WORLD TRADE ORGANIZATION

WT/DS518/R

6 November 2018

(18-6912)

Page: 1/105

Original: English

INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION 14
1.1 Complaint by Japan 14
1.2 Panel establishment and composition 14
1.3 Panel proceedings 14
2 MEASURE AT ISSUE AND OTHER FACTUAL ASPECTS 15
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 15
4 ARGUMENTS OF THE PARTIES 17
5 ARGUMENTS OF THE THIRD PARTIES 17
6 INTERIM REVIEW 17
7 FINDINGS 17
7.1 Introduction 17
7.2 General principles regarding standard of review, treaty interpretation, and burden of proof 17
7.2.1 Standard of review 17
7.2.2 Treaty interpretation 19
7.2.3 Burden of proof 19
7.3 Whether the Panel should make findings despite the expiry of the measure at issue 20
7.3.1 Introduction 20
7.3.2 Evaluation by the Panel 21
7.4 Whether Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute 24
7.4.1 Introduction 24
7.4.2 Whether the measure at issue constitutes an ordinary customs duty 25
7.4.3 Whether the measure at issue resulted in the suspension of a GATT obligation 27
7.4.3.1 Article II:1(b) of the GATT 1994 28
7.4.3.2 Article I:1 of the GATT 1994 29
7.4.3.3 Article XXIV of the GATT 1994 31
7.4.4 Conclusion 34
7.5 Whether India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to the existence of "unforeseen developments" and the effect of GATT obligations 34
7.5.1 Introduction 34
7.5.2 The Indian competent authority's determination 35
7.5.3 Article XIX:1(a) of the GATT 1994 36
7.5.4 The existence of unforeseen developments 37
7.5.5 Logical connection between unforeseen developments and the increased imports 39
7.5.6 Effect of the obligations incurred under the GATT 1994 43
7.5.7 Conclusion 44
7.6 Whether India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the increase in imports 45
7.6.1 Introduction 45
7.6.2 The Indian competent authority's determination on increased imports 45

7.6.3 Articles 2.1 and 4.2(a) of the Agreement on Safeguards 46
7.6.4 Evaluation by the Panel 47
7.6.5 Conclusion 51
7.7 Whether India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the domestic industry 51
7.7.1 Introduction 51
7.7.2 Article 4.1(c) of the Agreement on Safeguards 51
7.7.3 Evaluation by the Panel 52
7.8 Whether India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of serious injury and threat of serious injury 55
7.8.1 Introduction 55
7.8.2 The Indian competent authority's determination regarding serious injury and threat thereof 55
7.8.3 Serious Injury 56
7.8.3.1 Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards 56
7.8.3.2 Whether the Indian competent authority evaluated relevant injury factors consistently with Articles 4.1(a) and 4.2(a) 57
7.8.3.2.1 The share of the domestic market taken by increased imports 57
7.8.3.2.2 Profits and losses 60
7.8.3.2.3 Evaluation of injury factors showing stable or positive trends 63
7.8.3.2.4 Conclusion 65
7.8.3.3 Whether the Indian competent authority failed to base its serious injury determination on objective data 65
7.8.4 Threat of serious injury 66
7.8.5 Consequential claim under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 69
7.9 Whether India acted inconsistently with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of the causal link between the increase in imports and serious injury 69
7.9.1 Introduction 69
7.9.2 Article 4.2(b) of the Agreement on Safeguards 69
7.9.3 Causal link analysis 71
7.9.4 Non-attribution analysis 75
7.9.4.1 Introduction and general considerations relevant to Japan's claims on non-attribution analysis 75
7.9.4.2 The captive sales of domestic industry and sales of producers outside the domestic industry 77
7.9.4.3 The domestic industry's own internal factors 78
7.9.4.4 Other factors causing the decline in profitability 79
7.9.4.5 Conclusion 80
7.9.5 Consequential claims 80
7.10 Whether India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 80

7.11 Whether India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards 81
7.12 Whether India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards 82
7.13 Whether India acted inconsistently with Article 12 of the Agreement on Safeguards in notifying its measure and providing opportunities for consultations 83
7.13.1 Japan's claim under Article 12.4 of the Agreement on Safeguards 83
7.13.1.1 Introduction 83
7.13.1.2 Evaluation by the Panel 84
7.13.1.3 Conclusion 84
7.13.2 Japan's claim under Article 12.1 of the Agreement on Safeguards 84
7.13.2.1 Introduction 84
7.13.2.2 Evaluation by the Panel 86
7.13.2.2.1 Japan's claim under Article 12.1(a) 87
7.13.2.2.2 Japan's claim under Article 12.1(b) 88
7.13.2.2.3 Japan's claim under Article 12.1(c) 89
7.13.2.3 Conclusion 90
7.13.3 Japan's claim under Article 12.2 of the Agreement on Safeguards 90
7.13.3.1 Introduction 90
7.13.3.2 Evaluation by the Panel 92
7.13.3.3 Conclusion 96
7.13.4 Japan's claim under Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 97
7.13.4.1 Introduction 97
7.13.4.2 Evaluation by the Panel 98
7.13.4.3 Conclusion 98
7.14 Whether India acted inconsistently with Article II:1(b) of the GATT 1994 98
7.14.1 Introduction 98
7.14.2 Article II:1(b) of the GATT 1994 99
7.14.3 Evaluation by the Panel 99
7.14.4 Conclusion 101
7.15 Whether India acted inconsistently with Article I:1 of the GATT 1994 101
7.15.1 Introduction 101
7.15.2 Article I:1 of the GATT 1994 101
7.15.3 Evaluation by the Panel 101
7.15.4 Conclusion 103
7.16 Special and differential treatment 103
8 CONCLUSIONS AND RECOMMENDATION 104
8.1 Conclusions 104
8.2 Recommendation 105

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Interim Review	9

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	First integrated executive summary of the arguments of Japan	21
Annex B-2	Second integrated executive summary of the arguments of Japan	31
Annex B-3	First integrated executive summary of the arguments of India	41
Annex B-4	Second integrated executive summary of the arguments of India	53

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	65
Annex C-2	Integrated executive summary of the arguments of the European Union	68
Annex C-3	Integrated executive summary of the arguments of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu	70
Annex C-4	Integrated executive summary of the arguments of Ukraine	72
Annex C-5	Integrated executive summary of the arguments of the United States	73

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Argentina – Preserved Peaches	Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted 15 April 2003, DSR 2003:III, p. 1037
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Australia – Salmon	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Cellulose Pulp	Panel Report, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R and Add.1, adopted 22 May 2017
China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425

Short title	Full case title and citation
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 [appealed by the European Union 21 September 2018]
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018
EU – PET (Pakistan)	Panel Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/R, Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS486/AB/R
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767

Short title	Full case title and citation
India – Additional Import Duties	Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R, DSR 2008:XX, p. 8317
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Iron or Steel Products	Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
Indonesia – Iron or Steel Products	Panel Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/R, WT/DS496/R, and Add.1, adopted 27 August 2018, as modified by Appellate Body Report WT/DS490/AB/R, WT/DS496/AB/R
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125
Japan – Apples (Article 21.5 – US)	Panel Report, *Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States*, WT/DS245/RW, adopted 20 July 2005, DSR 2005:XVI, p. 7911
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299

Short title	Full case title and citation
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:1, p. 7
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649

Short title	Full case title and citation
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, p. 1473
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Steel Safeguards	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description
JPN-1/IND-1	Customs Tariff Act	Customs Tariff Act, 1975 (51 of 1975), as amended (18 August 1975)
JPN-2/IND-2	Safeguard Rules	Ministry of Finance (Department of Revenue), Notification No. 35/97-NT-Customs, Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, Gazette of India, Extraordinary, Part II, Section 3(i) (29 July 1997)
JPN-3/IND-3	Notification No. 19/2016-Customs (5 February 2016)	Ministry of Finance (Department of Revenue), Notification No. 19/2016-Customs (N.T.), superseding Notification No. 103/98-Customs, 14 December 1998, Gazette of India, Extraordinary, Part II, Section 3(i) (5 February 2016)
JPN-4/IND-4	Notice of Initiation	Directorate General of Safeguards Customs and Central Excise, Notice of Initiation of a Safeguard Investigation concerning imports of hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more, Gazette of India, Extraordinary, Part II, Section 3(i) (7 September 2015)
JPN-5/IND-5	Application	Petition for the initiation of safeguard investigation and imposition of safeguard duty on imports of hot-rolled flat products of alloy or non-alloy steel in coils (27 July 2015)
JPN-6/IND-20	Revised Application	Petition for the initiation of safeguard investigation and imposition of safeguard duty on imports of hot-rolled flat products of alloy or non-alloy steel in coils (24 August 2015)
JPN-7/IND-7	Preliminary Findings	Ministry of Finance, Director General (Safeguards), Notification, Safeguard investigation concerning imports of hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more into India, Preliminary Findings, Gazette of India, Extraordinary, Part II, Section 3(i) (9 September 2015)
JPN-8/IND-8	Notification imposing a provisional safeguard measure	Ministry of Finance (Department of Revenue), Notification No. 2/2015-Customs (SG), Gazette of India, Extraordinary, Part II, Section 3(i) (14 September 2015)
JPN-9/IND-9	Notification under Article 12.1(a) of the SA (15 September 2015)	WTO, Committee on Safeguards, Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reason for it: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/6/IND/41 (15 September 2015)
JPN-10/IND-10	Notification under Article 12.4 of the SA (28 September 2015)	WTO, Committee on Safeguards, Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/7/IND/10-G/SG/N/11/IND/14 and G/SG/N/7/IND/10/Suppl.1-G/SG/N/11/IND/14/Suppl.1 (28 September 2015)
JPN-11/IND-11	Final Findings	Ministry of Finance (Department of Revenue), Notification, Safeguard investigation concerning imports of hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more into India, Final Findings, Gazette of India, Extraordinary, Part II, Section 3(i) (15 March 2016)
JPN-12/IND-12	Notification under Article 12.1(b) of the SA (21 March 2016)	WTO, Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, Notification of a proposal to impose a measure, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards: India (hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more), G/SG/N/8/IND/28-G/SG/N/10/IND/19-G/SG/N/11/IND/14/Suppl.2 (21 March 2016)

Exhibit	Short Title (if any)	Description
JPN-13/IND-13	Notification imposing a definitive safeguard measure	Excerpt from Ministry of Finance (Department of Revenue), Notification No. 1/2016-Customs (SG), Gazette of India, Extraordinary, Part II, Section 3(i) (29 March 2016)
JPN-14/IND-14	Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016)	WTO, Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports; Notification pursuant to Article 12.1(c) of the Agreement on Safeguards; Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards: India Supplement (hot-rolled flat products of non-alloy and other alloy Steel in coils of a width of 600 mm or more), G/SG/N/8/IND/28/Suppl.1-G/SG/N/10/IND/19/Suppl.1 -G/SG/N/11/IND/14/Suppl.3 (4 April 2016)
JPN-17/IND-17	Notification No. 12/2012-Customs (17 March 2012)	Ministry of Finance (Department of Revenue), Notification No. 12/2012-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (17 March 2012)
JPN-18/IND-18	Notification No. 12/2014-Customs (11 July 2014)	Ministry of Finance (Department of Revenue) Notification No. 12/2014-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (11 July 2014)
JPN-19/IND-19	Notification No. 10/2015-Customs (1 March 2015)	Ministry of Finance (Department of Revenue), Notification No. 10/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (1 March 2015)
JPN-20/IND-6	Notification No. 39/2015-Customs (16 June 2015)	Ministry of Finance (Department of Revenue), Notification No. 39/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (16 June 2015)
JPN-21/IND-16	Notification No. 45/2015-Customs (12 August 2015)	Ministry of Finance (Department of Revenue), Notification No. 45/2015-Customs, Gazette of India, Extraordinary, Part II, Section 3(i) (12 August 2015)
JPN-26		Excerpt from The Customs Act, 1962, Section 28
JPN-28		Excerpt from Schedule of Concessions XII – India (15 March 2000)
IND-21		Excerpt from India's Schedule of Concessions with respect to customs heading 7208

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
API	American Petroleum Institute
CEPA	Comprehensive Economic Partnership Agreement
DSB	Dispute Settlement Body
DI	domestic industry
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FTA	free trade agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
Indian competent authority	Director General (Safeguards) of India's Ministry of Finance
INR	Indian Rupees
MFN	most-favoured nation
MT	metric tonne
POI	period of investigation
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 20 December 2016, Japan requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to certain measures imposed by India on imports of iron and steel products into India.[1]

1.2. Consultations were held on 6 and 7 February 2017 but failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 9 March 2017, Japan requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXII:1 of the GATT 1994 and Article 14 of the Agreement on Safeguards, with standard terms of reference.[3] At its meeting on 3 April 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS518/5, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS518/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 12 June 2017, Japan requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 22 June 2017, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Alexander Hugh McPhail
Members:	Ms Enie Neri de Ross
	Ms Ana Teresa Caetano

1.6. Australia, China, the European Union, Indonesia, Kazakhstan, Korea, Oman, Qatar, the Russian Federation (Russia), Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Ukraine, the United States and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetable on 10 October 2017.

1.8. The Panel held a first substantive meeting with the parties on 31 January and 1 February 2018. A session with the third parties took place on 1 February 2018. The Panel held a second substantive meeting with the parties on 1 and 2 May 2018. On 3 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 23 August 2018. The Panel issued its Final Report to the parties on 11 October 2018.

---

[1] Request for consultations by Japan, WT/DS518/1-G/L/1172-G/SG/D49/1 (Japan's consultations request).
[2] Request for the establishment of a panel by Japan, WT/DS518/5 (Japan's panel request).
[3] Japan's panel request.
[4] DSB, Minutes of meeting held on 3 April 2017, WT/DSB/M/395, pp. 3-4.
[5] Constitution note of the Panel, WT/DS518/6.
[6] See the Panel's Working Procedures in Annex A-1.

1.9. In these panel proceedings, certain filings were made outside of the deadlines prescribed by the Working Procedures adopted by the Panel.[7] The Panel stresses the importance of all parties and third parties adhering to the time limits for filing documents, in the interests of fairness and the orderly conduct of panel proceedings.

2 MEASURE AT ISSUE AND OTHER FACTUAL ASPECTS

2.1. This dispute concerns a safeguard measure imposed by India with regard to imports of hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more (product concerned). This measure was imposed following a safeguard investigation initiated on 7 September 2015 by the Director General (Safeguards) of India's Ministry of Finance (Indian competent authority).[8]

2.2. On 9 September 2015, the Indian competent authority issued its Preliminary Findings.[9] On 14 September 2015, the Ministry of Finance, after considering the Preliminary Findings, imposed a provisional safeguard duty of 20% for 200 days.[10]

2.3. On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.[11] On 28 September 2015, India notified the Committee on Safeguards, pursuant to Article 12.4 and Article 9, footnote 2, of the application of the provisional safeguard measure.[12]

2.4. On 15 March 2016, the Indian competent authority issued its Final Findings.[13] On 29 March 2016, after considering the Final Findings, the Ministry of Finance imposed a definitive safeguard duty at the following rate (minus anti-dumping duties, if any): 20% from 14 September 2015 to 13 September 2016; 18% from 14 September 2016 to 13 March 2017; 15% from 14 March 2017 to 13 September 2017; and 10% from 14 September 2017 to 13 March 2018.[14]

2.5. On 21 March 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(b), of the findings of serious injury or threat thereof caused by increased imports.[15] On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c), of its decision to impose a safeguard measure.[16]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel find that the measure at issue is inconsistent with India's obligations under the Agreement on Safeguards and the GATT 1994. Specifically, Japan requests the Panel to find that[17]:

a. India acted inconsistently with Article XIX:1(a) of the GATT 1994 because it failed to demonstrate the existence of "unforeseen developments" and a "logical connection" between the unforeseen developments and the increase in imports causing or threatening to cause serious injury to the domestic industry;

b. India acted inconsistently with Article XIX:1(a) of the GATT 1994 because it failed to demonstrate a "logical connection" between the effect of the obligations incurred under

[7] The Panel notes that India's questions to third parties were received the next working day following the deadline specified by the Panel in accordance with paragraph 17(c) of the Panel's Working Procedures.
[8] Notice of Initiation, (Exhibits JPN-4/IND-4).
[9] Preliminary Findings, (Exhibits JPN-7/IND-7).
[10] Notification imposing a provisional safeguard measure, (Exhibits JPN-8/IND-8).
[11] Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).
[12] Notification under Article 12.4 of the SA (28 September 2015), (Exhibits JPN-10/IND-10).
[13] Final Findings, (Exhibits JPN-11/IND-11).
[14] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13).
[15] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[16] Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).
[17] Japan's first written submission, para. 536; second written submission, para. 287.

the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry;

c. India acted inconsistently with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to determine the increase in imports as required by those provisions;

d. India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it failed to determine the domestic industry constituting a "major proportion" of the total domestic production and, consequently, acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its determination of whether the alleged increased imports have caused or are threatening to cause serious injury to the domestic industry;

e. India acted inconsistently with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to determine serious injury and threat thereof as required by those provisions;

f. India acted inconsistently with Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to establish the existence of a causal link between the alleged increased imports and the alleged serious injury and threat thereof to the domestic industry as well as failed to determine that the alleged serious injury and threat thereof caused by factors other than the increased imports was not attributed to increased imports;

g. India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to impose the safeguard measures only to the extent and for such time as necessary to prevent or remedy serious injury;

h. India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it failed to provide in the Preliminary Findings and the Final Findings, i.e. the published report of the competent authority, its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

i. India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because it imposed the safeguard measures in violation of Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1, and 7.1 of the Agreement on Safeguards as well as Article XIX of the GATT 1994;

j. India acted inconsistently with Article 12.4 of the Agreement on Safeguards because it failed to notify the Committee on Safeguards before taking the provisional safeguard measure;

k. India acted inconsistently with Article 12.1 of the Agreement on Safeguards because it failed to immediately notify the Committee on Safeguards upon initiating the investigation relating to serious injury or threat thereof; making a finding of serious injury or threat thereof caused by increased imports; and taking a decision to apply the safeguard measure;

l. India acted inconsistently with Article 12.2 of the Agreement on Safeguards because, in making the notifications pursuant to Articles 12.1(b) and 12.1(c), it failed to provide the Committee on Safeguards with "all pertinent information";

m. India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because it failed to provide Japan with an adequate opportunity for prior consultations in respect of the proposed action;

n. India acted inconsistently with Article II:1(b) of the GATT 1994 because, through the measures at issue, India imposes "other duties or charges" in violation of the second sentence of Article II:1(b) of the GATT 1994; and

o. India acted inconsistently with Article I:1 of the GATT 1994 because the measures at issue are not applied to the products originating in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to like products originating in other WTO Members, including Japan.

