes that the panel in *Ukraine – Passenger Cars* was of the view that a Member "can comply with its obligation in Article 7.4 even if it has not previously provided a timetable for progressive liberalization" because Article 7.4 is a "substantive provision that requires actual liberalization of the measure".[20] If there is no obligation to provide a timetable, it seems difficult to conclude that a change in the degree of liberalization, as set out in the timetable, would be a *per se* violation of Article 7.1.

25. Korea considers that the panel can start from the "objective and purpose" of Article 7.4. Korea views that "facilitation of the appropriate efforts of the domestic industry" is the key objective of Article 7.4 as is stipulated in this Article. Korea recalls the jurisprudence in *Ukraine – Passenger Cars*, "[d]elaying liberalization in this way could create a disincentive for the domestic industry to undertake appropriate efforts at adjustment from the outset of the period of application, thus providing increased protection and diminishing the impetus to adjust to competition from imports".[21]

26. In sum, Korea considers that the Panel's examination of the EU's reduction in the pace of liberalization of the TRQs from 5% to 3% should focus on whether the liberalization followed uniform intervals and whether it was not such as to create a disincentive for the industry to undertake appropriate efforts at adjustment. Korea does not express a view on the specific facts of this case, but hopes the above guidance may be helpful for the Panel's analysis.

VI. CONCLUSION

27. Korea reserves the right to further elaborate on the above issues as well any other issues raised by the parties in its oral statement.

[19] Panel Report, *Ukraine – Passenger Cars*, para. 7.362.
[20] Panel Report, *Ukraine – Passenger Cars*, para. 7.360.
[21] Panel Report, *Ukraine – Passenger Cars*, para. 7.362.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND

I. DETERMINATION AND ANALYSIS OF THE PRODUCTS UNDER INVESTIGATION

1. Article 2.1 of the Agreement on Safeguards provides that a safeguard measure may be applied to a product only if such product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry.

2. In *US – Steel Safeguards*, the panel recalled that the requirement of parallelism, as developed by panels and the Appellate Body, means that the competent authorities must explicitly establish that imports covered by a safeguard measure satisfy the conditions for its application. The methodology selected must be unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts support the determination made with respect to increased imports.[1]

3. Switzerland wishes to emphasize the importance for the competent authorities to explicitly establish that products covered by a safeguard measure satisfy the conditions for its application. The competent authorities must conduct an analysis that demonstrates that the conditions for applying the measures are satisfied for those products that are to be subject to the measure.[2]

4. This implies that the same product must be used in the determination of each of the conditions that must be met before a safeguard may be applied and that the safeguard may only be imposed on imports of that product, i.e. imports of the product that was used in the determination of each of the conditions for the application of the safeguard measure.[3]

5. A Member can in Switzerland's view exclude a subset of product(s) from the application of a safeguard measures. In that case, the corresponding imports should not be included in the "increased imports" examined for purposes of determining whether the criteria for applying a safeguard measure are met.[4]

6. If a Member modifies the grouping of the products depending on the aspects it wants to examine, or if it defines a product widely and then restricts the scope of the product under investigation, the conditions set out in the Agreement on Safeguards would in Switzerland's opinion not be met. If a product is defined widely, including several subsets, the subsets must be included in the analysis throughout the investigation.

II. THE REQUIREMENT OF "UNFORESEEN DEVELOPMENTS" AND THE CONNECTION BETWEEN UNFORESEEN DEVELOPMENTS AND THE INCREASE OF IMPORTS

a) Existence of unforeseen developments

7. Unforeseen developments constitute circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.[5] The Member taking a measure must thus explain why an event constitutes an "unforeseen development". In order to satisfy the requirement to demonstrate the existence of "unforeseen developments", the competent authorities need to provide, as a minimum, some discussion as to why such developments were unforeseen at the appropriate time.[6]

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[1] Panel Reports, *US – Steel Safeguards*, paras. 10.594-10.597.
[2] Appellate Body Report, *US – Wheat Gluten*, paras. 96, 98.
[3] First Written Submission of the European Union, para. 45.
[4] *Ibid.*
[5] Appellate Body Report, *Argentina – Footwear (EC)*, para. 92. See also Appellate Body Report, *Korea – Dairy*, para. 85.
[6] Panel Report, *Argentina – Preserved Peaches*, para. 7.23.