3.2. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its WTO obligations by revoking its measures.[18]

3.3. India requests that the Panel reject Japan's claims in this dispute in their entirety.[19]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, the European Union, Chinese Taipei, Ukraine, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). China, Indonesia, Kazakhstan, Korea, Oman, Qatar, Russia, Singapore, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 23 August 2018, we issued our Interim Report to the parties. On 11 September 2018, Japan and India each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested for an interim review meeting. On 25 September 2018, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-2.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns a measure applied by India on imports of certain steel products. Japan claims that the measure is inconsistent with various provisions of the Agreement on Safeguards and the GATT 1994. Before addressing Japan's claims in this dispute, we first set out the relevant principles guiding our review, including the relevant principles regarding standard of review, treaty interpretation, and burden of proof in WTO dispute settlement proceedings. We then address India's request that since the measure has expired, Japan's complaint is not "fruitful" in terms of Article 3.7 of the DSU. After that, we consider whether Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute.

7.2 General principles regarding standard of review, treaty interpretation, and burden of proof

7.2.1 Standard of review

7.2. Panels are bound by the standard of review set forth in Article 11 of the DSU, which provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the

[18] Japan's first written submission, paras. 537-538; second written submission, para. 288.
[19] India's first written submission, para. 352; second written submission, para. 20.

> facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

7.3. The Agreement on Safeguards is silent as to the standard of review to be applied by panels in reviewing the WTO-consistency of safeguard measures and the associated investigations. Previous panel and Appellate Body reports have established that the general standard of review contained in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of the GATT 1994.[20] In *US – Cotton Yarn*, the Appellate Body examined the scope of this general rule provided in Article 11 regarding the standard of review applicable to disputes under the Agreement on Safeguards and summarized its views as follows:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.[21]

7.4. Thus, a panel's examination of a competent authority's determination in a safeguard proceeding must involve neither a *de novo* review nor "total deference" to the competent authority's determination.[22] Rather, a panel is required to assess whether the competent authority has examined all relevant facts and provided a reasoned and adequate explanation as to how the facts support its determination.[23] A panel can make this assessment:

> *[O]nly* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[24]

7.5. Although this standard of review was articulated by the Appellate Body in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, the Appellate Body in *US – Steel Safeguards* clarified that the same standard should be applied to other obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994.[25]

7.6. A panel's assessment of whether the competent authorities have complied with their obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 should be based on the relevant report published by the authorities.[26] Article 3.1, last sentence, requires

---

[20] See, e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 120; and *US – Lamb*, paras. 100-102; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.4.

[21] Appellate Body Report, *US – Cotton Yarn*, para. 74 (referring at paras. 71-73 to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 121; *US – Lamb*, para. 103; and *US – Wheat Gluten*, para. 55).

[22] Appellate Body Reports, *US – Lamb*, para. 101; *US – Tyres (China)*, para. 123; *US – Cotton Yarn*, para. 69; and *Argentina – Footwear (EC)*, para. 119.

[23] Appellate Body Reports, *US – Lamb*, para. 103; *US – Line Pipe*, para. 217; and *US – Steel Safeguards*, paras. 296-297.

[24] Appellate Body Report, *US – Lamb*, para. 106. (emphasis original)

[25] Appellate Body Report, *US – Steel Safeguards*, para. 276 (stating that "[O]ur finding in those cases [such as *US – Lamb*] did not purport to address solely the standard of review that is appropriate for claims arising under Article 4.2 of the Agreement on Safeguards. We see no reason not to apply the same standard generally to the obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994").

[26] Panel Report, *Ukraine – Passenger Cars*, para. 7.26. (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 299; and *US – Lamb*, para. 105; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.9).

competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Similarly, Article 4.2(c) requires competent authorities to publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. The panel in *US – Steel Safeguards* noted that:

> It is precisely by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment of the matter before it" in accordance with Article 11. … [A] panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities. Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[27]

7.7. Panels should not be "left to 'deduce for themselves' from the report of that competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority'".[28] The explanations contained in a competent authority's published report must be "explicit", "clear and unambiguous", and must not "merely imply or suggest an explanation".[29]

7.8. Where there is no reasoned and adequate explanation apparent in the published report to support a competent authority's determinations "the panel has no option but to find that the competent authority has not performed the analysis correctly".[30] This implies that reasoning, analysis, and demonstrations provided after publication of the report – i.e. *ex post* explanations – are irrelevant and cannot be relied upon to remedy any deficiencies of the competent authorities' determinations.[31]

7.2.2 Treaty interpretation

7.9. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". The principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are generally accepted as such customary rules.[32]

7.2.3 Burden of proof

7.10. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[33] Therefore, as the complaining party, Japan bears the burden of demonstrating that the challenged measures are inconsistent with the Agreement on Safeguards and the GATT 1994. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[34] Generally, each party asserting a fact shall provide proof thereof.[35]

---

[27] Appellate Body Report, *US – Steel Safeguards*, para. 299. (fn omitted)
[28] Appellate Body Report, *US – Steel Safeguards*, para. 288.
[29] Appellate Body Reports, *US – Steel Safeguards*, paras. 296-297; *US – Line Pipe*, para. 217.
[30] Appellate Body Report, *US – Steel Safeguards*, para. 303.
[31] Panel Report, *Indonesia – Iron or Steel Products*, para. 7.7.
[32] Appellate Body Reports, *US – Gasoline*, DSR 1996:1, p. 16; *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104, section D.
[33] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 337.
[34] Appellate Body Report, *EC – Hormones*, para. 104.
[35] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 335.

7.3 Whether the Panel should make findings despite the expiry of the measure at issue

7.3.1 Introduction

7.11. The DSB established this Panel at its meeting on 3 April 2017 at the request of Japan. On 22 June 2017, the Director-General composed the Panel, pursuant to Article 8.7 of the DSU.[36]

7.12. The safeguard measure at issue in this dispute was imposed by the Indian Ministry of Finance on 29 March 2016.[37] According to the terms of the measure as published in the Gazette of India, the duties resulting from the measure would be in force, at different rates and subject to a schedule of progressive liberalization, until 13 March 2018.[38] During the proceedings India declared that it had no intention to extend the measure beyond the date of its expiration.[39]

7.13. Notwithstanding the expiration of the measure, in accordance with the relevant legislation if a duty resulting from the safeguard measure was not levied or was not paid for any reason *other than* collusion, wilful misstatement, or suppression of facts, such duty may still be claimed within two years from the date on which the customs officer made an order for the clearance of goods. In case the duty was not levied or was not paid by reason of collusion, wilful misstatement, or suppression of facts, such duty may be claimed within a period of five years.[40]

7.14. Considering that the measure at issue would only be in force until 13 March 2018, India has requested the Panel to determine whether the panel procedure initiated by Japan complies with the requirement in Article 3.7 of the DSU that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under [the DSU] procedures would be fruitful".[41] India has added that it does not have any intention to extend the measure beyond the date of its expiration.[42] India has also indicated that, in accordance with Article 7.5 of the Agreement on Safeguards, there is no possibility for the safeguard measure to be easily reimposed by India on the same products concerned.[43] India notes that, in accordance with Article 3.7 of the DSU, in the absence of a mutually agreed solution and if a measure is found to be inconsistent with provisions of the covered agreements, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure at issue. In India's view, considering that the measure expired on 13 March 2018, "no useful purpose would be served if Japan pursues with its claims".[44]

7.15. Japan has asked the Panel to reject India's request and to make findings and recommendations with respect to the measure at issue, even if the measure has expired.[45] Japan has referred to the previous statements by the Appellate Body indicating that (i) a Member enjoys broad discretion in deciding whether to bring a case against another Member under the DSU; (ii) the language of Article 3.7 of the DSU suggests that Members are expected to be "largely self-regulating" in deciding whether any action under the DSU procedures would be "fruitful"; and (iii) Article 3.7 neither requires nor authorizes a panel to look behind a Member's decision and to question its exercise of judgement.[46] Japan has added that it has initiated these panel proceedings

[36] See paras. 1.3-1.5 above.
[37] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.
[38] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 6. See also Japan's first written submission, paras. 42 and 416; and India's first written submission, para. 44.
[39] India's second written submission, para. 2.
[40] Excerpt from The Customs Act, 1962, Section 28, (Exhibit JPN-26). See also Japan's opening statement at the second meeting of the Panel, para. 19 and fn 28; closing statement at the second meeting of the Panel, para. 3; comments on India's response to Panel question No. 76; and India's response to Panel question No. 76.
[41] India's opening statement at the first meeting of the Panel, para. 45; second written submission, para. 2.
[42] India's second written submission, para. 2.
[43] India's second written submission, paras. 5-6.
[44] India's second written submission, para. 3. See also closing statement at the second meeting of the Panel, paras. 1-2; and response to Panel question No. 71.
[45] Japan's response to Panel question No. 13, para. 15; opening statement at the second meeting of the Panel, para. 10.
[46] Japan's response to Panel question No. 13, para. 8 (referring to Appellate Body Reports, *EC – Bananas III*, para. 135; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74). See also opening statement at the second meeting of the Panel, paras. 8-9.

in good faith.[47] It has noted that the measure at issue was in force at the time of the establishment of the Panel[48] and that Japan, as the complaining party, has continued to request that the Panel make findings.[49] Japan has further submitted that the dispute between the parties has not been resolved, given that India continues to argue that the measure at issue is fully consistent with the relevant provisions under the GATT 1994 and the Agreement on Safeguards.[50] Japan has also highlighted the difference between the expiration of a measure (when the measure has lapsed) and the revocation of a measure (recall or annulment of the measure). In Japan's view, only the revocation of the measure at issue, in which not only the measure itself but also any resulting effects are removed from the legal system, would solve this dispute.[51] Regarding India's argument on Article 7.5 of the Agreement on Safeguards, Japan has noted that Article 7.5 does not prevent India from imposing the measure after the time limit provided therein expires.[52] Finally, Japan has emphasized the temporary nature of safeguard measures and argued that if panels refrained from issuing findings and recommendations with respect to expired measures, it would mean that Members may adopt WTO-inconsistent safeguard measures without a possibility for other Members to effectively challenge those measures.[53]

7.3.2 Evaluation by the Panel

7.16. The terms of reference of this Panel are based on the description of the matter that was referred to the DSB by Japan in its panel request of 9 March 2017. That panel request included the specific measure at issue identified by Japan and the legal basis of Japan's complaint (the claims). When the DSB established this Panel on 3 April 2017, it outlined the Panel's jurisdiction to adjudicate the matter that has been brought before us.[54]

7.17. Once a panel's jurisdiction is established, the panel is required to address the "matter" before it in accordance with Article 11 of the DSU, which sets out the function of panels. We have already noted the text of Article 11 of the DSU, which describes the function of panels as assisting the DSB in discharging its responsibilities under the DSU and the covered agreements. To this end, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." In addition, a panel should "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Accordingly, panels carry out their adjudicative mandate, as set out in Article 11 of the DSU, so as to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

7.18. WTO panels have certain powers that are inherent in their adjudicative function under Article 11 of the DSU. For instance, panels have the authority to determine whether they have jurisdiction in a given case and to determine the scope and limits of that jurisdiction, as defined by their terms of reference.[55] Panels also have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly

[47] Japan's response to Panel question No. 13, para. 9.

[48] Japan's response to Panel question No. 13, para. 14; opening statement at the second meeting of the Panel, paras. 11-12.

[49] Japan's opening statement at the second meeting of the Panel, para. 12.

[50] Japan notes that previous panels considered relevant the fact that the defending party argued its measures to be consistent with its WTO obligations, when deciding whether they should make findings with regard to expired measures. (Japan's opening statement at the second meeting of the Panel, para. 13 (referring to Panel Reports, *EC – IT Products*, para. 7.166; *India – Additional Import Duties*, paras. 7.69-7.70; *China – Publications and Audiovisual Products*, para. 7.453; and *US – Poultry (China)*, para. 7.55)).

[51] Japan's response to Panel question No. 74, paras. 6-9.

[52] Japan's opening statement at the second meeting of the Panel, para. 16. Japan added that India failed to indicate the provision of the domestic legislation that prevents it from re-imposing safeguard measures.

[53] Japan's opening statement at the second meeting of the Panel, para. 16.

[54] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.13; *US – Countervailing Measures (China)*, para. 4.6; *US – Carbon Steel*, para. 125; and *Guatemala – Cement I*, paras. 69-76.

[55] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.16; *Mexico – Taxes on Soft Drinks*, para. 45 and fn 90 (referring to Appellate Body Reports, *US – 1916 Act*, fn 30; and *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53).

regulated".[56] However, as noted by the Appellate Body in *Mexico – Taxes on Soft Drinks*, once jurisdiction has been validly established, a WTO panel may not entirely decline to exercise that jurisdiction in a case that is properly before it.[57]

7.19. In the present case, neither of the parties has questioned that the Panel has jurisdiction to rule on the matter before it. We note in this respect that the measure at issue was in force at the time of the establishment of the Panel[58] and expired only during the Panel proceedings. As noted by the panel on *EU – PET (Pakistan)*, while some past panels have declined to make findings with respect to a measure that had expired *before* panel establishment, no panel has declined to hear the entirety of a dispute due to the expiry of the challenged measure after panel establishment.[59] Moreover, no issue has arisen that would indicate a legal impediment precluding the Panel from ruling on the merits of the matter before us.[60]

7.20. Article 3.7 of the DSU, the provision cited by India, contemplates a "largely self-regulating" mechanism by which each Member is to exercise its own judgement as to whether action under the WTO dispute settlement procedures would be fruitful before bringing a matter through this system.[61] In relevant part, Article 3.7 provides:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

7.21. We must accordingly presume that when Japan submitted its panel request, it did so in good faith, having duly exercised its judgement as to whether recourse to this panel process would be "fruitful". As noted by the Appellate Body, "Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement".[62] The fact that a Member may initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member, pursuant to Article 3.3 of the DSU, "implies that that Member is entitled to a ruling by a WTO panel".[63]

7.22. The Appellate Body has noted that the mere fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.[64] Although

---

[56] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.16; *Mexico – Taxes on Soft Drinks*, para. 45 and fn 91 (quoting Appellate Body Report, *EC – Hormones*, fn 138, referring in turn to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248).

[57] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 46 and 52-53.

[58] The Appellate Body in *EC – Chicken Cuts* stated:

> The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.

(Appellate Body Report, *EC – Chicken Cuts*, para. 156).

[59] Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35 (referring to Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, paras. 7.1307 and 7.1308; *US – Gasoline*, para. 6.19; and *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13).

[60] In *Mexico – Taxes on Soft Drinks*, the Appellate Body noted that a decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of the complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU. The Appellate Body, however, cautioned that it was "[m]indful of the precise scope of Mexico's appeal", and that it expressed "no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it." (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 53-54).

[61] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *EC – Bananas III*, para. 135).

[62] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.

[63] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis omitted)

[64] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.25; *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

Article 12.7 of the DSU provides that when the parties to a dispute arrive at a mutually satisfactory solution a panel should refrain from ruling on the merits of the claims before it, the repeal or expiry of a measure does not necessarily constitute, without more, a "satisfactory settlement of the matter" within the meaning of Article 3.4, or a "positive solution to the dispute" within the meaning of Article 3.7.[65]

7.23. We note India's argument that, due to its expiration, it would not be possible to "withdraw" the challenged measure within the meaning of Article 3.7 of the DSU, if it is found to be inconsistent with provisions of the covered agreements. We also note that even after the measure at issue expired on 13 March 2018, there are potential lingering effects of the measure with respect to imports that occurred before that date. Indeed, as noted above, if a duty resulting from the safeguard measure was not levied or was not paid for any reason, such duty may still be claimed within a period of two years (or even for a period of five years if the duty was not levied or was not paid by reason of collusion, wilful misstatement, or suppression of facts).[66]

7.24. We have already noted that the measure at issue was in force at the time when this Panel was established and expired only during the Panel proceedings. Moreover, as noted above, Japan has continued to request the Panel to make findings with respect to the measure at issue despite its expiry. The Appellate Body has noted that, pursuant to Articles 3.3 and 3.7 of the DSU, a complaining Member's continued request for findings following the expiry of a measure at issue is a relevant consideration for a panel in deciding whether to proceed to make findings in a dispute.[67] Despite the expiry of the measure, there continues to exist a dispute between the parties on the "applicability of and conformity with the relevant covered agreements"[68] as regards the Indian competent authority's findings underpinning the measure at issue. Therefore, the "matter" within the jurisdiction of the Panel has not been fully resolved by the expiry of the measure. Finally, as indicated, despite the termination of the measure at issue there are potential lingering effects of the measure with respect to imports that occurred before that date.

7.25. For the reasons indicated, in the circumstances of the present case, the expiry of the measure at issue after the Panel was established[69] does not excuse us from exercising our function under Article 11 of the DSU to make findings with respect to the matter raised by Japan.

7.26. Finally, we note that Japan has also asked the Panel to make recommendations with respect to the measure at issue, even if the measure has expired.

7.27. Article 19 of the DSU is entitled "Panel and Appellate Body Recommendations". In relevant part it provides in paragraph 1 that "[w]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement".[70] Despite what Article 19.1 provides, panels generally refrain from making recommendations on measures found to be inconsistent with provisions of the covered agreements when these measure are no longer in existence.[71] Having said that, to the extent that an expired measure may continue to have an effect on the operation of a covered agreement, it would be appropriate for a panel to provide recommendations with regard to the measures at issue.[72]

7.28. We have already noted that, despite the expiry of the measure at issue, there are potential lingering effects of the measure with respect to imports that occurred before that date. Accordingly,

---

[65] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.27; *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *US – Upland Cotton*, para. 270).

[66] Excerpt from the Customs Act, 1962, Section 28, (Exhibit JPN-26). Japan has noted that a resolution of the current dispute would require, not just the termination of the measure at issue itself, but also of any legal effects that may survive after the measure has expired. (Japan's response to Panel question No. 74, paras. 6-9).

[67] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.42.

[68] Article 11 of the DSU.

[69] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179.

[70] Fn omitted.

[71] See, for example, Appellate Body Reports, *US – Certain EC Products*, paras. 81-82; and *China – Raw Materials*, para. 264. See also Panel Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 8.6-8.7; and *EC – Approval and Marketing of Biotech Products*, para. 7.1316.

[72] See, for example, Appellate Body Report, *US – Upland Cotton*, paras. 271-273; and Panel Reports, *Thailand – Cigarettes (Philippines)*, paras. 6.25 and 8.8; and *India – Autos*, paras. 8.47, 8.51, 8.60, and 8.65.

in the circumstances of the present case, it is appropriate for the Panel to provide recommendations with regard to the measure at issue to the extent that there may continue to be effects with respect to imports occurred when the measure was in force.

7.4 Whether Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute

7.4.1 Introduction

7.29. We recall that Article 11 of the DSU sets out panels' standard of review, and provides that "a panel should make an objective assessment of the matter before it", which includes, among others, an assessment of the "applicability" of the relevant covered agreements.[73]

7.30. In this dispute, most of the claims have been raised by Japan under Article XIX of the GATT 1994 and under different provisions of the Agreement on Safeguards. The parties have not questioned the applicability of Article XIX of the GATT 1994 or the Agreement on Safeguards to the dispute. Indeed, both parties agree that the challenged measure is a safeguard within the meaning of Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards.[74] However, given the facts before us and the arguments made by the parties and third parties in this proceeding[75], we consider it appropriate to examine whether the measure at issue falls within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994, before addressing the merits of Japan's claims. Indeed, as noted by the Appellate Body:

> [A] panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute.[76]

7.31. According to Article 1 of the Agreement on Safeguards, this agreement contains rules "for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994".

7.32. Article XIX of GATT 1994 is entitled "Emergency Action on Imports of Particular Products" and provides in paragraph 1(a) as follows:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that [Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the [Member] shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, *to suspend the obligation in whole or in part or to withdraw or modify the concession*.[77]

7.33. In other words, Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards refer to emergency measures adopted by a Member, which suspend obligations under the GATT 1994 (including tariff concessions), when unforeseen developments and the effect of such

---

[73] In this respect the Appellate Body has noted that: "the 'fundamental structure and logic' of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement". (Appellate Body Reports, *China – Auto Parts*, para. 139 (emphasis original)).

[74] Japan's second written submission, paras. 278-279; response to Panel question No.11; India's response to Panel question No.11; and opening statement at the second meeting of the Panel, paras. 5-6. See also paras. 7.44, 7.54, and 7.64 below.

[75] Australia's third-party submission, paras. 5-15; third-party response to Panel question No. 3, paras. 3.1-3.4; European Union's third-party submission, paras. 7-26; third-party statement, paras. 3-19; and third-party response to Panel question No. 5, paras. 19-20. See also Chinese Taipei's third-party statement, paras. 5-13; and third-party response to Panel question No. 5, para. 11.

[76] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.33.

[77] Emphasis added.

GATT obligations have resulted in an increase in imports that causes or threatens to cause serious injury to the relevant domestic producers. Article XIX:1(a) and the Agreement on Safeguards allow WTO Members to impose a measure that would otherwise be inconsistent with its GATT obligations, provided that the conditions for the application of such a measure are met.[78] Such measures are to be applied temporarily, and subject to a schedule of progressive liberalization, so as to prevent or remedy serious injury caused by increased imports to the domestic producers of like or directly competitive products. Article 11 of the Agreement on Safeguards refers to the measures applied under Article XIX of the GATT 1994 as "emergency actions on imports of particular products", the same expression contained in the title of Article XIX. In this regard, the Appellate Body has stated that "safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'".[79]

7.34. The Appellate Body has further clarified that:

> [I]n order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole.[80]

7.4.2 Whether the measure at issue constitutes an ordinary customs duty

7.35. As part of our assessment of the design, structure, and operation of the measure at issue, we start by considering the argument raised by some third parties that the measure adopted by India constitutes an ordinary customs duty. Indeed, in response to a question posed by the Panel, the European Union has argued that "the safeguard duties imposed in this case are 'ordinary customs duties' within the meaning of Article II:1 of the GATT 1994".[81] The European Union concludes that the measure at issue "did not suspend, withdraw, or modify India's obligations under Article II of the GATT 1994".[82] Similarly, Australia has argued that the measure at issue did not withdraw or modify India's tariff concession of 40% recorded in its Schedule of Concessions.[83]

7.36. Article II:1(b) of the GATT 1994 provides as follows:

> The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.37. India has bound in its Schedule of Concessions its ordinary customs duties (tariffs) for the products at issue in this dispute, i.e. hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more (product concerned), classified under tariff heading 7208 and tariff item 7225.30.90, at a level of 40% *ad valorem*.[84] During the period of application of the

[78] Panel Reports, *US – Steel Safeguards*, para. 10.9.
[79] Appellate Body Report, *Korea – Dairy*, para. 86.
[80] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[81] European Union's third-party response to Panel question No. 2, para. 11.
[82] European Union's third-party submission, para. 22.
[83] Australia's response to Panel question No. 3.
[84] Schedule of Concessions XII – India, annexed to the Marrakesh Protocol, available at: https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (accessed 15 July 2018); Excerpt from India's Schedule of Concessions with respect to customs heading 7208, (Exhibit IND-21); and Excerpt from Schedule of Concessions XII – India (15 March 2000), (Exhibit JPN-28).

measure at issue, the applied tariffs for the products concerned were 10 or 12.5% *ad valorem*.[85, 86] In turn, the maximum amount of the duty imposed, pursuant to the safeguard at issue in the present dispute, was 20% *ad valorem*.[87] As a result, during the time when the measure at issue was in force, the duties imposed on the importation of the products concerned, including the duties resulting from the measure and the regular tariff, did not exceed 32.5% *ad valorem*. In other words, even considering both the measure at issue and the applicable tariff, the total import duties on the product concerned did not exceed India's 40% bound rate of ordinary customs duties.

7.38. The fact that the measure at issue did not result in total duties on the importation of the product concerned that exceeded the rate bound by India in its Schedule of Concessions, however, does not necessarily imply that the duties resulting from the measure had the nature of an ordinary customs duty.

7.39. As the panel in *Dominican Republic – Safeguard Measures* noted, while a Member may impose various duties at the border, ordinary customs duties are those that possess the essential attributes or qualities of customs duties.[88] The panel indicated that "the expression 'ordinary customs duties' in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute 'customs duties' in the strict sense of the term (*stricto sensu*) and … does not cover possible extraordinary or exceptional duties collected in customs".[89] The panel in that case considered the design and structure of the measures concerned.

7.40. We are aware that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law.[90] At the same time, the operation of measures under domestic law may be a useful starting point when ascertaining a measure's design, structure, and operation. As explained by India, customs duties on the importation of products are approved through legislation.[91] India has indicated that:

> The relevant domestic legislation governing "ordinary customs duties" is the Customs Act, 1962.
>
> The procedure for amending the relevant domestic legislation governing "ordinary customs duties" i.e. the Customs Act, 1962 is through an Act of Parliament. While the power to levy of "ordinary customs duties" flows from section 12 of the Customs Act, 1962, the "rate of duty" is set out under the Customs Tariff Act, 1975.[92]

7.41. In contrast, India's domestic legislation on safeguards is contained in Section 8B of the Customs Tariff Act, 1975, and in the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997.[93] The measure at issue was imposed by India's Ministry of Finance pursuant to this legislation that authorizes the Central Government "after conducting such enquiry as it deems

---

[85] India's response to Panel question No. 79; first written submission, para. 49; and Japan's first written submission, para. 48 (referring to Notification No. 10/2015-Customs (1 March 2015), (Exhibit JPN-19); Notification No. 39/2015-Customs (16 June 2015), (Exhibit JPN-20); and Notification No. 45/2015-Customs (12 August 2015), (Exhibit JPN-21)).

[86] During the POI, the applied tariff for the product concerned was primarily 7.5%. (Final Findings, (Exhibits JPN-11/IND-11), para. 81, p. 205). See also India's first written submission, para. 49; and Japan's first written submission, para. 48 (referring to Notification No. 12/2012-Customs (17 March 2012), (Exhibit JPN-17); and Notification No. 12/2014-Customs (11 July 2014), (Exhibit JPN-18)).

[87] The safeguard duty at issue was imposed on imports of the product concerned at the following rate: (i) 20% from 14 September 2015 to 13 September 2016, (ii) 18% from 14 September 2016 to 13 March 2017, (iii) 15% from 14 March 2017 to 13 September 2017, and (iv) 10% from 14 September 2017 to 13 March 2018. (Final Findings, (Exhibits JPN-11/IND-11), p. 209).

[88] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.82.

[89] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85.

[90] Appellate Body Reports, *China – Auto Parts*, para. 178. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60 (referring to Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 586 and 593; *US – Offset Act (Byrd Amendment)*, para. 259; *US – Softwood Lumber IV*, para. 56; *US – Corrosion-Resistant Steel Sunset Review*, fn 87; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127).

[91] India's response to Panel question No. 12. See Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 2, p. 2. See also ibid. Sections 6-7, pp. 8-9.

[92] India's response to Panel question No. 81.

[93] Customs Tariff Act, (Exhibits JPN-1/IND-1); Safeguard Rules, (Exhibits JPN-2/IND-2).

fit, [when it] is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry … by notification in the Official Gazette [to] impose a safeguard duty on that article".[94]

7.42. The measure at issue resulted in duties levied in customs on the importation of the products concerned into the territory of India. These duties operated similarly to an ordinary customs duty. However, by its design and structure, the measure at issue and the duties that resulted from its application were different from an ordinary customs duty. As noted above, the legal basis in Indian domestic legislation under which the measure at issue was applied is different from that which regulates the imposition of tariffs on imports. Moreover, as described in the decision adopted on 29 March 2016 by the Ministry of Finance, the definitive safeguard measure was imposed for a period of thirty months (two and a half years, from 14 September 2015 to 13 March 2018). During this period, the duties resulting from the measure were subject to progressive reductions, according to a schedule contained in the same Ministry of Finance decision. As noted in the same decision by the Ministry of Finance, the measure was imposed on the basis of a conclusion from the national competent authority that "[t]he increased imports of [the product under consideration] into India, [had] caused serious injury and [were] threatening to cause serious injuries to the domestic producers of [the product under consideration] and [that] it [would] be in the public interest to impose safeguard duty on imports of [the product under consideration] into India … in terms of Rule 12 of the Customs Tariff (Identification And Assessment of Safeguard Duty) Rules'97, for a period of two Years and Six months".[95] In other words, the measure at issue was an "extraordinary" or "exceptional" instrument and not an "ordinary" one.

7.43. The duties resulting from the measure at issue did not replace the normal tariffs applied to imports. Indeed, the applicable legislation in India provides that "[t]he duty chargeable under this section [i.e. Section 8B on safeguard measures] shall be in addition to any other duty imposed under this Act or under any other law for the time being in force".[96] In other words, the measure at issue did not constitute the ordinary tariff that is normally applicable to the importation of the product concerned into the territory of India under the Customs Act, 1962. Instead, the measure at issue constituted an emergency action under specific legislation, that resulted in temporary duties ("other duties or charges") applied on the importation of goods originating from certain countries, and that was adopted by the Indian competent authority to protect domestic production from the alleged injury caused by increased imports of the subject product. In conclusion, the measure at issue does not possess the essential attributes or qualities of ordinary customs duties. By their design, structure, and operation, the duties resulting from this measure do not constitute "ordinary customs duties" for the purposes of Article II:1(b) of the GATT 1994.

7.4.3 Whether the measure at issue resulted in the suspension of a GATT obligation

7.44. We now turn to the argument raised by some third parties that the measure at issue did not suspend India's obligations under the GATT 1994.[97] In contrast, the complainant and the respondent are of the view that the duties resulting from the measure at issue resulted in a suspension of some obligations under the GATT 1994. Indeed, both parties assert that the measure at issue suspended India's obligation under Article II:1(b), second sentence, of the GATT 1994 with regard to "all other duties or charges of any kind".[98] Both parties also argue that the measure suspended India's most-favoured nation (MFN) obligation under Article I:1 of the GATT 1994.[99] India

[94] Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B, pp. 10-11. See also Safeguard Rules, (Exhibits JPN-2/IND-2), p. 9.

[95] Final Findings, (Exhibits JPN-11/IND-11), section R, p. 208. See also Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 5.

[96] Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(3), pp. 10-11.

[97] Australia's third-party submission, para. 15; third-party response to Panel question No. 3, paras. 3.1-3.4; European Union's third-party submission, paras. 22-23 and 25; and third-party statement, paras. 8-17.

[98] Japan's response to Panel question No. 11, para. 4; second written submission, paras. 279-283; India's first written submission, para. 344; opening statement at the first meeting of the Panel, para. 44; responses to Panel question No. 11(a) and No. 91; and opening statement at the second meeting of the Panel, paras. 5-6.

[99] Japan's responses to Panel question No. 11, para. 5, and No. 80, paras. 19-23; second written submission, paras. 279 and 284-285; India's responses to Panel question Nos. 11(a), 80, 83, and 91; and opening statement at the second meeting of the Panel, paras. 5-6.

additionally asserts that the measure also suspended India's obligations under paragraphs 4, 8, and 12 of Article XXIV of the GATT 1994.[100] Japan disagrees that the measure resulted in a suspension of obligations under Article XXIV of the GATT 1994.[101]

7.45. We recall in this regard the Appellate Body's indication that one of the constituent features of a safeguard is that the measure suspends, in whole or in part, a GATT obligation (or withdraws or modifies a GATT concession).[102] Moreover, for a measure to be a safeguard, the suspension of the relevant GATT obligation or the withdrawal or modification of a tariff concession must be done to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry.[103] We will accordingly consider the specific GATT obligations that India allegedly suspended by applying the measure at issue.

7.4.3.1 Article II:1(b) of the GATT 1994

7.46. We have noted above the text of Article II:1(b) of the GATT 1994. The first sentence of this provision prohibits levying of ordinary customs duties in excess of the bindings set forth in the schedule of concessions of the importing Member. The second sentence of Article II:1(b) prohibits the levying of "other duties or charges of any kind" imposed on or in connection with importation in excess of those imposed on the date of entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date. The Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 provides that the importing Member had to record in its schedule of concessions any other duties or charges 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.

7.47. Article II:2 contains a list of measures which are carved out from the obligation in Article II:1(b) and may be imposed on the importation of any product, which includes (i) charges equivalent to internal taxes levied on like domestic products or in respect of articles from which the imported product has been manufactured; (ii) anti-dumping or countervailing duties; and (iii) fees or other charges commensurate with the cost of services rendered. Safeguard measures or the duties resulting from such safeguard measures are not carved out by Article II:2 from the obligations in Article II:1(b).

7.48. As stated by the panel on *Dominican Republic – Safeguard Measures*:

> The use of the expression "*all other* duties or charges of any kind imposed on or in connection with the importation" in Article II:1(b), second sentence, suggests that the prohibition covers any duty or charge of any kind on or in connection with the importation that is not an ordinary customs duty.[[146]] In other words, the category of *other duties or charges* under Article II:1(b), second sentence, is a residual one covering all duties or charges on or in connection with the importation that are not ordinary customs duties and which are not expressly provided for in Article II:2 of the GATT 1994.[104]
>
> [146] Save for certain exceptions, such as duties or charges applied or mandatorily required to be applied on the date of the agreement. See in this connection the provisions of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

7.49. We have already concluded that the duties resulting from the measure at issue do not constitute "ordinary customs duties" in the sense of Article II:1(b) of the GATT 1994. We also note that those duties do not correspond to any of the measures listed in Article II:2 of the GATT 1994. To the extent that those duties were imposed on imports of the product concerned into the territory

[100] India's first written submission; para. 117; responses to Panel question Nos. 11(a), 20, 86, and 91; and opening statement at the second meeting of the Panel, paras. 5-6 and 8.

[101] Japan's second written submission, para. 286; comments on India's responses to Panel question No. 86, para. 22, and No. 125, paras. 77-78.

[102] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

[103] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

[104] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79. (emphasis original; some fns omitted)

of India, they constituted "other duties or charges … imposed on or in connection with … importation". We also note that the measures at issue are not recorded in India's Schedule of Concessions as other duties or charges 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.[105] Consequently, the imposition of the duties resulting from the measure at issue to imports of the product concerned into the territory of India constituted a suspension of India's obligations under Article II:1(b), second sentence, of the GATT 1994.

7.50. The remaining question is whether the duties imposed by India, which resulted in a suspension of Article II:1(b) of the GATT 1994, were adopted to prevent or remedy serious injury to India's domestic production. Again, the starting point is the manner in which India itself has characterized the measure at issue.

7.51. As noted above, the measure at issue was imposed by India's Ministry of Finance pursuant to legislation that authorizes the Central Government to impose safeguard duties when it is satisfied that products are imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to domestic industry.[106] Moreover, as described in the Ministry of Finance's decision of 29 March 2016 adopting the definitive safeguard measure, this measure was imposed on the basis of a conclusion from the national competent authority that the increased imports of the product concerned into India had caused serious injury and were threatening to cause serious injury to the domestic producers of the product concerned.[107]

7.52. The design, structure, and operation of the measure at issue confirm this aspect. The measure resulted in the imposition by the Indian Government of temporary duties on the importation of the subject products of up to 20% *ad valorem*, additional to the applicable tariffs.[108] The level and form of the duties corresponded to the recommendation made by the Indian competent authority, which was based in turn on its estimation of "the minimum required to protect the interests of the domestic industry", by considering the average cost of sales by the domestic producer of the product concerned, after allowing a reasonable return.[109] The Indian competent authority also noted that the domestic industry had submitted "detailed adjustment plans… which [focused] on cost reduction, optimum utilization and expansion of production capacities which will enable them to adjust to the international competition".[110] The design, structure, and operation of the measure at issue suggest to us that the central aspect of that measure is the imposition of specific duties through which India sought to remedy an alleged serious injury to its domestic industry and to prevent a threat of further serious injury.

7.53. Accordingly, we find that the suspension of Article II:1(b) of the GATT 1994 by India was designed to prevent or remedy serious injury to India's domestic production.

7.4.3.2 Article I:1 of the GATT 1994

7.54. Japan and India consider that the challenged measure also suspended India's MFN obligation under Article I:1 of the GATT 1994, because India excluded certain developing countries from the application of the duties resulting from the measure at issue, and thus granted an advantage that was not accorded immediately and unconditionally to the like products originating in other WTO Members.[111]

7.55. Article I of the GATT 1994 is entitled General Most-Favoured-Nation Treatment. In its paragraph 1 it provides as follows:

---

[105] Excerpt from India's schedule of concessions with respect to customs heading 7208, (Exhibit IND-21); India's opening statement at the first meeting of the Panel, para. 44. See also Japan's first written submission, para. 520; second written submission, para. 270; opening statement at the first meeting of the Panel, para. 113; and response to Panel question No. 11, para. 4.

[106] See para. 7.41 above.

[107] See para. 7.42 above.

[108] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 5.

[109] Final Findings, (Exhibits JPN-11/IND-11), section R, p. 209.

[110] Final Findings, (Exhibits JPN-11/IND-11), section J, pp. 203-204.