8. The ordinary meaning of the term "unforeseen" is synonymous with "unexpected", in particular when it relates to the word "developments".[7] The developments must have been unexpected at the time the relevant concessions or obligations have been undertaken, that is generally at the time the WTO Member concerned acceded to the WTO.[8]

9. Whether an event is "unforeseen" must be determined on a case-by-case basis.[9] However, an importing Member will have to demonstrate through a reasoned and adequate explanation that the development was unexpected for it.[10] In addition, the standard for unforeseen developments cannot be purely subjective, and the Panel should focus on what should or could have been foreseen in light of the circumstances.[11]

10. Switzerland is also of the view that the confluence of a number of developments can form the basis of "unforeseen developments" for the purposes of Article XIX of the GATT 1994, as long as these developments have a clear temporal connection[12], and provided that the Member concerned demonstrates that the confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.[13]

11. In Switzerland's view, if the Member concerned demonstrates the existence of the circumstances, or the confluence of circumstances, and demonstrates through a reasoned and adequate explanation featuring in the published report of the competent authority that these circumstances were unexpected for it, the fact that the Member uses different labels, such as "factors", in relation with the said circumstances should not be given excessive weight by the Panel in its assessment.

b) Increased use of trade defence instruments as an "unforeseen development"

12. Regarding the question of whether the increased use of trade defence instruments could constitute an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994, Switzerland considers that if the covered agreements expressly envisage the adoption of such measures, they could have been anticipated and cannot be considered as "unexpected".[14]

13. In Switzerland's view, this conclusion is confirmed by the fact that the existence of trade defence measures may be taken into account in relation to the *application* of a safeguard measure. Switzerland notes that when a safeguard measure is taken in the form of a tariff rate quota (TRQ), based on Article XIII:2(d) of the GATT 1994, the Member concerned shall allot TRQs on the basis of a previous representative period, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product. Article 5.2(a) of the Agreement on Safeguards provides similar language if the safeguard measure is taken in the form of a quota. Switzerland notes that the existence of trade defence measures imposed on the product concerned could typically constitute such "special factors". Switzerland notes that, when allocating the TRQs, the European Commission considered as "special factors" affecting the trade in the products concerned the anti-dumping and countervailing duty measures imposed on certain exporting countries for a number of products under investigation.[15] If the use of trade defence measures could constitute an unforeseen development, it would be illogical for the same circumstance to be considered *again* as a special factor to be taken into account in the application of a safeguard measure.

14. Allowing the use of trade defence instruments to constitute "unforeseen developments" would also create a vicious circle in which trade-restrictive measures (e.g., anti-dumping and countervailing duties) lead to more trade-restrictive measures (safeguards) – and ultimately distort markets even more.

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[7] Appellate Body Report, *Korea – Dairy*, para. 84.

[8] Appellate Body Report, *Korea – Dairy*, para. 89, referring to GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

[9] Panel Reports, *US – Steel Safeguards*, paras. 10.41-10.42.

[10] Panel Reports, *US – Steel Safeguards*, paras. 10.42.

[11] Panel Reports, *US – Steel Safeguards*, para. 10.43.

[12] Panel Report, *India – Iron and Steel Products*, para. 7.114.

[13] Panel Reports, *US – Steel Safeguards*, para. 10.99.

[14] Panel Report, *EC – Asbestos*, para. 8.272 (footnote omitted).

[15] See Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, Exhibit TUR-5, para. 146.

c) Logical connection between the unforeseen developments and the increase in imports

15. The increased imports to which this provision refers must be an effect or outcome of the "unforeseen developments". The "unforeseen developments" must "result" in increased imports of the product that is subject to a safeguard measure.[16] There should be a logical connection between "unforeseen developments" and the conditions set forth in Article XIX:1(a).[17]

16. The logical connection between unforeseen developments and increased imports must be demonstrated. If the origin of the unforeseen developments differs from the origin of the increased imports, an explanation as to *why* the alleged increase in imports occurred due to the unforeseen developments (of different origin) is necessary.[18] Switzerland considers that, at a minimum, the Member concerned should link the unforeseen developments to the specific increase of imports into its market and support its conclusions with evidence.[19] Moreover, the competent authority must explain how unforeseen developments related to steel *in general* resulted in an increase in imports of the *specific product* at issue into the market concerned or, alternatively, why such analysis was unnecessary.[20]

17. Switzerland considers that, in order to demonstrate such a logical connection, it is not sufficient to identify "on the one hand" unforeseen developments and "on the other hand" the increase in imports.[21] Neither can the mere fact that the unforeseen developments and the increase in the import volumes took place "during the same period"[22] be determinative. The Member concerned must provide a reasoned and adequate explanation of how the alleged unforeseen developments resulted in increases in imports. To do so, it must demonstrate the existence of a link between the unforeseen circumstances and the increase in imports of the specific products concerned, and support its conclusions with evidence.