[111] Japan's responses to Panel question No. 11, para. 5, and No. 80, paras. 19-23; second written submission, paras. 279 and 284-285; India's responses to question Nos. 11(a), 80, 83 and 91; and opening statement at the second meeting of the Panel, paras. 5-6.

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.56. Section 8B of the Customs Tariff Act, 1975, provides that:

> [No safeguard] duty shall be imposed on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing countries … so long as the aggregate of the imports from all such countries taken together does not exceed nine per cent of the total imports of that article into India.[112]

7.57. The same provision notes that, for the purpose of that section, "'developing country' means a country notified by the Central Government in the Official Gazette".[113] The list of developing countries for the purposes of safeguard investigations (which includes 132 countries) was provided in Notification No. 19/2016 published by the Ministry of Finance on 5 February 2016.[114]

7.58. In the Final Findings, the Indian competent authority noted that it had examined the share of imports from developing countries during the period of investigation (POI). It stated that developing countries had less than 3% individually and 9% collectively of total imports into India, apart from China and Ukraine whose shares were 24% and 4% of total imports respectively. The Indian competent authority concluded that all developing countries listed in Notification No. 19/2016, except for China and Ukraine, should be excluded from the application of the measure at issue.[115] The Ministry of Finance notification of 29 March 2016, imposing the definitive safeguard measure, provided that:

> Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries under clause (a) of sub-section (6) of section 8B of the Customs Tariff Act, other than [the] People's Republic of China and Ukraine.[116]

7.59. India has argued that its exclusion of developing countries from the application of the measure at issue was done pursuant to Article 9.1 of the Agreement on Safeguards.[117] The provision cited by India, entitled Developing Country Members, provides as follows:

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

7.60. Japan argues that the fact that imports from Ukraine and China are subject to the measure at issue due to their significant market shares indicates that India selected the sources of imports to be subject to the measure with a view to preventing or remedying serious injury.[118]

7.61. It is an undisputed fact that the measure at issue excluded imports originating in certain developing countries from the application of the resulting duties. This exclusion resulted in favourable treatment for imports from those countries that was not accorded immediately and unconditionally to the like products originating in the territories of all other Members. This aspect as

[112] Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(1), p. 10.
[113] Customs Tariff Act, (Exhibits JPN-1/IND-1), Section 8B(6)(a), p. 11.
[114] Notification No. 19/2016-Customs (5 February 2016), (Exhibits JPN-3/IND-3).
[115] Final Findings, (Exhibits JPN-11/IND-11), section M, p. 206. See also ibid. section R(b), p. 209.
[116] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 7.
[117] India's first written submission, paras. 342-343.
[118] Japan's second written submission, para. 285; response to Panel question No. 11, para. 5.

a matter of fact resulted in a suspension by India of the general MFN treatment provided for in Article I:1 of the GATT 1994.

7.62. We have noted, however, that the mere suspension of a GATT obligation is not sufficient to characterize a measure as a safeguard. To constitute a safeguard, the suspension of the GATT obligation must be done with the objective of preventing or remedying serious injury to the domestic production. In this respect, neither the Ministry of Finance's notification of 29 March 2016, imposing the definitive safeguard measure, nor the findings by the Indian competent authority, indicate that the exemption of imports from certain developing countries from the application of the duties was designed to prevent or remedy serious injury. Before the Panel, India has argued instead that this exclusion was done to comply with Article 9.1 of the Agreement on Safeguards.[119] Indeed, the language of the legislation on which India based the exemption of imports from certain developing countries (namely, Section 8B of the Customs Tariff Act, 1975) closely reflects the language in Article 9.1 of the Agreement on Safeguards. The exemption of certain countries from the application of the duties resulting from the measure at issue has the result of allowing *more* imports of the subject products into India's territory for the purpose of complying with India's obligation under Article 9.1 of the Agreement on Safeguards.

7.63. Accordingly, the suspension of Article I:1 of the GATT 1994 entailed by the exemption of certain countries from the application of the duties resulting from the measure at issue was not designed to prevent or remedy serious injury to India's domestic industry.

7.4.3.3 Article XXIV of the GATT 1994

7.64. India also asserts that the measure at issue suspended its obligations under Article XXIV of the GATT 1994, specifically Articles XXIV:4, XXIV:8, and XXIV:12, with respect to the free trade agreements (FTAs) subscribed with the Republic of Korea and Japan.[120] "In India's view, compliance with FTAs entered by India with Korea and Japan under the aegis of Article XXIV of the GATT, 1994 is an 'obligation' under the GATT, 1994."[121] India refers to the statement in the Final Findings that the bilateral safeguard action under the respective FTAs limits the safeguard duties only to a level not exceeding MFN rates, which would not be sufficient to mitigate the serious injury suffered by the domestic industry.[122] Japan replies that Article XXIV does not impose an obligation on Members to either establish a customs union or free-trade area or to apply a particular rate of duty on imports of the product concerned from certain FTA partners.[123]

7.65. We note that in 2009 India and Japan entered into to a Comprehensive Economic Partnership Agreement, which came into effect on 1 August 2011 (India-Japan CEPA). India is also a party to a Comprehensive Economic Partnership Agreement with Korea, which entered into force on 1 January 2010 (India-Korea CEPA).[124] Both agreements provide that the duties for the products concerned shall be reduced or eliminated. In the Final Findings, the Indian competent authority explained in this way its recommendation that imports of the products concerned from Korea and Japan be included in the safeguard measure:

> [I]t is immaterial that imports from Korea RP and Japan increased due to low customs duty under the respective FTAs. Imports from these two countries have occurred in huge quantities in the most recent period and these imports are at very low prices causing serious injury to the domestic industry. Further, it is the discretion of the Government of India to explore bilateral mechanisms under the respective FTAs or adopt a general safeguard measure in this case. Both the FTAs nowhere mention that India is obligated to explore bilateral mechanisms first and only after failure of such

[119] India's first written submission, paras. 342-343; opening statement at the first meeting of the Panel, para. 42.

[120] India's first written submission, para. 117; responses to Panel question Nos. 11(a), 20, 86, and 91; and opening statement at the second meeting of the Panel, paras. 5-6 and 8.

[121] India's response to Panel question No. 20.

[122] India's first written submission, para. 117 (referring to Final Findings, (Exhibit IND-11), para. 55, pp. 200-201).

[123] Japan's second written submission, para. 286. See also comments on India's responses to Panel question No. 86, para. 22, and No. 125, para. 78.

[124] Japan's first written submission, paras. 50-53. See also WTO regional trade agreements information system, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (accessed 15 July 2018).

> mechanisms can adopt a general safeguard measure. The imports from non-FTA countries had also significantly increased, therefore, safeguard action under the FTA would have left the door open for non-FTA countries to further increase their exports. Secondly, the safeguard action on the FTA limits the safeguards duties only to the level not exceeding the MFN rates, which is not by itself sufficient to mitigate the present situation. It may be noted that these FTAs have specific provisions that allow India to impose general safeguard duty. The only exception under [the Agreement on Safeguards] and Safeguard Duty Rules is exclusion of developing countries whose individual share in imports is below 3% and whose aggregate share in imports is below 9%. Korea RP and Japan do not fall under this exception, as both of them are developed countries.[125]

7.66. Article XXIV of the GATT 1994 contains rules applicable to customs unions and free-trade areas of which WTO Members are part. In its relevant sections, this provision states:

> 4. The [Members] recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other [Members] with such territories.
>
> 5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of [Members], the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> …
>
> (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of [Members] not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
>
> (c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.
>
> 8. For the purposes of this Agreement:
>
> …
>
> (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[125] Final Findings, (Exhibits JPN-11/IND-11), para. 55, p. 201.

> 12. Each [Member] shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.[126]

7.67. As indicated by the Appellate Body in *Turkey – Textiles* "Article XXIV [of the GATT 1994] may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency".[127] The *chapeau* of Article XXIV:5 provides that the obligations contained in the GATT 1994 shall not prevent the formation of such customs unions or free-trade areas. According to this provision, however:

> Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.[128]

7.68. A Member party to a free-trade area may invoke Article XXIV to defend a measure incompatible with an obligation under the GATT 1994 if it can demonstrate that two conditions are met (i) the free-trade area must comply with the requirements in paragraphs 8(b) and 5(b) of Article XXIV; and (ii) the measure at issue must be necessary for the formation or functioning of the free-trade area, in the sense that the formation or proper functioning of the free-trade area would be prevented if the measure at issue was not allowed.[129]

7.69. In other words, any obligation that India may have, under the FTAs entered with Korea and Japan, to apply a particular rate of duties or to refrain from imposing specific measures to imports of those countries does not arise from the GATT 1994 but from the FTAs in question. As noted by the panel in *Indonesia – Iron or Steel Products*:

> Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its [regional trade agreements] partners. Article XXIV of the GATT 1994 is a *permissive* provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures. Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its [Association of Southeast Asian Nations] trading partners is established in the [Association of Southeast Asian Nations] Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the [Association of Southeast Asian Nations]-Korea Free Trade Agreement, not in Article XXIV. In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a).[130]

7.70. More specifically, Article XXIV:4, which is one of the provisions cited by India, reflects only the recognition by WTO Members that (i) freedom of trade can be increased through preferential trade agreements between Members; and (ii) the purpose of preferential trade agreements (customs union and free-trade areas) should be to facilitate trade between the parties and not to raise barriers to the trade of other Members. This language may provide context when interpreting other provisions, but does not contain any positive obligation for WTO Members.

7.71. Similarly, Article XXIV:8, another provision cited by India, defines what shall be understood by a free-trade area for the purpose of the agreement. Again this language provides important context when interpreting other provisions. The Member who attempts to justify a GATT-inconsistent

[126] Emphasis original.
[127] Appellate Body Report, *Turkey – Textiles*, para. 45.
[128] Appellate Body Report, *Turkey – Textiles*, para. 46.
[129] Appellate Body Report, *Turkey – Textiles*, paras. 58-59.
[130] Panel Report, *Indonesia – Iron or Steel Products*, para. 7.20. (emphasis original; fns omitted)

measure by invoking Article XXIV has the burden of demonstrating that the free-trade area at issue complies with the requirements in Article XXIV:8(b). Article XXIV:8, however, does not contain any positive obligation for WTO Members.

7.72. In contrast with other sections in Article XXIV, paragraph 12 contains a positive obligation. It provides that Members shall take all reasonable measures available to ensure that regional and local authorities comply with obligations under the GATT 1994. The measure at issue, however, was adopted by India's Central Government. There is no indication that the measure resulted in regional or local authorities engaging in any conduct that was inconsistent with India's obligations under the GATT 1994. Accordingly, the issue of whether India failed to take all reasonable measures available to it to ensure that regional and local authorities complied with obligations under the GATT 1994 has not arisen in this case.

7.73. Accordingly, India has not demonstrated that the measure at issue resulted in a suspension of its obligations under Article XXIV of the GATT 1994, specifically under Articles XXIV:4, XXIV:8, and XXIV:12.

7.4.4 Conclusion

7.74. For the reasons explained above, the Panel concludes that the measure at issue resulted in a suspension of obligations incurred by India under the GATT 1994, namely Article II:1(b), second sentence. The measure that resulted in this suspension of GATT obligations was adopted by India as a temporary emergency action, designed to remedy an alleged situation of serious injury to the domestic industry brought about by an increase in imports of the subject products. In light of those aspects, we find that the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Accordingly, the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination that the Panel has to make of the claims raised in the present dispute.

7.75. We have already noted that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law. Likewise, the manner in which a Member conducts an investigation or notifies measures to the WTO is not dispositive of the legal characterization of the measure. However, all these factors may be relevant elements when considering a measure's design and structure. In this regard, we find that the following elements confirm our conclusion. First, the fact that the Indian competent authority imposed the measure at issue and conducted the respective investigation under domestic legislation that authorizes the Government to impose duties on imports after determining that relevant products are being imported into India in increased quantities and under conditions so as to cause or threaten to cause serious injury to the domestic industry. Second, the fact that the measure at issue had the typical characteristics of a safeguard measure, including (i) that it resulted in duties imposed on imports of the like or directly competitive product to that produced by the affected domestic industry; (ii) that the duties were only temporary; (iii) that the measure was subject to a progressive liberalization at periodic intervals; and (iv) that imports from certain developing countries that did not exceed a threshold were exempted from the duties. Third, the fact that India notified this investigation and measures to the WTO Committee on Safeguards pursuant to the provisions in Article XIX of the GATT 1994 and in the Agreement on Safeguards.

7.5 Whether India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to the existence of "unforeseen developments" and the effect of GATT obligations

7.5.1 Introduction

7.76. Japan claims that India acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate:

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

b. a logical connection between the effect of the obligations incurred under the GATT 1994 and the increase in imports causing or threatening to cause serious injury to the domestic industry.

7.77. Before addressing Japan's claims, we recall the relevant facts regarding the Indian competent authority's determination on the unforeseen developments and the effect of the obligations incurred under the GATT 1994 and set out our understanding of Article XIX:1(a) of the GATT 1994.

7.5.2 The Indian competent authority's determination

7.78. Both the Preliminary and Final Findings of the Indian competent authority address the issue of "unforeseen developments" and "the effect of the obligations incurred" under the GATT 1994.

7.79. With respect to "unforeseen developments", the Indian competent authority observed that the world production capacity of crude steel was 2,351 million tonnes as of 31 December 2014, which exceeded global demand by almost 30%.[131] It further noted that the production capacity in early 2015 was 1,055 million tonnes for the non-Chinese industry and 991 million tonnes for China, for a total of 2.05 billion tonnes. When compared to steel production of 1.66 billion tonnes in 2014, there were 382 million tonnes of excess global steel production capacity.[132]

7.80. The Indian competent authority stated that, specifically, China, Russia, Ukraine, Japan, and Korea developed "huge capacities" to meet the demand for steel in developed countries. At the same time, the traditional importers of steel such as the United States and the European Union reduced their dependence on imported steel. This fact induced exporters to look for other export markets with increasing demand and high domestic prices.[133] The latter included India, where demand for steel had increased by 3.1%. The Indian competent authority considered that India became "the natural choice" for steel surplus manufacturers due to its increasing demand and high domestic prices.[134]

7.81. The Indian competent authority also noted that the Russian currency had depreciated due to a drop in oil prices and Russian steel exporters experienced "high realization for their exports". At the same time, Russian exporters faced restricted access to their traditional export markets, such as the European Union and Ukraine.[135] The Indian competent authority further noted that, after a sustained growth rate for many decades, the demand for steel in China had decreased due to a slowdown in its infrastructure sector, which was the biggest consumer of steel in China. It considered that this situation was unlikely to change in the near future.[136] The Indian competent authority further observed that, due to its political crisis, Ukraine's currency had depreciated by 60% in 2014. The depreciation of the Ukrainian currency and the resulting low export prices for Ukrainian steel, together with the Russian and Chinese sales, put further pressure on the global steel market.[137] The Indian competent authority concluded that the above events were unforeseen developments that had resulted in increased imports of the product concerned into India.[138]

7.82. With respect to the "the effect of the obligations incurred" under the GATT 1994, the Indian competent authority examined whether the increase in imports had occurred as a result of the effect of the obligations incurred by India under the GATT 1994.[139] The Indian competent authority stated that, according to India's Schedule of Concessions, the bound rate on the product concerned was

[131] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 19, p. 14.
[132] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15 (referring to *World Steel Dynamics*).
[133] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 18, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.
[134] Preliminary Findings, (Exhibits JPN-7/IND-7), paras. 18 and 20, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.
[135] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 21, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 76, p. 204.
[136] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 23, pp. 14-15; Final Findings, (Exhibits JPN-11/IND-11), para. 78, p. 204.
[137] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 22, p. 14; Final Findings, (Exhibits JPN-11/IND-11), para. 77, p. 204.
[138] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15; Final Findings, (Exhibits JPN-11/IND-11), para. 79, pp. 204-205.
[139] Final Findings, (Exhibits JPN-11/IND-11), paras. 80-81, p. 205.

40% *ad valorem*. It noted that India reduced its applied rates on products in many sectors, including the steel sector and that the applied rate on the product concerned was 7.5% in 2013-2015. The Indian competent authority concluded that "due to the effect of such low applied tariffs" and given the circumstances and market conditions present in that time the imports of the product concerned had increased in "sudden, sharp, significant manner into India".[140]

7.83. Considering the above, the Indian competent authority concluded that "as a result of unforeseen developments and as an effect of obligations under GATT including tariff concessions", imports of the product concerned had increased in a sudden, sharp, significant and recent manner into India.[141]

7.5.3 Article XIX:1(a) of the GATT 1994

7.84. Article XIX:1(a) reads as follows:

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

7.85. Article XIX:1(a) provides WTO Members with a right to apply a safeguard measure when, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT, a 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 producing like or directly competitive products.[142] As noted by the panel in *US – Steel Safeguards*, pursuant to Article XIX of GATT 1994, when unforeseen developments have resulted in increased imports that are causing or threatening to cause serious injury to the relevant domestic industry, WTO Members may limit market access by taking an otherwise WTO-inconsistent measure and obtain temporary relief.[143]

7.86. The unforeseen developments and the effect of GATT obligations are not "independent conditions" for the application of safeguard measures, additional to the conditions set forth in the second clause of Article XIX:1(a) and reiterated in Article 2.1 of the Agreement on Safeguards. Rather, these two elements constitute "circumstances" that must be demonstrated, as a matter of fact, to apply safeguard measures consistently with Article XIX:1(a). In this sense, the Appellate Body stated that there is a "logical connection" between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member" – and the conditions for the application of safeguard measures set forth in the second clause of Article XIX:1(a), such as a demonstration of an import surge, serious injury, and a causal link.[144]

7.87. A WTO Member imposing a safeguard measure must demonstrate the existence of unforeseen developments and the effect of GATT 1994 obligations through reasoned and adequate explanations contained in its published report.[145] These explanations must show that the identified unforeseen developments have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic industry, and that one or more obligations under the GATT 1994 limit the importing Member's ability to prevent or offset the effect resulting from such increased imports.

---

[140] Final Findings, (Exhibits JPN-11/IND-11), para. 81, p. 205.
[141] Final Findings, (Exhibits JPN-11/IND-11), para. 82, p. 205.
[142] Appellate Body Report, *US – Steel Safeguards*, para. 264; Panel Reports, *US – Steel Safeguards*, para. 10.9.
[143] Panel Reports, *US – Steel Safeguards*, para. 10.9; See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.
[144] Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92.
[145] Appellate Body Report, *US – Lamb*, paras. 72 and 76.