III. THE EXPECTED FUTURE IMPORT VOLUMES AND THE THREAT/CAUSATION ANALYSIS

18. As regards threat, Article 2.1 of the Agreement on Safeguards requires an actual increase in imports as a basic prerequisite for a finding of either a threat of serious injury or serious injury.[23] Expected future import volumes, however, may be a relevant factor for the competent authority to consider in determining whether a "threat of serious injury" exists under Article 4.1(b).[24]

19. Article 4.1(b) requires that "the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility". In order for a threat determination to be based on facts, the competent authority will need to examine information and data, which will primarily be drawn from the investigation period.[25]

20. A projection of future increases in imports should not be equated with a "threat of serious injury".[26] Under Article 4.2(a), the competent authority shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry.

21. As regards causation, Switzerland notes that Article 4.2(b) requires that the existence of the causal link between increased imports and the threat of serious injury be demonstrated "on the basis of objective evidence", i.e there must be facts, which will need to be drawn from the investigation

[16] Appellate Body Report, *US – Steel Safeguards*, para. 315.
[17] Appellate Body Report, *US – Steel Safeguards*, para. 317, referring to Appellate Body Report, *Argentina – Footwear (*EC*)*, para. 92 and Appellate Body Report, *Korea – Dairy*, para. 85.
[18] Panel Report, *India – Iron and Steel Products*, para. 7.110.
[19] Panel Report, *India – Iron and Steel Products*, para. 7.113.
[20] Panel Report, *India – Iron and Steel Products*, para. 7.112.
[21] See First Written Submission of the European Union, para. 116.
[22] See First Written Submission of the European Union, para. 117.
[23] Panel Report, *Argentina – Footwear (EC)*, para. 8.284.
[24] Appellate Body Report, *US – Lamb*, para. 125, Panel Report, *Ukraine – Passenger Cars*, para. 7.254.
[25] Panel Report, *US – Lamb*, para. 7.129.
[26] Panel Report, *US – Lamb*, para. 7.187 ("We agree in general with the complainants' argument that a threat of *increased imports* as such cannot be equated with threat of *serious injury*".); Panel Report, *Argentina - Footwear (EC)*, para. 8.284 ("A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b)".).

period, showing that increased imports have a negative effect on the domestic industry. Without a factual predicate showing some sort of cause and effect between increased imports and injury, a finding that imports are likely to increase cannot show that the industry is likely to suffer serious injury in the near future because of those imports.

IV. THE APPLICATION OF SAFEGUARD MEASURES IN THE FORM OF TARIFF RATE QUOTAS

22. Switzerland considers that the application of Article XIII of the GATT 1994 to safeguard measures taken in the form of tariff rate quotas does not imply that Article 5.2(a) of the Agreement on Safeguards cannot apply to those measures.

23. In *US – Line Pipe*, the panel came to the conclusion that Article XIII:2(d) of the GATT applied to safeguard measures taken in the form of tariff rate quotas, but not Article 5.2(a) of the Agreement on Safeguards, in particular because tariff rate quotas are not "quotas", which constitute a subset of "quantitative restrictions". In Switzerland's view, the panel's reasoning in *US – Line Pipe* is formalistic and disregards the fact that Article 5.1 and Article 5.2(a) of the Agreement on Safeguards establish distinct obligations. As confirmed by the Appellate Body, Article 5.1 imposes a general substantive obligation, namely, to apply safeguard measures only to the permissible extent, and also a particular procedural obligation in the case of quantitative restrictions. In turn, Article 5.2(a), like Article XIII:2(d) of the GATT 1994, provides for certain rules governing the allocation of shares in the quota in cases in which a quota is allocated among supplying countries.

24. Moreover, in Switzerland's opinion, in order to determine whether Article 5.2(a) of the Agreement on Safeguards applies to safeguard measures taken as tariff rate quotas, the absence of an equivalent provision to Article XIII:5 of the GATT 1994 in the Agreement on Safeguards is not the only relevant factor.

25. In this regard, Switzerland notes that the panel in *US – Line Pipe* also stated that the fact that Article XIII of the GATT 1994 applies in the context of safeguard measures does not "nullify any of the provisions of the Agreement on Safeguards", and that "all of the provisions of the Safeguards Agreement remain fully applicable".[27]

V. THE LIBERALIZATION OF SAFEGUARD MEASURES

26. The purpose of progressive liberalization, as provided in article 7.4 of the Agreement on Safeguards, is to facilitate adjustment of the domestic industry, by increasing the exposure of the domestic industry to foreign competition[28] and by creating an incentive for the domestic industry to adjust from the beginning of the application of the measure.

27. Switzerland considers that the discretion of the Member applying the measure with regard to liberalization is not unfettered, since it must ensure that progressive liberalization facilitates adjustment, i.e. adjustment to the "new competitive conditions *caused by the increased imports*".[29] Consequently, the reference period for determining the pace of liberalization must be the period of investigation, which served as a basis for applying safeguard measures. Adjusting the pace of liberalization based on developments taking place *after* the safeguard measure has been applied, and which are independent from increased imports, such as general and industrial outlooks, would fail to achieve the purpose of facilitating adjustment to the new competitive conditions *caused by the increased imports*.

28. Similarly, since the purpose of progressive liberalization is to increase the exposure of the domestic industry to foreign competition from the beginning of the application of the measure, the fact that the imports would reach in the last year of application of a measure a volume above a level considered as causing a threat of serious injury cannot be determinative for setting the pace of liberalization.[30]

29. Moreover, the only review of a safeguard measure after its implementation that is contemplated in the Agreement on Safeguards is the "mid-term" review required under Article 7.4

[27] Panel Report, *US – Line Pipe*, para. 7.45.
[28] Panel Report, *Ukraine – Passenger Cars*, para. 7.362.
[29] Appellate Body Report, *Korea – Dairy*, para. 87 (emphasis added).
[30] First Written Submission of the European Union, para. 299.

for measures lasting more than three years. Based on that review, the Member applying the measure is to "withdraw it or increase the pace of liberalization" if appropriate. No provision is made for decreasing the pace of liberalization. This provides additional support that adjustments to the safeguard measure following the initial implementation of the measure should further increase the exposure of the domestic industry to imports, rather than shield the domestic industry from such competition.

30. Switzerland notes that the review investigations performed by the European Union in the course of application of the safeguard measures are not envisaged by the Agreement on Safeguards. To the extent that the administration of the TRQ and specific adjustments are performed, they cannot make the measure more restrictive. The Panel should therefore analyze whether the modifications introduced following the review investigations made the safeguard measure more restrictive and, if so, conclude that such modifications are inconsistent with Article 7.4 of the Agreement on Safeguards.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

1. During the course of the present dispute Ukraine provided comments on certain legal issues relating to the interpretation and application of the provisions on "unforeseen developments" under the Article XIX of the of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") as well as the views concerning the approach of broad-based definition of the products in safeguard investigations.

2. According to the Appellate Body in *Korea – Dairy* the ordinary meaning of the term "unforeseen" is synonymous with "unexpected", in particular when it relates to the word "developments". Therefore, the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected"[1]. At the same time, according to the Appellate Body in *US – Lamb* "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in its view, a "pertinent issue[] of fact and law", under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments".[2]

3. The Panel in *Argentina – Preserved Peaches* stated that in order for "changes mentioned in these alleged developments could be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994 […] this requires, as a minimum, some discussion by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances in the first clause".[3]

4. The Appellate Body in *Korea – Dairy* concluded that safeguard measures were intended to be "matters out of the ordinary, and to be matters of urgency, to be, in short, 'emergency actions'".[4] The Panel in *Argentina – Preserved Peaches* also emphasized that increased quantities of imports should not be equated with unforeseen developments.[5]

5. Similarly, the Panel in *Ukraine – Passenger Cars* concluded that "there is a clear distinction between the circumstances contained in the first clause of Article XIX:1(a) of the GATT 1994 and the conditions contained in the second clause. The Panel concluded that Article XIX:1(a) of the GATT 1994 refers to a product being imported in increased quantities "as a result of unforeseen developments". The phrase "as a result of" implies a relationship of cause and effect, indicating that unforeseen developments and increased imports cannot be one and the same thing.[6]

6. In Ukraine's view, in order to meet the requirements of Article XIX:1(a) of the GATT 1994 the competent authority must provide a reasoned finding as to what exactly it considers to be "unforeseen developments" in the given matter under this Article. Consequently, the Panel should examine carefully whether stipulated factors constitute unforeseen developments taking into account that such event as global steel overcapacity is a challenge that steel industry has been facing for decades while trade measures adopted by a series of third countries including US tariffs under Section 232 have been in place and whether it could be considered as unforeseen.