7.88. The phrase "unforeseen developments" means developments that were "unexpected" at the time the importing Member incurred the relevant GATT obligation.[146] In *US – Fur Felt Hats*, the GATT panel stated that "unforeseen developments" should be interpreted to mean "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[147] In *US – Steel Safeguards*, the panel stated that the legal standard used to determine what constitutes unforeseen developments has subjective and objective elements. The subjective element relates to what constitutes unforeseen developments for a particular importing Member and it will vary depending on the context and circumstances. The objective element focuses on what negotiators could reasonably have had in mind when they incurred a GATT obligation (not what the specific negotiators had in mind).[148] The competent authority's published report must discuss how the developments were unforeseen at the appropriate time, and why the increase in imports causing or threatening to cause serious injury to the domestic industry occurred as a result of those unforeseen developments.[149]

7.89. With respect to the effect of a GATT 1994 obligation, the competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry.

7.5.4 The existence of unforeseen developments

7.90. Japan submits that India acted inconsistently with Article XIX:1(a) by failing to demonstrate the existence of unforeseen developments. Japan argues that, although the Preliminary and Final Findings include a section on unforeseen developments, the Indian competent authority failed to demonstrate why the developments identified in that section were unforeseen.[150] Japan also argues that the Indian competent authority did not explain whether all or some of the events mentioned in its determination were considered as unforeseen developments.[151] Japan adds that the Final Findings note that the identified developments were unforeseen by the domestic industry, which does not prove that they were necessarily unforeseen by India. Japan submits that under Article XIX:1(a) the developments have to be unforeseen or unexpected for the importing country, rather than for its domestic industry.[152]

7.91. India responds that the Preliminary and Final Findings clearly indicate that the Indian competent authority considered a confluence of events or circumstances to constitute the "unforeseen developments".[153] India points out that its competent authority referred to the panel report in *US – Steel Safeguards*, which clarified that a confluence of events can form a basis for the unforeseen developments. India notes that Article XIX:1(a) does not specify how a competent authority should demonstrate the existence of unforeseen developments. India refers to the Appellate Body's statements in *US – Lamb* to argue that a competent authority should demonstrate the existence of unforeseen developments as a "matter of fact" and to provide a "discussion", and not necessarily an "explanation", as to why the identified developments were "unforeseen" at the appropriate time.[154] Finally, India submits that, although the Final Findings note that the domestic industry demonstrated the existence of unforeseen developments that had resulted in an import surge, the conclusion regarding unforeseen developments is that of the competent authority.[155]

---

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

[147] Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT ("Hatters' Fur"), GATT/CP/106 (adopted 22 October 1951), para. 9.

[148] Panel Reports, *US – Steel Safeguards*, paras. 10.41-10.43.

[149] Panel Reports, *US – Steel Safeguards*, para. 10.67.

[150] Japan's first written submission, paras. 104-106, 108-112, and 116 (referring to Panel Report, *Argentina – Preserved Peaches*, paras. 7.23 and 7.33); second written submission, paras. 13-23.

[151] Japan's first written submission, para. 107; second written submission, paras. 9-12.

[152] Japan's first written submission, para. 113; second written submission, paras. 24-25.

[153] India's first written submission, paras. 70-72, 76, and 81(a) (referring to Panel Reports, *US – Steel Safeguards*, para. 10.99).

[154] India's first written submission, paras. 79 and 81(b).

[155] India's first written submission, para. 81(g).

7.92. We first note that both parties agree that the text of Article XIX:1(a) allows a competent authority to consider either a confluence of events or individual events as the unforeseen developments provided for in Article XIX:1(a).[156] This understanding is supported by the panel report in *US – Steel Safeguards*, referred by both parties, that a "confluence of developments can form the basis of 'unforeseen developments' for the purposes of Article XIX of GATT 1994".[157] Japan argues, however, that the Indian competent authority's determination lacks an explanation on whether the identified events separately or together constitute unforeseen developments.

7.93. Both the Preliminary and Final Findings show that the Indian competent authority considered the simultaneous occurrence of developments or confluence of events as the "unforeseen developments" provided for in Article XIX:1(a). In particular, the Indian competent authority, before analysing each of the events, referred to the panel's statement in *US – Steel Safeguards* that "the confluence of several events can unite to form the basis of an unforeseen development".[158]

7.94. The Indian competent authority considered that major steel exporting countries (including China, Russia, Ukraine, Japan, and Korea) had significantly increased their production capacity to meet the demand in developed countries. According to the Preliminary Findings, as of 31 December 2014 the world crude steel capacity was in excess of global demand by almost 30%. The developed countries that traditionally were big importers of steel, including the United States and the European Union, had reduced their dependence on imported steel. After a "sustained growth rate" for many decades, China had experienced a drop in its domestic demand for steel. The findings also note that, at the same time, the demand in India was growing and domestic prices were high, which made India a natural destination for steel exports from countries with high supply of steel products. In addition, the depreciation of the Russian and the Ukrainian currencies relative to the US dollar led to the lowering of export prices for steel from these countries, which put further pressure on the global steel market. These findings show that the Indian competent authority considered that the excess production capacity of steel, combined with the increased demand in India, declined demand in other major markets, and currency depreciation in Ukraine and Russia, were unexpected developments that allegedly led to the increase in imports into India.

7.95. Japan next argues that India did not explain why the identified developments were unforeseen. Japan submits that a mere statement that a given event constitutes an unforeseen development, without any explanation as to why such event is to be regarded as an unforeseen development, is insufficient. According to Japan, while the Final Findings use several times the words "unforeseen" or "unforeseen developments", they fail to provide any explanation as to why the reported events were indeed "unforeseen" at that time.[159] As discussed above, the term "unforeseen developments" means changes that the importing Member could not have reasonably foreseen at the time when the relevant GATT obligation was negotiated (in this case, at the end of the Uruguay Round, as of 1 January 1995). A competent authority must demonstrate in its published report, through reasoned and adequate explanation, how these developments were unexpected or unforeseen.[160] We note that Japan does not advance any arguments that any of the identified developments or confluence of these developments could have been foreseen by India. Japan's argument focuses instead on the alleged lack of explanation by the Indian competent authority as to why the developments were unforeseen. Therefore, we will consider whether the Indian competent authority sufficiently explained its conclusion that the identified developments were unforeseen.

---

[156] Japan's second written submission, para. 10; India's first written submission, para. 72.

[157] The panel in *US – Steel Safeguards* stated that:

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

(Panel Reports, *US – Steel Safeguards*, para. 10.99).

[158] Preliminary Findings, (Exhibits JPN-7/IND-7), paras. 14-17; Final Findings, (Exhibits JPN-11/IND-11), paras. 71-74.

[159] Japan's first written submission, para. 112; second written submission, paras. 16-18.

[160] Panel Report, *Indonesia – Iron or Steel Products*, para. 7.51.

7.96. In its discussion of unforeseen developments, the Indian competent authority referred to the increase of production capacity in major exporting countries, the increase in demand in India, and the decrease in demand in the European Union, the United States, and China. Even though the 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 the market can be unforeseen.[161] The Indian competent authority observed that in 2014 the world production capacity of crude steel was 2,351 million tonnes, which exceeded the global demand by almost 30%.[162] The production capacity further increased significantly in 2015: "effective capacity figure for early 2015 is 1055 million tones [sic] for the non-Chinese industry and 991 million tones [sic] for China, a total of 2.05 billion tones [sic]. When compared to steel production in 2014 of 1.66 billion tones [sic], there is 382 million tones [sic] of excess global steel making capacity".[163] These data indicate the significant extent and speed of changes in world production capacity of steel. Furthermore, the Indian competent authority found that the increase in production capacity occurred at the same time as other developments in the market. In particular, the European Union and the United States, which were "traditionally the biggest importers of steel", decreased their demand for imported steel. The Indian competent authority also referred to the decrease in the domestic demand in China and noted that China used to have a "sustained growth rate" for many decades, which indicates that the drop in growth rate was unexpected. Finally, India could not reasonably have expected the currency depreciations in Russia and Ukraine, which happened due to political and economic crises in these countries that were unrelated to the ordinary course of commerce.

7.97. In our view, it was reasonable for the Indian competent authority to find that an increase to such extent in production capacity, combined with higher domestic demand in India, decreased demand in several major markets, and that currency depreciation in Russia and Ukraine were unforeseen developments. We consider that negotiators could not reasonably have expected this confluence of events when India negotiated its tariff concessions. In light of the above reasons, we conclude that the Indian competent authority provided reasoned and adequate explanation as to why the identified developments were unforeseen.

7.98. Japan also argues that the Indian competent authority concluded that the domestic industry, and not India, did not foresee the developments. Japan refers to the Indian competent authority's statement that "[t]he domestic industry has been able to demonstrate that the developments in the market for surge in imports of the [product under consideration] were unforeseen".[164] We reject this argument, because, even if the Indian competent authority was supporting arguments made by the domestic industry during the investigation, the Final Findings contain a statement by the authority and not by the domestic industry.

7.99. In light of the above, we find that Japan has failed to demonstrate that India did not identify events that represent a plausible set of unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994.

7.5.5 Logical connection between unforeseen developments and the increased imports

7.100. We turn to considering Japan's arguments that the Preliminary and Final Findings do not demonstrate that the identified unforeseen developments resulted in increased imports into India allegedly causing injury to the domestic industry.

[161] In *US – Fur Felt Hats*, a GATT panel considered that the fact that hat styles had changed did not constitute an "unforeseen development" within the meaning of Article XIX:1(a). However, "the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947". (Report of the intersessional Working Party on the complaint of Czechoslovakia concerning the withdrawal by the United States of a tariff concession under Article XIX of the GATT, GATT/CP/106 (adopted 22 October 1951), paras. 11-12).

[162] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 19, p. 14.

[163] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 24, p. 15.

[164] Japan's first written submission, para. 113 (referring to Final Findings, (Exhibit JPN-11), para. 102(iii), p. 208).

7.101. Japan contends that India failed to demonstrate a "logical connection" between the unforeseen developments and the increase in imports of the product concerned into India.[165] First, Japan argues that the Indian competent authority failed to explain how imports of the product concerned increased "as a result" of the unforeseen developments.[166] In this respect, Japan submits that the Indian competent authority should have examined how the unforeseen developments modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports causing serious injury to the domestic industry.[167] Furthermore, Japan argues that the Indian competent authority should have conducted a country-specific analysis of imports, given that certain unforeseen developments in this case relate to specific countries.[168] Japan emphasizes that the Indian competent authority also failed to address any developments in Japan and Korea, which are the two largest exporting countries of the product concerned into India.[169] Japan also argues that the Indian competent authority failed to demonstrate when the events identified as unforeseen developments occurred. According to Japan, the increased imports can be "a result of" unforeseen developments only if the latter have occurred before the imports started to surge. Japan argues that the Indian competent authority failed to indicate whether the unforeseen developments preceded the import surge, and thus failed to establish the link between the alleged unforeseen developments and the import surge.[170]

7.102. Second, Japan asserts that India examined the unforeseen developments with regard to steel in general and failed to consider the effect of unforeseen developments with regard to the specific product concerned.[171] Third, Japan submits that the Indian competent authority failed to provide any supporting data regarding the alleged unforeseen developments, including specific data regarding production capacities of the product concerned in the exporting countries and supporting evidence regarding depreciation of Russian and Ukrainian currencies.[172]

7.103. India argues that Article XIX:1(a) does not require a competent authority to examine whether the unforeseen developments have modified the conditions of competition between the imported and the domestic products. India considers that Japan reads into Article XIX:1(a) an obligation that does not exist.[173] India asserts that Article XIX:1(a) only requires a competent authority to demonstrate a logical connection between "unforeseen developments" and "increased imports", which was shown in the Indian competent authority's determination.[174] India submits that, in the circumstances, a logical connection should be examined between the increased imports and the confluence of developments, and not with individual events which form the basis for the unforeseen developments.[175] India disagrees with Japan that the complexity of the matter in the underlying investigation required more sufficient explanation. India considers that Japan failed to exercise its burden of proof to demonstrate that a more detailed analysis was necessary.[176]

7.104. India further submits that considering the global nature of safeguard measures, there is no requirement to examine the developments individually on a country-specific basis.[177] India also argues that, in accordance with Article XIX:1(a), a competent authority has to demonstrate a logical connection between (i) the unforeseen developments, and (ii) the increased imports of specified products. India disagrees that the unforeseen developments themselves should be connected to a

[165] Japan's first written submission, paras. 114-116 and 118 (referring to Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; and *US – Steel Safeguards*, para. 315; and Panel Reports, *Argentina – Preserved Peaches*, para. 7.23; and *US – Steel Safeguards*, para. 10.122).

[166] Japan's first written submission, paras. 114-116 and 118 (referring to Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; and *US – Steel Safeguards*, para. 315; and Panel Reports, *Argentina – Preserved Peaches*, para. 7.23; and *US – Steel Safeguards*, para. 10.122).

[167] Japan's first written submission, paras. 85-86 and 117-119 (referring to Panel Reports, *US – Lamb*, paras. 7.23-7.24; and *US – Steel Safeguards*, para. 10.115); second written submission, paras. 42-43.

[168] Japan's first written submission, paras. 133 and 136; second written submission, paras. 44-48.

[169] Japan's first written submission, paras. 134-135; second written submission, para. 47.

[170] Japan's first written submission, paras. 137-141; second written submission, paras. 49-52.

[171] Japan's first written submission, paras. 142-146; second written submission, paras. 53-62.

[172] Japan's first written submission, paras. 147-151; second written submission, paras. 63-67.

[173] India's first written submission, para. 85; second written submission, paras. 9-10.

[174] India's first written submission, paras. 84-87 and 91.

[175] India's first written submission, para. 70.

[176] India's first written submission, paras. 88 and 93-95.

[177] India's first written submission, paras. 86 and 90 (referring to Final Findings, (Exhibit IND-11), paras. 34-42, 102(i), and 102(iii); and Preliminary Findings, (Exhibit IND-7), paras. 14-24 and 71-82); response to Panel question No. 88.

specific product, since the increase in imports may result from such events as, for example, currency devaluations, closure of downstream industries, or acts of war, which do not relate to a specific product.[178] India also rejects Japan's allegation that the unforeseen developments should necessarily coincide with the increased imports. India notes that Japan does not dispute the facts of the currency devaluation and the increase in imports in the recent past.[179]

7.105. We begin by noting Japan's argument that, since in this case there is no clear link between the unforeseen developments and the increase in imports, the Indian competent authority should have examined how the alleged unforeseen developments modified the conditions of competition between the domestic and imported products. We recall that Article XIX:1(a) does not provide any guidance on how the relationship between unforeseen developments and the increase in imports shall be examined. The competent authorities enjoy certain discretion in choosing the appropriate method for examining the relationship between unforeseen developments and the increase in imports, taking into account the facts and circumstances of the particular case. At the same time, a competent authority must provide in its published report a reasoned and adequate explanation supporting its conclusions on unforeseen developments. Therefore, the question before us is whether the Indian competent authority demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments resulted in increased imports causing (or threatening to cause) serious injury to the domestic industry of the products concerned.

7.106. We agree with the panel's statement in *US – Steel Safeguards* that the enquiry as to whether an explanation regarding the relationship between unforeseen developments and the increased imports is reasoned and adequate depends on the factual circumstances of the particular case. In particular, the panel stated that:

> In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a[n] explanation is reasoned and adequate.[180]

7.107. We will first consider Japan's argument that the Indian competent authority should have conducted a country-specific analysis of imports, considering that some of the alleged unforeseen developments relate to events in specific exporting countries. The Indian competent authority's examination of unforeseen developments focused on changes in the global steel market (the difference between global production capacity and global demand) as well as on developments in certain exporting countries (such as China, Russia, and Ukraine). The developments in specific countries include the weakening of the Russian currency due to a drop in oil prices and the consequent increase of steel exports from Russia; the restricted access for Russian steel to its traditional export markets; the depreciation of the Ukrainian currency and consequent low priced imports from Ukraine; and a decrease in domestic demand for steel in China.[181]

7.108. The Indian competent authority hardly mentioned any developments relating to Korea and Japan, even though these two countries were the two largest exporters of the product concerned. The share of imports from Japan was 37% in 2013-2014, 31% in 2014-2015, and 34% in the first quarter of 2015-2016. The share of imports from Korea was 13% in 2013-2014, 26% in 2014-2015, and 40% in 2015-2016.[182] Although the Indian competent authority mentioned Korea and Japan among countries that significantly increased their production capacity, no supporting data

[178] India's first written submission, para. 103.
[179] India's first written submission, para. 102.
[180] Panel Reports, *US – Steel Safeguards*, para. 10.115.
[181] The share of imports from Russia was 4% in 2013-2014, 6% in 2014-2015, and 5% in the first quarter of 2015-2016. The share of imports from Ukraine was 6% in 2013-2014, 3% in 2014-2015, and 4% in the first quarter of 2015-2016. (Japan's first written submission, para. 134 (referring to Revised Application, (Exhibit JPN-6); and Application, (Exhibit JPN-5)). See also Final Findings, (Exhibits JPN-11/IND-11), section XIII, para. k, p. 186.
[182] Japan's first written submission, para. 134 (referring to Revised Application, (Exhibit JPN-6), and Application, (Exhibit JPN-5)). See also Final Findings, (Exhibits JPN-11/IND-11), section XIII, para. k, p. 186.

regarding the increase in production capacity in Japan and Korea were provided in the Preliminary or Final Findings. The section on unforeseen developments does not discuss further any development in Japan and Korea that may have led to the import surge from these countries into India. At the same time, the section on serious injury refers to the FTAs that India concluded with Japan and Korea. In particular, the India-Korea CEPA came into effect on 1 January 2010 and India-Japan CEPA came into effect on 1 August 2011.[183] These FTAs provided for a gradual reduction of applied duties for the product concerned originating from Korea and Japan. The reduced tariffs under the respective FTAs ranged from 0% to 3.75% during the POI, while the MFN duty rate was 10%.[184] The Indian competent authority concluded that:

> [I]t is immaterial that imports from Korea RP and Japan increased due to low customs duty under the respective FTAs. *Imports from these two countries have occurred in huge quantities in the most recent period* and these imports are at very low prices causing serious injury to the domestic industry.[185]

7.109. In response to a question from the Panel, India stated that the lowering of duties under the respective FTAs was not considered part of the confluence of unforeseen developments, and that it instead referred to the effect of the obligations incurred by India under the GATT 1994, namely Article XXIV.[186] As noted above, the lowering of tariffs for the product concerned originating from Korea and Japan is an obligation for India under the respective FTAs. Article XXIV of the GATT 1994 does not impose an obligation on India to either enter into specific FTAs or to provide a certain level of customs duties to its FTA partners. India's acknowledgement that the significant volume of imports originating from Korea and Japan as a result of the FTAs was not part of the confluence of unforeseen developments undermines the logical connection between the increased imports and the unforeseen developments. In any case, the reference to India's obligations under Article XXIV of the GATT 1994 is an *ex post* explanation, since the Indian competent authority did not refer to these obligations in the Final Findings.