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[1] Appellate Body Report, *Korea – Dairy*, para. 84.
[2] Appellate Body Report, *US – Lamb*, para. 76.
[3] Panel Report, *Argentina – Preserved Peaches*, para. 7.23.
[4] Appellate Body Report, *Korea – Dairy*, para. 86.
[5] Panel Report, *Argentina – Preserved Peaches*, para. 7.18.
[6] Panel Report, *Ukraine – Passenger Cars*, paras. 7.83-7.84.

7. Therefore, Ukraine is of the view that the Panel should examine whether the report of the competent authority demonstrates the consistent relationship between "unforeseen developments" and the increase in imports causing or threatening to cause serious injury to the domestic industry as well as whether the alleged "unforeseen developments" change competitive relationship between the imported and domestic products in the categories defined by the European Union.

8. Ukraine would also like to share its comments on the approach of broad-based definition of the products in safeguard investigations.

9. Ukraine considers that broad-based definition of the products under investigation may assume to include wide list of products, for instance, products with different production technologies, range of sizes, surface treatment which results in both the general-use mass products as well as advanced complex products used in very specific and niche applications.

10. Hence, the price of these categories of products may differ significantly. Indeed, general-use mass products with higher volume share and low price affect the average price of the categories. Therefore, including a wide list of products may result in artificial and incorrect findings in the framework of such categories' injury examination and, as a result, may lead to distorted findings of an investigation.

11. Ukraine emphasizes that for appropriate estimation of "unforeseen developments" it makes sense for the Panel in this dispute to determine whether the Party to the dispute provided a proper explanation as to how such events actually resulted in increased imports causing serious injury or threat thereof to the domestic industry and whether the approach of broad-based definition of the products concerned in a safeguard investigation did not distort the results thereof.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM

I. INTRODUCTION

1. The United Kingdom welcomes the opportunity to participate as a third party in this dispute. The United Kingdom wishes to provide the Panel with its views on the relevant obligations of a Member when defining the product subject to a safeguard measure (the "product concerned"), as well as the obligation to progressively liberalise a safeguard measure during its period of application.

II. THE SAFEGUARDS AGREEMENT PROVIDES AN IMPORTING MEMBER WITH DISCRETION TO DEFINE THE PRODUCT CONCERNED

2. The Safeguards Agreement does not contain a definition of the product that is subject to a safeguard investigation. Article 2.1 of the Safeguards Agreement provides only that an importing Member may apply a safeguard measure to a "product" when the Member has determined, following an investigation and in accordance with the provisions of the Safeguards Agreement, that "such product" is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry.

3. The absence of a definition of the "product" indicates that a competent authority is permitted to define a product concerned as comprising more than one individual good or product, or more than one product category. The ordinary meaning of the term "product" is capable of being used either specifically to, for example, describe an individual good covered by a specific commodity code, or more generally to describe a wider set of goods.

4. This interpretation is supported by the panel decision in *Dominican Republic – Safeguard Measures*, which found that there is "no provision in the Agreement on Safeguards that governs the selection, description and determination of [the] 'product'".[1] That panel also concluded that there is nothing in the Safeguards Agreement that requires the competent authority to provide a detailed explanation of its definition of the product concerned.[2]

5. Where a product concerned is defined by a competent authority as comprising multiple goods or products, the competent authority is required to make a single assessment of each of the substantive conditions required for the imposition of a safeguard measure (i.e. increased imports, serious injury, causation) for the product concerned as a whole, and not in respect of its individual components. The panel in *Dominican Republic – Safeguard Measures* explicitly stated, in the context of an assessment of increased imports, that Article 2.1 of the Safeguards Agreement "does not require a disaggregated analysis for all cases in which the definition of the *product under investigation* comprises more than one product".[3]

6. The panel's task, therefore, is to determine whether the Member's competent authority properly assessed whether each of the conditions for imposing a safeguard measure were met with respect to the product concerned, as defined by the competent authority.

7. To carry out this task, the Panel should, first, examine the evidence on record and make a factual determination of the product definition adopted by the competent authority during its investigation. The Panel should make this factual determination with particular caution so as to avoid substituting the *actual* product definition adopted by the competent authority with a product definition that the complainant, or interested parties during the investigation, consider that the authority *should* have adopted.

8. Next, the Panel should assess whether the competent authority made objective and unbiased determinations that the substantive conditions for imposing a safeguard measure have been met for

[1] Panel Report, *Dominican Republic – Safeguard Measures,* para. 7.177.
[2] Panel Report, *Dominican Republic – Safeguard Measures,* para. 7.177.
[3] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.237 (emphasis original).

the product concerned.[4] The Safeguards Agreement does not require a competent authority to follow any specific methodology when analysing the relevant data during its investigation.[5] However, the competent authority should provide a "reasoned and adequate" explanation of how the methodology used allowed it to make an objective determination.[6]

9. In the present case, the Panel should therefore consider whether the European Commission's methodology – including its exclusion of two product categories that showed no increase in imports – could have "*affected the analysis* […] and resulted in an inadequate determination".[7] The European Commission's analysis could have been affected if, without the exclusion, it would not have been possible to find that the substantive conditions to impose a safeguard measure were met when assessing the product concerned. In the United Kingdom's view, evidence that the analysis would not have been affected would demonstrate that the methodology allowed an objective and unbiased determination to be made and did not result in an inadequate determination.

10. In this case, the exclusion of a sub-part of the product concerned before conducting an overall assessment resulted in the application of a *narrower safeguard measure* than the European Commission would otherwise have been entitled to apply. If this approach were found in violation of the Safeguards Agreement, Members would have an inappropriate incentive to apply only the widest permissible safeguard measures. The United Kingdom considers that such an interpretation would be contrary to the text, object and purpose of the Safeguards.

III. THE SAFEGUARDS AGREEMENT IS NOT PRESCRIPTIVE AS TO HOW A MEMBER SHOULD PROGRESSIVELY LIBERALISE A MEASURE

11. Beyond stating that liberalisation should facilitate adjustment and be carried out at regular intervals, and providing certain rules for reviews, Article 7.4 of the Safeguards Agreement imposes few requirements on how a Member should progressively liberalise a measure.

12. When assessing whether a Member has complied with Article 7.4, the United Kingdom considers that the Panel should be guided by the panel decision in *Ukraine – Passenger Cars*. In that case, the panel rejected the argument that Article 7.4 contains various detailed obligations, such as a requirement to publish a liberalisation timetable and rules on the length of regular intervals of liberalisation. It found that Article 7.4 imposes an obligation to "actually progressively liberalize [a] safeguard measure".[8] This "substantive" obligation is not prescriptive as to *how* the measure must be liberalised.[9] The only constraint imposed is that the liberalisation "be such as will 'facilitate adjustment' of the domestic industry".[10]

13. The absence of prescriptive requirements in Article 7.4 means that Members are not prohibited from decreasing the pace of liberalisation once it has been set. A panel instead should focus on whether the Member's revised rate of liberalisation results in actual progressive liberalisation.

14. Moreover, Article 7.4 does not require a competent authority to adopt any particular methodology when setting a pace of liberalisation. A panel should assess whether the pace of liberalisation is reasonable and sufficient to create an incentive for domestic industry "to undertake appropriate efforts at adjustment".[11] While data from the original period of investigation is clearly a relevant and important consideration for a competent authority when setting the pace of liberalisation, it would not be appropriate to interpret the need to "facilitate adjustment" as precluding a competent authority from also considering other potentially relevant factors.[12]

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[4] Appellate Body Report, *US – Lamb*, paras. 106 and 130; Appellate Body Report, *US – Steel Safeguards*, para. 302.

[5] Appellate Body Report, *US – Lamb*, para. 137.

[6] Appellate Body Report, *US – Lamb*, para. 106; Appellate Body Report, *US – Steel Safeguards*, para. 302.

[7] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.237 (emphasis added).

[8] Panel report, *Ukraine – Passenger Cars*, para. 7.360.

[9] Panel report, *Ukraine – Passenger Cars*, paras. 7.360 and 7.363.

[10] Panel report, *Ukraine – Passenger Cars*, para. 7.363.

[11] Panel Report, *Ukraine – Passenger Cars*, para. 7.362.

[12] See Turkey's Second Written Submission, paras. 256-257; Switzerland Third Party Submission, paras. 26-28.

15. A panel's task is, therefore, to assess whether a Member has *actually liberalised* its safeguard measure at regular intervals in a way that is sufficient to *facilitate adjustment* by domestic industry. There are a number of considerations that the United Kingdom considers should guide a panel's substantive assessment of the WTO-consistency of amendments that a Member has made to a safeguard measure.