7.110. As indicated above, Article XIX:1(a) does not provide any methodology for examining the relationship between the unforeseen developments and the increase in imports. Even though a competent authority enjoys a certain latitude in choosing the appropriate method, it must provide a reasoned and adequate explanation of its findings. In the underlying investigation, the Indian competent authority relied in its analysis of unforeseen developments on events occurring in specific countries, in particular China, Russia, and Ukraine, while a significant portion of imports during the POI originated from its FTA partners, Korea and Japan. Although we acknowledge that the origin of the unforeseen developments may differ from the origin of the increased imports[187], the facts before the Indian competent authority warranted an explanation as to why the alleged increase in imports, with a predominant share from Japan and Korea, occurred due to the unforeseen developments of different origins.

7.111. Moreover, the unforeseen developments identified in the Indian competent authority's findings relate to changes in the steel market in general. The steel industry worldwide produces numerous varieties of steel products. The underlying investigation was conducted with regard to a particular product – "hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more". In response to a question from the Panel, India noted that:

> Steel production worldwide is measured in terms of the crude capacity. The proportion of the [product under consideration] remains the same *qua* the crude production for which data is available in public domain. There is no indication on record to suggest that either the production or the consumption pattern has changed so as to make an analysis based on the crude steel capacity unreliable.[188]

7.112. Neither the Preliminary nor the Final Findings, however, contain this explanation, nor do they provide any supporting data regarding the proportion of the product concerned in the crude

[183] India's response to Panel question No. 85. See also WTO regional trade agreements information system, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (accessed 15 July 2018).
[184] Japan's comments on India's response to Panel question No. 85, para. 19 and table 1.
[185] Final Findings, (Exhibits JPN-11/IND-11), para. 55, p. 201. (emphasis added)
[186] India's responses to Panel question Nos. 20 and 86.
[187] Panel Reports, *US – Steel Safeguards*, para. 10.146.
[188] India's response to Panel question No. 16. See also response to Panel question No. 90.

steel production. In our view, the Indian competent authority failed to explain how the unforeseen developments related to steel in general resulted in an increase in imports of the specific product concerned into India or, alternatively, why such analysis was unnecessary.

7.113. The Indian competent authority also found that many developed countries that were "traditionally the biggest importers of steel", including the United States and the European Union, had decreased their demand for imported steel. The exporting countries searched for other markets and India was a natural choice for these manufactures to divest their excess capacity.[189] The Indian competent authority failed to support this statement with any data and to link the excess supply with the alleged increase of imports into India. Similarly, the Indian competent authority stated that Russian exporters had "a restricted access to traditional markets like the European Union and Ukraine resulting in [an] export push to India"[190], without providing any supporting data. The findings also mention that China experienced a decrease in domestic demand for steel, which led to a sudden surge of imports from China to India.[191] Apart from noting that a negative growth rate of -0,5% in steel use in China would continue in 2015 and 2016, no other supporting data were provided. Therefore, we consider that the Indian competent authority failed to support its conclusions regarding the change in demand in several markets with data and to link these steel market displacements to the specific increase of imports into India.

7.114. Finally, we agree with Japan that the timing of the unforeseen developments is a relevant consideration for showing that the unforeseen developments resulted in an increase in imports. In our view, the Indian competent authority's examination of unforeseen developments lacks an explanation on the timing of events, which form the basis for the unforeseen developments. In particular, the Indian competent authority referred to the increase in production capacity in certain exporting countries[192], the decrease in demand in the European Union and the United States, as well as the increase in demand in India, but failed to indicate the timing of these developments as well as to link them to the subsequent increase in imports into India. The Indian competent authority further noted that domestic demand in China was likely to remain unchanged in the short term and that steel use in China would continue to experience a "negative growth of -0.5% in 2015 and 2016". However, this consideration refers to an estimation of future developments. The Indian competent authority's determination does not provide data regarding the timing of the decrease in demand in China. Similarly, the Indian competent authority refers to the currency depreciation in Russia and the subsequent decrease in export prices, as a reason for increased imports from Russia[193], but failed to indicate the timing of these developments. We recall that the Indian competent authority identified the confluence of events as "unforeseen developments". Although we do not believe that all events that form a confluence of developments must necessarily take place simultaneously, there must be a clear temporal connection between the events that constitute a confluence of developments that is in turn connected to the increase in imports.

7.115. For the foregoing reasons, we find that India failed to provide a reasoned explanation that the increase in imports of the product concerned into India occurred as a result of unforeseen developments.

7.5.6 Effect of the obligations incurred under the GATT 1994

7.116. We now address Japan's arguments that India failed to demonstrate a "logical connection" between the effect of the obligations incurred by India under the GATT 1994 and the increase in imports causing (or threatening to cause) serious injury to the domestic industry.

7.117. Japan argues that a Member imposing a safeguard measure must demonstrate, not only the existence of the obligation under the GATT 1994 *per se*, but also *the effects* that such obligation has

[189] Final Findings, (Exhibits JPN-11/IND-11), para. 75, p. 204.
[190] Final Findings, (Exhibits JPN-11/IND-11), para. 76, p. 204.
[191] Final Findings, (Exhibits JPN-11/IND-11), para. 78, p. 204.
[192] In particular, the Indian competent authority observed that "a number of countries including China PR, Russia, Ukraine, Japan and Korea have developed huge capacities". It indicated the timing of the changes in production capacity only with regard to China. See paras. 7.79-7.80 above.
[193] We note that the Indian competent authority indicated the timing of currency depreciation in Ukraine. It observed that the Ukrainian currency depreciated by 60% in 2014 and considered that this trend would continue in 2015. (Preliminary Findings, (Exhibits JPN-7/IND-7), para. 22, p. 15).

produced.[194] Japan contends that a competent authority has to explain how the effects of the obligation under the GATT 1994 have resulted in the increase in imports causing or threatening to cause serious injury to the domestic industry, i.e. that there must be a "logical connection" between the effects of the GATT obligation and the increased imports.[195] Japan argues that this "logical connection" means that a relevant GATT obligation constrains a Member's freedom of action and prevents it from taking a WTO-consistent measure to address the increase in imports causing injury to the domestic industry.[196] Japan notes that India's bound rate on the product concerned was 40% *ad valorem*, while the applied rate was 7.5% in 2013-2015. Japan therefore submits that India could have increased its applied rate up to the level of the bound rate and was not prevented from doing so by Article II:1(b) of the GATT 1994.[197]

7.118. India refers to the Appellate Body's statement that the phrase "the effect of the obligations incurred" under the GATT 1994 means that an importing Member must demonstrate "as a matter of fact" that it has incurred obligations under the GATT 1994, including tariff concessions.[198] India submits that Japan's argument that, in order to apply a safeguard measure, it must be demonstrated that the effects of the obligations under the GATT 1994 have resulted in the increase in imports, is contrary to the panel's statement in *US – Steel Safeguards* that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product".[199] India submits that the Indian competent authority's Final Findings note that India has tariff concessions on the product concerned.

7.119. India has stated that the safeguard measure at issue is a result of the obligations incurred by India under Article II and Article XXIV of the GATT 1994 collectively. India argues that it considers its FTAs to constitute obligations under Article XXIV of the GATT 1994 and refers to the Indian competent authority's discussion of the FTAs with Korea and Japan.[200] India has also argued that the challenged measure suspended, in addition to Article XXIV of the GATT 1994, India's obligations under the second sentence of Article II:1(b) of the GATT 1994, which prohibits Members from imposing "all other duties or charges of any kind imposed on or in connection with … importation".[201]

7.120. As we have noted above, Article XXIV of the GATT 1994 does not impose an obligation on Members to enter into FTAs or to provide a certain level of customs duties to its FTA partners. In any event, India's argument on Article XXIV is an *ex post* explanation, because the Indian competent authority's consideration of the effect of the GATT obligations does not include any reference to the obligations with respect to customs unions and free-trade areas contained in Article XXIV.

7.121. With respect to Article II:1(b), we recall that, in its Final Findings, the Indian competent authority referred to India's tariff concession on the product concerned – a bound rate of 40% *ad valorem*. The Indian competent authority cited, not the tariff concession, but the "low applied tariffs" as a reason for the increase in imports into India. The findings contain no discussion on the alleged effect of India's obligations under either the first sentence of Article II:1(b), with respect to tariff bindings, or the second sentence, with respect to other duties or charges. Therefore, we consider that the Indian competent authority failed to provide a reasoned and adequate explanation with regard to the effect of the relevant obligations of the GATT 1994.

7.5.7 Conclusion

7.122. In light of the foregoing, we conclude that India acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate that the unforeseen developments and the effect of

[194] Japan's first written submission, para. 155; second written submission, para. 80 (referring to Panel Report, *Ukraine – Passenger Cars*, para. 7.96).
[195] Japan's first written submission, para. 156.
[196] Japan's first written submission, paras. 157 and 161.
[197] Japan's first written submission, paras. 162-163; second written submission, paras. 81-82.
[198] India's first written submission, para. 114 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 91).
[199] India's first written submission, paras. 115-116 (quoting Panel Reports, *US – Steel Safeguards*, paras. 10.139-10.140).
[200] India's first written submission, para. 117 (referring to Final Findings, (Exhibit IND-11), para. 55).
[201] India's responses to Panel question Nos. 11 and 91.

GATT obligations have resulted in an increase in imports of the product concerned causing or threatening to cause serious injury to the relevant domestic industry in India.

7.6 Whether India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to the increase in imports

7.6.1 Introduction

7.123. Japan claims that India's examination of the increase in imports is inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[202] Specifically, Japan submits that the Indian competent authority failed to (i) make a qualitative analysis of the increase in imports; (ii) demonstrate that its determination of an increase in imports is based on "objective data"; (iii) demonstrate that the increase in imports was "recent enough, sudden enough, sharp enough, and significant enough"; and (iv) ensure that the examined increase in imports is "a result of" unforeseen developments and the effect of GATT obligations.[203]

7.124. Before addressing Japan's arguments, we will recall the Indian competent authority's findings with regard to increased imports and set out our understanding of the relevant provisions of the Agreement on Safeguards.

7.6.2 The Indian competent authority's determination on increased imports

7.125. In its Final Findings, the Indian competent authority found that there had been an increase in imports of the product concerned during the POI in absolute terms and relative to production.

7.126. The Indian competent authority evaluated the volume of imports during the POI, which included the following three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).[204] The first two years covered the volume of imports during full financial years from 1 April 2013 until 31 March 2015. The volume of imports for the last year (2015-2016) was "annualized" on the basis of the data for the first quarter of 2015-2016 (from 1 April to 30 June 2015) by multiplying by four the volume of imports for the first quarter.[205]

Table 1: Increase in imports

Financial Year	Total Imports (MT)	Trend	Production in India (MT)	% of imports with respect to production
2013-2014	1,252,441	100	25,510,777	5
2014-2015	2,644,911	211	26,395,795	10
2015-2016(Q1)	881,233		6,646,258	
2015-2016(A)	3,524,932	281	26,585,032	13

Source: Final Findings, (Exhibits JPN-11/IND-11), paras. 41 and 43, p. 197.

7.127. The Indian competent authority noted that:

> It is apparent from the data in the table above that there is a surge in import in absolute terms i.e. Import increased from [1,252,441] MT during the period 2013-14 to [3,524,932] MT during 2015-16 (Annualised).
>
> The imports of product under consideration in India during the period of investigation have increased in relation to all Indian production. The import with respect to total production increased from 5% in 2013-14 to 13% in 2015-16(A).[206]

[202] Japan also claims that India acted inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards by failing to provide a reasoned and adequate explanation of its determination regarding the increase in imports. This claim is addressed in section 7.11 below.

[203] Japan's first written submission, para. 179; second written submission, para. 91.

[204] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), para. 31, p. 196.

[205] India's first written submission, para. 139; responses to Panel question Nos. 31 and 32.

[206] Final Findings, (Exhibits JPN-11/IND-11), paras. 42-43, p. 197.

7.128. Based on these data, the Indian competent authority concluded that there was "a sudden, sharp and significant surge in imports" during the POI both in absolute terms and relative to total domestic production.[207]

7.6.3 Articles 2.1 and 4.2(a) of the Agreement on Safeguards

7.129. Article 2.1 reads as follows:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[208]

7.130. Article 4.2(a) provides in relevant part that:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms[.]

7.131. Article 2.1 of the Agreement on Safeguards sets out conditions for the application of safeguard measures. In particular, a Member applying a safeguard measure has to determine that the product "is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause or threaten to cause serious injury to the domestic industry. Article 4.2(a) of the Agreement on Safeguards further provides that a competent authority shall evaluate "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" as one of the relevant factors "of an objective and quantifiable nature" having a bearing on the situation of the domestic industry. In *Argentina – Footwear (EC)*, the panel noted that Articles 2.1 and 4.2(a) are both relevant provisions for examining an increase in imports as a basic prerequisite for the application of safeguard measures.[209] Article 2.1 "sets forth the conditions for the application of a safeguard measure", while Article 4.2(a) provides "the operational requirements for determining whether the conditions identified in Article 2.1 exist".[210]

7.132. Article 2.1 requires a competent authority to examine the increase in imports in both absolute terms and relative to domestic production. Previous panels and the Appellate Body have stated that Article 2.1 does not refer to just any increase in imports, but to an increase in "such … quantities" as to cause or threaten to cause serious injury to the domestic industry.[211] The Appellate Body clarified that the expression "in such increased quantities" in Article 2.1 requires that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[212]

7.133. In turn, Article 4.2(a) requires that the increase in imports must also be evaluated "in its full context, in particular with regard to its 'rate and amount'".[213] The obligation under Article 4.2(a) to evaluate the rate and amount of the increased imports requires a competent authority to analyse the intervening *trends* of imports over the POI (rather than just comparing the end points).[214] The

---

[207] Final Findings, (Exhibits JPN-11/IND-11), paras. 40-44, p. 197.
[208] Fn omitted.
[209] Panel Report, *Argentina – Footwear (EC)*, para. 8.138.
[210] Panel Report, *Argentina – Footwear (EC)*, paras. 8.139-8.140.
[211] Panel Report, *Argentina – Footwear (EC)*, para. 8.161; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[212] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[213] Panel Report, *Argentina – Footwear (EC)*, para. 8.161.
[214] Panel Report, *Argentina – Footwear (EC)*, para. 8.159 and fn 526; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

use of the present tense in the phrase "is being imported" suggests that a competent authority must examine the recent imports.[215] The Appellate Body noted that "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".[216] At the same time, the data from the most recent past should be assessed in the light of the longer-term trends in the data for the entire POI.[217]

7.6.4 Evaluation by the Panel

7.134. Japan's claim regarding the Indian competent authority's determination on the increase in imports raises two main questions before us. First, whether by using annualized import data for 2015-2016 the Indian competent authority was basing its determination regarding an increase in imports on objective data. Second, whether the Indian competent authority examined the increase in imports both quantitatively and qualitatively and sufficiently explained its conclusions in the Final Findings that the increase in imports was "recent enough, sudden enough, sharp enough, and significant enough".

7.135. We begin by considering Japan's allegation that by using annualized data for 2015-2016, the Indian competent authority failed to base its determination regarding an increase in imports on "objective data" and thus acted inconsistently with Article 4.2(a).

7.136. Japan argues that the Indian competent authority failed to explain why it was reasonable to use annualized data for 2015-2016, extrapolating data from the first quarter to the rest of the year.[218] India submits that the Agreement on Safeguards does not provide any guidance regarding the analysis of the data, therefore the method applied by the Indian competent authority cannot be questioned unless it is shown that such method is unreasonable and biased.[219] India argues that the annualization of data is a logical method, when the only data available pertains to a short period of the year.[220] India submits that the data for one quarter was annualized to make it comparable to the full year data of the preceding periods.[221]

7.137. Pursuant to Article 4.2(a), "the rate and amount of the increase in imports" is one of the factors of "an objective and quantifiable nature" that must be evaluated by a competent authority. In *US – Lamb*, the Appellate Body stated that the requirement of "objectivity and quantifiability" applies, not only to factors, but also to data:

> We recognize that the clause "of an objective and quantifiable nature" refers expressly to "factors", but not expressly to data. We are, however, convinced that factors can only be "of an objective and quantifiable nature" if they allow a determination to be made, as required by Article 4.2(b) of the *Agreement on Safeguards*, on the basis of "objective evidence". Such evidence is, in principle, objective data. The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors.[222]

We agree with this statement and consider that a competent authority must base its evaluation of factors under Article 4.2(a), including the rate and amount of the increase in imports, on objective data and evidence. Although 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.[223]

---

[215] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[216] Appellate Body Report, *US – Lamb*, para. 137.
[217] Appellate Body Report, *US – Lamb*, para. 138.
[218] Japan's first written submission, paras. 206-210; second written submission, paras. 111-117.
[219] India's first written submission, para. 139 (referring to Panel Report, *US – Line Pipe*, para. 7.203).
[220] India's first written submission, para. 139.
[221] India's responses to Panel question Nos. 31, 33, and 95.
[222] Appellate Body Report, *US – Lamb*, para. 130. (emphasis original)
[223] In *US – Line Pipe*, in determining whether the US methodology for the analysis of increased imports complied with the Agreement on Safeguards and the GATT 1994, the panel considered "whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports". (Panel Report, *US – Line Pipe*, para. 7.194).

7.138. As noted above, in the underlying investigation, the Indian competent authority selected the POI from 2013-2014 to 2015-2016 (annualized on the basis of the first quarter), i.e. the POI covers the following three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).[224] The first two years covered the period from 1 April until 31 March. The volume of imports for the last year (2015-2016) was annualized on the basis of the data for the first quarter of 2015-2016 (from 1 April to 30 June 2015).[225] In response to a question from the Panel, India clarified that the POI was, in fact, from 1 April 2013 to 30 June 2015.[226] This period covers two financial years (from 1 April 2013 to 31 March 2015) and three months (1 April to 30 June 2015). India explained that the first quarter of 2015-2016 was only annualized to make the data of this period comparable to the full year data of the preceding periods.[227]

7.139. The methodology used by the Indian competent authority, where data were annualized in order to make them comparable with those of previous years, warrants a compelling explanation as to why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. The Preliminary and Final Findings do not contain any explanation in this respect.

7.140. The section of the Final Findings titled "Examination of Post POI data" provides data on the volume of imports for the second quarter of 2015-2016. The Indian competent authority observed that the volume of imports for 2015-2016, annualized on the basis of the first and second quarters, was 4,587,168 tonnes, which is 1,062,236 tonnes more than the volume of imports for 2015-2016, annualized on the basis of the first quarter only (3,524,932 tonnes).[228] Although these data show that the volume of imports had increased by about 30% in the second quarter as compared to the first quarter of 2015-2016, they cast doubts as to what extent the volume of imports in 2015-2016, annualized on the basis of the first quarter, could provide a reasonable basis for comparison with the preceding periods.

7.141. In addition, the import data provided in the domestic industry's application show that the volume of imports fluctuates during a year. The domestic industry provided the data on the volume of imports in 2014-2015 with quarterly breakdown: first quarter – 421,109 tonnes; second quarter – 499,941 tonnes; third quarter – 718,494 tonnes; fourth quarter – 900,570 tonnes.[229] The Indian competent authority examined the change in imports during the first two years of the POI (2013-2014 and 2014-2015) based on annual data only and did not provide any quarterly breakdown, which could provide a basis for comparison of import trends with quarterly data of 2015-2016.

7.142. The analysis of the increase in imports must be based on evidence of the actual volume of imports. As noted before, it should be also based on evidence from the most recent *past*.[230] We recall that the Indian competent authority initiated the safeguard investigation on 7 September 2015. Before the Panel, India asserts that the POI was from 1 April 2013 to 30 June 2015, and that the annualized data for the rest of the financial year 2015-2016 were used only to make the information comparable to the full year data of the preceding periods. Although India denies that the data for the first quarter were used to draw conclusions with regard to the whole year[231], the Final Findings, cited in paragraphs 7.126-7.127 above, show that the Indian competent authority relied on the full year of 2015-2016 (annualized) to examine the trends in imports and draw conclusions regarding the existence of the import surge.[232] Absent any explanation on methodology, the reliance on annualized data calls into question whether the evaluation of import trends was based on actual imports, especially pertaining to the third and fourth quarters of 2015-2016.

[224] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), para. 31, p. 196.
[225] India's first written submission, para. 139.
[226] India's response to Panel question No. 29.
[227] India's first written submission, para. 230; responses to Panel question Nos. 29 and 31.
[228] Final Findings, (Exhibits JPN-11/IND-11), para. 100, p. 208.
[229] Revised Application, (Exhibits JPN-6/IND-20), p. 7.
[230] See para. 7.133 above.
[231] India's response to Panel question No. 31.
[232] Final Findings, (Exhibits JPN-11/IND-11), paras. 40-44, p. 197. See also Preliminary Findings, (Exhibits JPN-7/IND-7), para. 13, p. 13.

7.143. Moreover, the record of the investigation contains import data for the three most recent years preceding the initiation of the investigation, which could have been used by the Indian competent authority. Indeed, the domestic industry's application specifically provides information on the volume of imports from 2011-2012 to June 2015[233]:

Table 2: Increase in Imports

2011-2012	2012-2013	2013-2014	2014-2015	2015-2016 (Quarter 1)
2,219,711	2,120,996	1,292,099	2,540,114	844,840

Source: Revised Application, (Exhibits JPN-6/IND-20), p. 7.

7.144. The Final Findings do not explain why the Indian competent authority did not use this information and decided instead to annualize the data for 2015-2016. In response to a question from the Panel, India noted that since the Agreement on Safeguards does not indicate how long the POI should be, a competent authority enjoys certain discretion to select the POI.[234] Although the competent authorities can determine in each case the relevant POI to evaluate the increase in imports, the Final Findings do not indicate why the Indian competent authority did not use a period for which information was available and decided instead to annualize the data for 2015-2016.

7.145. For the above reasons, we consider that the Indian competent authority failed to evaluate the rate and amount of the increase in imports on the basis of objective data, when it analysed the increase in imports at least partly on annualized data.

7.146. Next, we turn to Japan's allegation that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, by failing to conduct a qualitative analysis of the increase in imports, since its analysis did not ensure that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.[235]

7.147. In particular, Japan submits that the Indian competent authority failed to properly examine the recent trends in imports in the context of longer-term trends. Japan points out to import trends before the POI, in 2011-2012 and 2012-2013, and argues that the short-term increase between 2013-2014 and the first quarter of 2015-2016 was only a recovery of imports to their previous levels.[236] Japan submits that the domestic industry referred to import trends in 2011-2013 in their application and the interested parties raised the same issue during the investigation, but the Indian competent authority failed to provide reasons for disregarding this data.[237] According to Japan, in order to make a qualitative analysis, the Indian competent authority should have evaluated the real significance of this short-term trend during the POI in light of longer-term trends or any other methods so as to ensure that this short-term upward trend was recent enough, sudden enough, sharp enough and significant enough.[238] Although Japan does not challenge the selection of the POI as such, it considers that a competent authority's discretion to select the POI is not unlimited and must be exercised with due regard to the obligations provided in the Agreement on Safeguards that relate to the investigation process.[239] Japan also argues that the Indian competent authority failed to provide an adequate explanation as to why it considered that the increase in imports was recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, as to cause and threaten to cause serious injury.[240]

[233] Revised Application, (Exhibits JPN-6/IND-20), p. 7.
[234] India's response to Panel question No. 36.
[235] Japan's second written submission, para. 103; response to Panel question No. 94, para. 38.
[236] Japan's first written submission, paras. 185, 187-188, and 190 (referring to Panel Report, *Argentina – Preserved Peaches*, para. 7.64); second written submission, para. 105.
[237] Japan's first written submission, para. 192 (referring to Final Findings, (Exhibit JPN-11), para. 30, p. 195).
[238] Japan's second written submission, para. 103.
[239] Japan's first written submission, paras. 194-195.
[240] Japan's first written submission, paras. 211-215; second written submission, para. 18.

7.148. India submits that the selected POI was long enough to enable the Indian competent authority to examine the recentness of the increase in imports in the context of the longer-term trends.[241] India asserts that the Agreement on Safeguards does not provide any guidance regarding the selection of the POI and that a competent authority enjoys certain discretion for determining the POI.[242] India denies Japan's allegation that the selected POI distorted the picture regarding the trends in imports. India submits that a mixed trend or even a downturn in imports does not mean that the serious injury to the domestic industry ceases to exist. According to India, the data show that although the imports declined before the POI, they have increased in recent terms and exceeded the quantities of the period preceding the POI.[243] India adds that, even assuming that the period of 2011-2012 had been included into the POI, it would have still shown that the imports had increased both in absolute terms and relative to the domestic production.[244]

7.149. As we have discussed above, Article 2.1 of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 require a competent authority to determine not just any increase in imports, but an increase in "such … quantities" as to cause or threaten to cause serious injury to the domestic industry.[245] This implies both a quantitative and a qualitative consideration of the increase in imports. The increase in imports must be considered "in its full context", including in particular its "rate and amount" as required by Article 4.2(a).[246] It follows that the enquiry with regard to the increase in imports requires the evaluation of the trends in imports or changes in import levels over the entire POI. While the Agreement on Safeguards does not provide any guidance with regard to the selection of the POI and a competent authority has certain discretion in this regard[247], the POI should be long enough to provide an adequate basis for comparison of import trends. In *US – Line Pipe*, the panel noted that the POI should allow a competent authority to focus on recent imports, while being sufficiently long so that the authority can draw conclusions regarding the existence of increased imports.[248]

7.150. In our view, the POI of two years and three months did not allow the Indian competent authority to make a quantitative and qualitative objective analysis. India based its evaluation of the increase in imports on the import data pertaining to two years and three months, which in effect provides two points of comparison of the volume of imports in 2013-2014 and in 2014-2015. With regard to the third point of comparison, 2015-2016, as we have found above, the Indian competent authority did not have objective data for the full financial year. The import data for 2015-2016 was based on imports for the first quarter of this year, which undermines the trend analysis of changes in imports in 2015-2016 compared to the previous two years. Furthermore, the data for the last year of POI is of particular importance, since it reflects the most recent trends in imports. Considering the above, we conclude that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994, by failing to objectively examine trends in imports and to provide a reasoned explanation with regard to the conclusion in the Final Findings that there was "a sudden, sharp and significant surge in imports" during the POI.[249]

7.151. Finally, Japan argues that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX of the GATT 1994 by failing to ensure that the examined increase in imports is a result of unforeseen developments and of the effect of GATT obligations. Japan submits that the Indian competent authority considered all imports and failed to ensure that these imports resulted from unforeseen developments and the effect of the obligations incurred under the GATT 1994.[250] Since we have found above that India acted inconsistently with Article XIX:1 of the GATT 1994 with regard to its consideration of the unforeseen developments, the effect of GATT obligation and the increase in imports, we do not need to address this argument of Japan.

---

[241] India's first written submission, paras. 125-127 (referring to Appellate Body Report, *US – Lamb*, para. 138 and fn 88).

[242] India's first written submission, para. 124 (referring to Appellate Body Report, *US – Line Pipe*, paras. 7.196-7.197 and 7.201).

[243] India's first written submission, para. 133.

[244] India's first written submission, paras. 128-130.

[245] Panel Report, *Argentina – Footwear (EC)*, para. 8.161; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[246] Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

[247] Panel Report, *US – Line Pipe*, para. 7.196.

[248] Panel Report, *US – Line Pipe*, para. 7.201.

[249] Final Findings, (Exhibits JPN-11/IND-11), para. 44, p. 197.

[250] Japan's first written submission, paras. 180-183; second written submission, paras. 97-100.

7.6.5 Conclusion

7.152. In light of the foregoing, we find that India's determination on the increase in imports is inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994.

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

7.7.1 Introduction

7.153. Japan submits that India failed to determine the domestic industry as required by Article 4.1(c) of the Agreement on Safeguards.[251] Japan asserts that the concept of "domestic industry" is critical to the injury and causal link analysis and alleges that the Indian competent authority's injury and causation determinations are consequently inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards as well as with Article XIX:1(a) of the GATT 1994.[252]

7.7.2 Article 4.1(c) of the Agreement on Safeguards

7.154. Article 4.1(c) of the Agreement on Safeguards reads as follows:

> [I]n determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

7.155. Article 4.1(c) of the Agreement on Safeguards provides two options for the definition of the "domestic industry" (i) "the producers *as a whole* of the like or directly competitive products"; or (ii) the producers whose output constitutes "*a major proportion*" of the total domestic production of the like or directly competitive products.[253]

7.156. The Agreement on Safeguards does not provide any specific percentage or share of the domestic production, which would meet the requirement of "a major proportion".[254] Neither does it establish any methodology or procedure that competent authorities must follow for determining a major proportion of the total domestic production. The consideration as to what constitutes "a major proportion" depends on the specific circumstances of each case.

7.157. The Appellate Body has clarified, in the context of a similar provision in the Anti-Dumping Agreement, that the term "major proportion" means "a relatively high proportion of the total domestic production".[255] The term "major proportion" has both "quantitative and qualitative connotations".[256] The qualitative element aims to ensure that "the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production".[257] The Appellate Body has stated that there is "an inverse relationship" between the proportion of total production included in the domestic industry and the existence of a material risk of distortion in the definition of domestic industry and in the assessment of injury.[258]

---

[251] Japan's first written submission, paras. 216-217 and 243; second written submission, para. 120.
[252] Japan's first written submission, paras. 244-246.
[253] Emphasis added.
[254] Appellate Body Report, *EC – Fasteners (China)*, para. 411.
[255] Appellate Body Report, *EC – Fasteners (China)*, para. 412. In addition, in *Argentina – Poultry Anti-Dumping Duties*, the panel stated that "it is permissible to define the 'domestic industry' in terms of domestic producers of an important, serious or significant proportion of total domestic production". (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.341-7.342).
[256] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303.
[257] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.13.
[258] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303; *Russia – Commercial Vehicles*, para. 5.13.

Specifically, "the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole".[259] At the same time, "the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted".[260]

7.7.3 Evaluation by the Panel

7.158. In the investigation at hand, the Indian competent authority defined the domestic industry on the basis of the second option, i.e. "a major proportion" of the total domestic production of the like or directly competitive products. The "domestic industry", as defined by the Indian competent authority, comprised producers representing 70% of the total domestic production in 2013-2014, 68% in 2014-2015, and 67% in the first quarter of 2015-2016.[261] The domestic industry comprised three out of six producers of the product concerned in India, namely: Steel Authority of India Limited, Essar Steel India Limited, and JSW Steel Limited, who filed the application for the initiation of the safeguard investigation (the applicants).[262] Questionnaires were sent to all six known domestic producers, but replies were received only from the applicants.[263]

7.159. Japan submits that if a competent authority defines the domestic industry based on the second option provided in Article 4.1(c) (i.e. those producers whose collective output constitutes "a major proportion" of the total domestic production), it must ensure that the process of defining the domestic industry does not give rise to a material risk of distortion in the injury and causation determination.[264] Japan argues that the Indian competent authority's approach to define the domestic industry introduced a material risk of distortion, because the record of the investigation shows that the producers outside the domestic industry as defined performed substantially differently, in particular in terms of sales, market share, and production. Japan refers to this fact to argue that the producers comprising the domestic industry did not "substantially reflect" the total domestic production.[265] For Japan, the Indian competent authority relied on a "purely quantitative test", when it concluded that the applicants necessarily constituted "a major proportion" under Article 4.1(c) if they represented at least 50% of the total production.[266] In addition, Japan takes issue with the fact that the domestic industry comprised only the applicants. Japan argues that the domestic industry was defined based on "a self-selection process" by the domestic producers themselves, which does not exclude that the domestic producers "purposively" included low performing producers into the "domestic industry" while ignoring high performing producers.[267]

7.160. India responds that since the share of domestic production of producers comprising the domestic industry is more than 50%, the competent authority does not need to examine the rest of the producers. India asserts that examining the rest of producers would result in merging the two options provided in Article 4.1(c).[268] India further submits that since the Indian competent authority examined data with respect to 67% of the total domestic production, there is no basis to suggest that the injury or causation analysis is distorted.[269] India notes that even though there is no requirement to examine all producers, the Indian competent authority nevertheless sent questionnaires to all known producers, but the rest of the producers did not cooperate.[270] Regarding Japan's reference to sales and market share, India argues that the data on sales and market share have no bearing on the definition of the domestic industry. Furthermore, India submits that once

[259] Appellate Body Report, *EC – Fasteners (China)*, para. 412.
[260] Appellate Body Report, *EC – Fasteners (China)*, para. 414.
[261] Final Findings, (Exhibits JPN-11/IND-11), para. I(f), p. 167. As explained by India, the domestic industry as defined by the Indian competent authority covered both captive and non-captive segments of production. (India's response to Panel question No. 42).
[262] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 1, p. 12; Final Findings, (Exhibits JPN-11/IND-11), para. 26, p. 194.
[263] Final Findings, (Exhibits JPN-11/IND-11), para. 4, pp. 119-120; India's first written submission, paras. 159-160.
[264] Japan's first written submission, para. 235.
[265] Japan's first written submission, paras. 237-241; second written submission, para. 127.
[266] Japan's first written submission, para. 236; second written submission, paras. 122-125.
[267] Japan's second written submission, para. 126.
[268] India's first written submission, paras. 157-158.
[269] India's first written submission, para. 162; second written submission, para. 13.
[270] India's first written submission, paras. 159-160; second written submission, para. 14.

the domestic industry has been defined, the data with regard to producers outside the domestic industry do not have any bearing on the determination of either injury or causation.[271]

7.161. We begin by addressing Japan's argument that the Indian competent authority defined the domestic industry on the basis of a quantitative approach only, and failed to conduct any qualitative analysis. To support this argument, Japan refers to the Appellate Body's statement that the term "major proportion" has both quantitative and qualitative connotations. We note that the Appellate Body linked the qualitative analysis to the proportion of the domestic producers represented in the domestic industry. If the proportion of the domestic producers is sufficiently high, it is likely to meet both the quantitative and the qualitative aspects of the analysis, because the domestic industry so defined sufficiently reflects the totality of the domestic producers. The Appellate Body explained:

> [T]here is an inverse relationship between, on the one hand, the proportion of producers represented in the domestic industry and, on the other hand, the absence of a risk of material distortion in the definition of the domestic industry and in the assessment of injury. We thus read the requirement in Article 4.1 that domestic producers' output constitute a "major proportion" as having both quantitative and qualitative connotations.
>
> When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1. However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1.[272]

7.162. From a quantitative point of view, the domestic industry, as defined by the Indian competent authority, represented a high proportion of the domestic production in relation to the total. Specifically, the domestic industry comprised between 67% and 70% of the total domestic production and can in principle be considered as a substantial reflection of the domestic producers as a whole.

7.163. Japan supports its claim that the Indian competent authority failed to conduct a qualitative analysis by the fact that the producers outside the domestic industry performed better. Japan contends that the Indian competent authority defined the domestic industry in a manner that introduced "a material risk of distortion" of the injury analysis, because the situation of producers outside of the domestic industry improved and they had different trends in sales, market share, and production than the producers included into the domestic industry. Japan considers that factors such as sales, market share, and production of the domestic producers outside the domestic industry may be relevant in confirming whether the domestic industry "substantially reflects" the total domestic production.[273] Specifically, Japan asserts that (i) the sales of the domestic industry slightly increased over the POI, while the sales of the other domestic producers increased substantially over the same period[274]; (ii) the market share of the domestic industry decreased over the POI, while the market share of the other domestic producers increased[275]; and (iii) the production of the domestic industry

[271] India's first written submission, paras. 164 and 167.

[272] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303 (fn omitted). In that case, the domestic industry had been defined "at the lower end of the spectrum", representing 27% of the total domestic production.

[273] Japan's response to Panel question No. 45(a), para. 67.

[274] The sales of the domestic industry (captive and non-captive) were 14,616,565 tonnes in 2013-2014; 14,968,955 tonnes in 2014-2015; and 15,645,704 tonnes in 2015-2016 (annualized). The sales of other Indian producers were 6,995,047 tonnes in 2013-2014; 7,914,137 tonnes in 2014-2015; and 8,986,612 tonnes in 2015-2016 (annualized). (Japan's first written submission, para. 238).

[275] The domestic industry's market share (covering captive and non-captive segments of the market) was 64% in 2013-2014; 59% in 2014-2015; and 56% in 2015-2016 (annualized). The market share of other Indian producers was 31% in 2013-2014; 31% in 2014-2015; and 32% in 2015-2016 (annualized). (Japan's first written submission, para. 239).

remained stable, while the production of the other Indian producers substantially increased.[276] For Japan, these trends suggest that the alleged increase in imports affected the domestic industry and the other producers differently.