16. First, the ordinary meaning of the term "liberalisation" is the "removal or reduction of restrictions". Article 7.4 thus creates a requirement to remove or reduce restrictions on trade arising from the safeguard measure at regular intervals throughout its duration. Amendments to a safeguard that add or increase restrictions on trade would not ordinarily be compatible with this requirement. In fact, the panel in *Argentina – Footwear* noted that the Safeguards Agreement "does not contemplate modifications that increase the restrictiveness of a measure".[13]

17. Second, Articles 5.1 and 7.1 of the Safeguards Agreement state that a Member should apply a safeguard measure only to the extent and for a duration as may be "necessary to prevent or remedy serious injury and to facilitate adjustment". Articles 7.2 and 7.4 of the Safeguards Agreement also envisage reviews of measures at the mid-point or expiry of the initial term to confirm whether the safeguard remains necessary or suited to fulfil these purposes. The underlying purpose of a safeguard measure, according to the Safeguards Agreement, is therefore to prevent or remedy serious injury to a domestic industry and to facilitate its adjustment. Members are able to make amendments to a safeguard measure that they deem necessary to ensure that it is able to prevent or remedy serious injury, provided that the core requirement of removing or reducing restrictions at regular intervals in order to facilitate adjustment is fulfilled.

18. Third, various provisions in the WTO agreements, such as Article 5.2(a) of the Safeguards Agreement and Article XIII:2(d) of the GATT 1994, place obligations on Members to, in certain circumstances, allocate quotas or TRQs in a way that reflects previous trade flows supplied by exporting countries. These provisions provide relevant context to the interpretation of Article 7.4 of the Safeguards Agreement. The progressive liberalisation requirement should be interpreted harmoniously with those provisions, so as to not prohibit amendments to a safeguard measure (*e.g.*, the country allocations of TRQs) that are appropriate to ensure trade reflects prior trade flows.

[13] Panel report, *Argentina – Footwear (EC)*, para. 8.303.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views as a third party in this dispute. The United States will address certain issues of systemic concern regarding the interpretation and application of Article XIX:1(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Safeguards* ("Safeguards Agreement").

II. The framework under Article XIX:1(a) of the GATT 1994 and the Safeguards Agreement Concerning Unforeseen Developments and Obligations Incurred

2. Turkey (the complainant) asserts that the European Union (the respondent) acted inconsistently with Article XIX:1(a) concerning the respondent's determinations on "unforeseen developments" and on "the effect of the obligations incurred". The United States will address the complainant's arguments with respect to each of these phrases in turn.

a. "*Unforeseen Developments*"

3. With respect to unforeseen developments, the complainant first argues that the respondent "failed to demonstrate the existence of unforeseen developments" because the developments identified by the respondent in the EU Provisional Measures Regulation and the EU Definitive Measures Regulation *could* have been foreseen by the respondent's negotiators during the Uruguay Round. Thus, the complainant asserts that the developments identified by the respondent "cannot be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994".

4. As the United States explained in the U.S. third party written submission, unforeseen developments are those that are unexpected or unanticipated at the time that the Member took on obligations, including concessions, with respect to the product that is subject to a safeguard measure. The phrase "unforeseen developments" appears only once in the covered agreements, in Article XIX:1(a) of the GATT 1994.

5. The ordinary meaning of the term "unforeseen" is "[t]hat has not been foreseen". The phrase "[i]f, as a result of unforeseen developments and of the effects of the obligations incurred" sets out a temporal and logical connection between the developments that were not foreseen and the "obligations incurred"[1] by a Member. This text thus acknowledges that, had the developments been anticipated or predicted, the Member might not have incurred the obligation.

6. Accordingly, "unforeseen developments" are those that a Member did not foresee at the time of undertaking a commitment. In its first written submission, the complainant appears to agree with this interpretation of Article XIX:1(a) of the GATT 1994. In its written submissions, however, the complainant does not attempt to demonstrate whether the developments listed in the EU Provisional Measures Regulation and the EU Definitive Measures Regulation were actually foreseen by the respondent's negotiators. Instead, the complainant argues that the developments were *foreseeable*. These arguments err as a legal matter in focusing on whether the developments listed by the respondent were arguably foreseeable (rather than actually foreseen) by the respondent's negotiators.

7. Next, the complainant errs by asserting that a competent authority has to demonstrate the existence of unforeseen developments before a Member implements a safeguard measure. The text of Article XIX:1(a) differentiates between the factual circumstances in which a Member may take a safeguard measure (set out in the first clause of Article XIX:1(a)) and the conditions that must be established before applying a safeguard measure (set out in the second clause of Article XIX:1(a)).

[1] For purposes of this Integrated Executive Summary, the United States uses the phrase "obligations incurred" in the sense it is used in Article XIX of the GATT 1994, as "including tariff concessions".

In other words, the first clause of Article XIX:1(a) does not create (to use the complainant's term) a "prerequisite" coequal with the conditions of the second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations incurred" are circumstances that must be shown to exist, whereas "any product is being imported […] in such increased quantities and under such conditions as to cause or threaten serious injury" are "conditions" that must be met.

8. The text of the Safeguards Agreement confirms this interpretation of Article XIX:1(a). Article 1 of that agreement "establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994". And Article 11.1(a) states that a Member shall not take action under Article XIX "unless such action conforms with the provisions of that article applied in accordance with" the Safeguards Agreement. Thus, the Safeguards Agreement requires that a Member apply Article XIX "in accordance with" the Safeguards Agreement, which provides rules for the application of a safeguard measure.

9. Additionally, the United States observes that Article 2.1 of the Safeguards Agreement only includes the conditions referenced in the second clause of Article XIX:1(a). Notably, Article 2.1 does not mention unforeseen developments nor obligations incurred. Instead, the only requirement in Article 2.1 is for a Member applying a safeguard measure to determine that a product is being imported in "such increased quantities" and "under such conditions as to cause or threaten to cause serious injury".

10. Finally, the complainant errs by asserting that a competent authority "must demonstrate" in its published report "that unforeseen developments resulted in increased imports causing or threatening to cause serious injury to the domestic industry of the products concerned". As the United States demonstrated in the U.S. third party submission, the text of the Safeguards Agreement does not require a competent authority to demonstrate the existence of unforeseen developments in the report that contains its findings pursuant to a safeguards investigation. Instead, Articles 3.1 and 4.2(a) of the Safeguards Agreement require only that the report of the competent authorities address whether increased imports have caused or are threatening to cause serious injury to a domestic industry.

b. "*[T]he effect of the obligations incurred*"

11. Turning to obligations incurred, the United States recalls that Article XIX:1(a) provides that the condition of the increase in imports set out in the second clause of Article XIX:1(a) be a result of the "effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions". GATT 1994 uses the term "obligations" to refer to the substantive commitments that a Member undertakes with respect to the products of another Member under the provisions of the agreement. "Tariff concessions" refers to the Schedule of Concessions granted by a Member under Article II of GATT 1994, and in particular to commitments not to impose ordinary customs duties in excess of the amount set out in the schedule. The ordinary meaning of the term "effect" is "[s]omething accomplished, caused or produced; a result, a consequence". Thus, the "effect of obligations incurred" refers to the consequences of a Member's substantive commitments, including tariff bindings; namely, that the Member cannot take certain trade-restrictive measures.

12. In *Korea – Dairy*, which the complainant cites in its first written submission with respect to obligations incurred, the Appellate Body expressed support for our analytical approach. In that dispute, the Appellate Body reasoned that the phrase "the effect of the obligations incurred" simply means that "the importing Member has incurred obligations under the GATT 1994, including tariff concessions". Pursuant to paragraph 7 of Article II of the GATT, a Schedule annexed to the GATT is an integral part of Part I of that agreement. Thus, the Appellate Body reasoned that a tariff concession or commitment in a "Member's Schedule is subject to the obligations contained in Article II of the GATT 1994".

13. In other words, WTO obligations in the form of tariff concessions bound in a Member's Schedule under Article II of the GATT 1994 represent "obligations incurred" for purposes of GATT Article XIX:1(a). Accordingly, a Member may establish that increased imports are the "effect of obligations incurred" by identifying a commitment, such as a tariff concession, that prevents it from raising duties on the imports in question.

14. For these reasons, the United States disagrees with the complainant's interpretation of the phrase "incurred obligations" in Article XIX:1(a). The complainant's interpretation is inconsistent with the framework above as it does not recognize that a Member may show that increased imports are the "effect of obligations incurred" by simply identifying a commitment that prevents that Member from raising duties on imports. Moreover, the text of Article XIX:1(a) does not require that a Member establish a causal link, in the sense of Article 4.2(a) of the Safeguards Agreement, with the "obligations incurred" and the increased imports.

III. CONCLUSION

15. The United States welcomes the opportunity to present its views in connection with this dispute on the proper interpretation of relevant provisions of Article XIX of the GATT 1994 and the Safeguards Agreement.