7.164. During the investigation, the Indian competent authority rejected a similar argument of interested parties that the applicants did not meet the requirement of "a major proportion", given that their market share was 45% in 2013-2014, while the market share of other domestic producers was 51%. The Indian competent authority explained the market share is not a "measure of standing" for defining the domestic industry.[277] India repeats this argument before the Panel and argues that under Article 4.1(c) the domestic industry is defined on the basis of a proportion in domestic production. We agree with India. Article 4.1(c) specifically provides that "a major proportion" is defined on the basis of the "collective output" of the like or directly competitive products in "the total domestic production" of those products. When the competent authority defines the "domestic industry" as the producers "whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products" pursuant to Article 4.1(c), the focus is on "the question of *how much* production must be represented by those producers making up the domestic industry".[278] Article 4.1(c) does not require a competent authority to examine the domestic producers' market share and sales in order to define the domestic industry. Therefore, we reject Japan's argument that the Indian competent authority needed to consider the market share and sales of the other domestic producers, when it defined the domestic industry.[279]

7.165. At the same time, once the domestic industry is defined, in accordance with Article 4.2(a) the competent authority must examine the trends in its production, sales, and market share as part of the mandatory relevant factors in the evaluation of the domestic industry's situation. The performance of producers outside the domestic industry (including their production, sales, and market share) may be considered as a non-attribution factor under Article 4.2(b) and taken into account in the final determination of whether the domestic industry suffers serious injury caused by the increased imports.

7.166. Furthermore, Japan argues that the Indian competent authority's definition of the domestic industry involved "a self-selection process" by the domestic producers themselves, because only applicants were included into the definition of the domestic industry. According to Japan, this approach might suggest that better performing producers were intentionally excluded from the domestic industry. In this respect, we note that it is not unusual that the weaker-performing producers take an initiative to start and participate in a trade remedy investigation, while better performing producers may choose a passive approach. This understanding is consistent with the panel's statement in *China – Autos (US)* in the context of an anti-dumping dispute:

> In our view, the possibility that weaker-performing producers in a given industry will more strongly support an AD or CVD investigation or be more likely to participate actively is simply a reflection of the realities of trade remedy actions. The possibility of imposition of definitive AD and/or CVD measures will afford all producers relief from lower-priced imports, but producers performing less well will tend to have a greater incentive to seek initiation of and participate in an investigation.[280]

[276] The domestic industry's production was 17,881,187 tonnes in 2013-2014; 17,836,937 tonnes in 2014-2015; and 17,827,180 tonnes in 2015-2016 (annualized). The production of other Indian producers was 7,629,590 tonnes in 2013-2014 tonnes; 8,558,858 tonnes in 2014-2015; and 8,757,852 tonnes in 2015-2016 (annualized). (Japan's first written submission, para. 241).

[277] Final Findings, (Exhibits JPN-11/IND-11), para. 25, p. 194.

[278] Appellate Body Report, *EC – Fasteners (China)*, para. 411. (emphasis original)

[279] We also note Japan's argument that in *Russia – Commercial Vehicles* the Appellate Body upheld the panel's findings, in the context of a similar provision in the Anti-Dumping Agreement, that the investigating authority had not complied with the "major proportion" requirement by failing to include one producer in the domestic industry although the other producer included in the domestic industry represented 87.9% share of total domestic production of the like product. The facts in *Russia – Commercial Vehicles* are different from those in this case. In *Russia – Commercial Vehicles*, the panel's finding was based on the fact that the investigating authority defined the domestic industry as one producer, representing 87.9% of total production, after it had received the questionnaire responses from two domestic producers producing like products. (Panel Report, *Russia – Commercial Vehicles*, para. 7.16).

[280] Panel Report, *China – Autos (US)*, paras. 7.224-7.225.

7.167. We note the cautionary words of the Appellate Body that, when the domestic industry is defined as the domestic producers whose output constitutes a major proportion of total domestic production, if the proportion is not sufficiently high, then a qualitative element becomes crucial in establishing whether the domestic industry has been appropriately defined.[281] This situation may arise, for example, in the case of a fragmented industry with numerous producers, when there are practical constraints on an authority's ability to obtain information and therefore a "major proportion" may be lower than what would be ordinarily permissible in a less fragmented industry.[282] This is not the situation in the present case. As noted above, the Indian competent authority included in the definition of the domestic industry a proportion of the domestic producers' output that was high enough that it can constitute a substantial reflection of the total domestic production. Accordingly, the definition of the domestic industry would very likely satisfy both the quantitative and the qualitative elements of the definition in Article 4.1(c) of the Agreement on Safeguards. Japan has failed to demonstrate that, despite such high proportion, the domestic production as defined by the Indian competent authority was not representative of the total domestic production in India.

7.168. Considering the above, we find that Japan has not demonstrated that India failed to meet the requirement of "a major proportion" under Article 4.1(c) of the Agreement on Safeguards. Accordingly, we also reject Japan's consequential claims in this regard under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

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

7.8.1 Introduction

7.169. With respect to India's determination of serious injury and threat of serious injury, Japan has brought the following claims:

a. that India acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards, by failing to properly evaluate certain injury factors (such as the share of the domestic market taken by increased imports, prices, profits and losses) and by failing to provide reasoned and adequate explanation regarding other factors showing positive trends;

b. that India acted inconsistently with Article 4.2(a), by failing to base its analysis of the existence of serious injury on objective data;

c. that India's alleged determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a); and

d. as a consequence of the above alleged violations, that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.170. We will first summarize the relevant facts regarding the Indian competent authority's determination on serious injury and threat of serious injury. We will then turn to considering Japan's claim regarding the Indian competent authority's evaluation of the share of the domestic market taken by increased imports, the prices, profits and losses, as well as the examination of other factors showing positive trends. After that, we will address Japan's claim that India failed to base its analysis of serious injury on objective data. Finally, we will consider Japan's claims regarding an alleged finding of threat of serious injury in addition to the finding of serious injury.

7.8.2 The Indian competent authority's determination regarding serious injury and threat thereof

7.171. In its serious injury analysis, the Indian competent authority evaluated the following factors having a bearing on the situation of the domestic industry (i) production, (ii) changes in the level of

[281] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303.
[282] Appellate Body Report, *EC – Fasteners (China)*, para. 419.

sales, (iii) market shares of imports and the domestic industry, (iv) capacity utilization, (v) employment, (vi) productivity, (vii) profits and losses, (viii) inventories, and (ix) price effects. Following the evaluation of these factors, the Indian competent authority observed that some of the factors such as production, sales, capacity utilization, employment, productivity, and inventories remained stable over the POI. The domestic industry's profitability declined sharply leading to losses, its prices went down, and its market share declined due to the increase in imports, all of which led to a serious injury to the domestic industry by way of financial losses.[283]

7.172. The Indian competent authority evaluated most of the injury factors during the POI, which includes three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized).[284] The trends in prices, profitability, and inventories were evaluated during the two financial years of 2013-2014 and 2014-2015, and the first quarter of 2015-2016.[285]

7.173. The Indian competent authority observed that the demand for the product concerned in India increased during the POI. However, despite the increase in demand, the production, employment, and sales of the domestic industry "remained stagnant", while inventories slightly increased. While the domestic industry increased its production capacity to meet the increased demand in India, it was unable to increase its capacity utilization, production, and sales. Most of the share of increased demand was taken by imports. The profitability of the domestic industry decreased significantly and turned into losses. An evaluation of all relevant factors having a bearing on the situation of the domestic industry showed a "significant overall impairment" of the situation of the domestic industry. The Indian competent authority concluded that the domestic industry suffered serious injury as a result of the increased imports of the product concerned.[286]

7.174. The Indian competent authority further indicated that, given "the surplus production capacities available" to foreign producers, the imports would continue to increase. Considering the likelihood of further increase in imports, it concluded that "there is a threat of further serious injury to the domestic market." The Indian competent authority found that the domestic industry "faces serious injury and a further threat of greater serious injury".[287]

7.175. In the final section of the Final Findings titled "Recommendations", the Indian competent authority concluded that the increased imports of the product concerned "have caused serious injury and are threatening to cause serious injuries to the domestic producers".[288]

7.8.3 Serious Injury

7.8.3.1 Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards

7.176. Article 4.1(a) of the Agreement on Safeguards defines "serious injury" for the purposes of this agreement as "a significant overall impairment in the position of a domestic industry". Article 4.2(a) reads as follows:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

7.177. The standard of serious injury under Article 4.1(a) of the Agreement on Safeguards has been described as a "very high standard of injury". The word "serious" implies a "much higher" standard

[283] Final Findings, (Exhibits JPN-11/IND-11), paras. 49-50, pp. 198-200.
[284] Preliminary Findings, (Exhibits JPN-7/IND-7), para. 9, p. 13; Final Findings, (Exhibits JPN-11/IND-11), paras. 31 and 49, pp. 196 and 198-199.
[285] Final Findings, (Exhibits JPN-11/IND-11), para. 49 (g), pp.198-199.
[286] Final Findings, (Exhibits JPN-11/IND-11), paras. 56-58, p. 201.
[287] Final Findings, (Exhibits JPN-11/IND-11), para. 59.
[288] Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 208.

of injury than the word "material" used by the Anti-Dumping and the SCM Agreements.[289] In order to make a determination of serious injury, Article 4.2(a) requires a competent authority to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". Article 4.2(a) does not provide any specific methodology as to how the relevant factors shall be examined. The Appellate Body has clarified that an objective assessment of a claim under Article 4.2(a) has two elements. A panel must consider, first, whether the competent authority has evaluated all relevant factors and, second, whether the competent authority has provided a reasoned and adequate explanation of how the facts support its determination.[290]

7.178. The determination of serious injury must be made on the basis of the "overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry".[291] In other words, a competent authority is required to make its determination based on an evaluation of all injury factors "as a whole".[292] In order to demonstrate a "significant overall impairment", a competent authority does not need to show a negative trend in each factor listed in Article 4.2(a), rather "it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination".[293] At the same time, positive trends in some factors would require a compelling explanation by the competent authority of why and how the domestic industry is still injured despite such positive trends.[294]

7.8.3.2 Whether the Indian competent authority evaluated relevant injury factors consistently with Articles 4.1(a) and 4.2(a)

7.8.3.2.1 The share of the domestic market taken by increased imports

7.179. Article 4.2(a) of the Agreement on Safeguards lists the share of the domestic market taken by increased imports among the mandatory factors that a competent authority must evaluate in determining whether increased imports have caused or are threatening to cause serious injury to the domestic industry. In the Final Findings, the Indian competent authority concluded that over the POI the market share of imports increased from 5% to 13%, while the market share of the domestic industry decreased from 45% to 37%.[295] Japan contends that the Indian competent authority failed to properly evaluate and provide a reasoned and adequate explanation regarding the effect of the decline in the domestic industry's market share on the situation of the domestic industry.

7.180. Japan argues that the Indian competent authority failed to explain why a decrease in the domestic industry's market share is indicative of serious injury, given that the domestic demand was expanding and the domestic industry's sales increased. Japan submits that the Indian competent authority failed to consider other reasons why the domestic industry maintained its volume of non-captive sales, but did not meet the increasing demand. Japan suggests, for instance, that the market share of the domestic industry might have decreased due to either a limited domestic production capacity to meet increasing demand, the domestic industry's decision to shift its sales to its captive market, or the increased demand for products that the domestic industry did not produce.[296] Japan also submits that the Indian competent authority focused its analysis on the non-captive segment of the domestic industry, without evaluating the captive segment, and therefore failed to examine the market share with regard to the entire domestic industry.[297]

7.181. India responds that Article 4.2(a) of the Agreement on Safeguards requires a competent authority to evaluate "the share of the domestic market taken by increased imports", which is distinct

---

[289] Appellate Body Report, *US – Lamb*, paras. 124 and 126.
[290] Appellate Body Report, *US – Lamb*, para. 103. See also Panel Reports, *Ukraine – Passenger Cars*, para. 7.248; and *Dominican Republic – Safeguard Measures*, para. 7.260.
[291] Panel Report, *US – Wheat Gluten*, para. 8.80 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 138-139).
[292] Panel Report, *US – Lamb*, para. 7.188.
[293] Panel Report, *US – Wheat Gluten*, para. 8.85 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 139).
[294] Panel Reports, *Thailand – H-Beams*, para. 7.249; *China – Cellulose Pulp*, para. 7.129 (in the context of a similar provision in the Anti-Dumping Agreement).
[295] Final Findings, (Exhibits JPN-11/IND-11), para. 49(c), p. 198.
[296] Japan's first written submission, paras. 279-280; second written submission, paras. 147-149.
[297] Japan's first written submission, paras. 281-290 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204 and 207); second written submission, paras. 150-155.

from the language in the Anti-Dumping Agreement that refers to a "decline" in the domestic industry's market share. India argues that, under Article 4.2(a), a competent authority has to establish whether the domestic industry lost market share to imports.[298] India asserts that its competent authority found that the market share of imports had increased, while the domestic industry's market share had decreased during the same period.[299] India rejects Japan's claim that the market share was evaluated only with respect to the non-captive segment.[300] India submits that the Indian competent authority, when considering market share, examined the entire domestic market, including captive and non-captive sales of the domestic industry, sales of other domestic producers, and imports.[301]

7.182. As we indicated above, when addressing a claim under Article 4.2(a), a panel must consider whether a competent authority has evaluated all relevant factors and has provided a reasoned and adequate explanation of how the facts support its injury determination. There is no disagreement between the parties that the Indian competent authority evaluated the market share of increased imports in its Final Findings. Therefore, the question before us is whether, in its evaluation of the share of the domestic market taken by increased imports, the Indian competent authority provided a reasoned and adequate explanation in the context of the overall examination of the situation of the domestic industry.

7.183. In the Final Findings, the Indian competent authority considered the following data regarding the market shares of imports and the domestic industry:

Table 3: Changes in the level of sales and market shares

Financial Year	Total Import (MT)	Sales of DI (MT)	Sales of other Indian Producers (MT)	Captive Sale of DI(MT)	Captive Sale of Others (MT)	Total Demand (MT)	Market Share (%)	
							DI	Imports
2013-14	1,252,441	10,342,565	2,994,323	4,274,000	4,000,724	22,864,053	45	5
2014-15	2,644,911	9,949,214	3,298,273	5,019,741	4,615,864	25,528,003	39	10
2015-16(Q1)	881,233	2,589,929	1,065,972	1,321,497	1,180,681	7,039,312		
2015-16(A)	3,524,932	10,359,716	4,263,888	5,285,988	4,722,724	28,157,248	37	13

Source: Final Findings, (Exhibits JPN-11/IND-11), para. 49(b), p. 198.

7.184. Based on these data, the Indian competent authority concluded that:

> Imports had a market share of 5% in 2013-14 which increased to 13% during 2015-16(A) whereas the market share of Domestic industry decreased from 45% to 37% during the same period.[302]

7.185. When addressing the interested parties' arguments, the Indian competent authority also noted that the market share of domestic producers outside the domestic industry increased by two percentage points in 2015-2016 compared to 2014-2015.[303]

7.186. Further, in its examination of the situation of the domestic industry, the Indian competent authority stated that:

> Imports have taken away most of share of the increase in demand of the subject goods. In 2014-15, while demand excluding captive increased by [1,303,069] MT and imports increased much more by [1,392,470] MT. This shows the aggressive manner in which imports of the [product under consideration] are entering the Indian market. The domestic industry had raised its capacities foreseeing the increasing demand in India.

[298] India's first written submission, para. 199.
[299] India's first written submission, paras. 199 and 202 (referring to Final Findings, (Exhibit IND-11), para. 49(c), p. 198).
[300] India's first written submission, para. 215.
[301] India's first written submission, paras. 206 and 213.
[302] Final Findings, (Exhibits JPN-11/IND-11), para. 49(c), p. 198. See also ibid. para. 97, p 207.
[303] Final Findings, (Exhibits JPN-11/IND-11), para. 97, p. 207.

> However, the domestic industry is unable to increase its capacity utilization, production and sales.[304]

7.187. We begin by noting that the product concerned (hot-rolled coils) is an intermediate good used in the production of various downstream steel products (e.g. cold rolled sheets, electrical sheets, coating, and plating sheets). The product concerned can be sold externally (open or non-captive market) as well as used internally to manufacture downstream steel products (captive market).[305] In the latter situation, the product concerned is not sold into an open or non-captive market, where it competes with imports, but is transferred internally to an integrated producer. The Indian competent authority's findings above show that, when it assessed the share of the domestic market taken by imports, it considered both the captive and the non-captive segments of the market.

7.188. The market shares of both imports and domestic industry were assessed based on the total demand (captive and non-captive). The domestic industry lost sales and market share in the non-captive segment, while it was able to maintain its market share represented by the captive market (19%).[306] Over the POI, the market share of imports increased by 8 percentage points, while the domestic industry's market share decreased by a similar 8 percentage points. Other domestic producers not part of the domestic industry maintained the same market share during the first two years of POI (13%) and gained 2 percentage points of the market share (15%) towards the end of the POI.[307] The data in table 3 also shows that the total demand in the Indian market for the product concerned grew by 23% from 22,864,053 tonnes to 28,157,248 tonnes over the POI. The domestic industry increased its sales by 1,029,139 tonnes, which allowed it to keep its market share in the captive market. The sales of the domestic industry in the non-captive segment, where it competes with imports, remained nearly the same over the POI. This suggests that the share of the increased demand in the non-captive segment was taken by imports and by domestic producers not part of the domestic industry. Given that the market share of imports increased by 8 percentage points and domestic producers outside the domestic industry gained 2 percentage points, we consider that the Indian competent authority reasonably concluded that "imports have taken away *most* of share of the increase in demand of the subject goods".[308]

7.189. Next, the Indian competent authority considered that, notwithstanding the expanded production capacity[309], the domestic industry could not increase its sales and capacity utilization commensurate with the surge in demand due to the competition with the increased imports.[310] The Final Findings note that the level of capacity utilization of the domestic industry over the POI remained the same, around 76%.[311] In our view, it is not unreasonable for a competent authority to consider that the fact that the domestic industry could not keep its market share in front of increasing demand indicates a negative trend in the situation of the domestic industry, considering that the domestic industry had available production capacity to meet the growing demand.[312]

7.190. Finally, we consider Japan's argument that the Indian competent authority focused its analysis on the non-captive segment of the domestic industry, without evaluating the captive segment. In *US – Hot-Rolled Steel*, the Appellate Body addressed the question of examining captive and non-captive markets in an injury analysis in the context of the Anti-Dumping Agreement. The Appellate Body observed that in an industry "where a significant part of domestic production – captive production – is shielded by the structure of the domestic market from direct competition with imports", a comparison between the captive and the merchant markets is important, because

---

[304] Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.
[305] Japan's first written submission, para. 45.
[306] See table 4 below.
[307] Final Findings, (Exhibits JPN-11/IND-11), paras. 49(b) and 97, pp. 198 and 207.
[308] Emphasis added.
[309] According to the domestic industry's application, in 2011-2013, the domestic industry increased its production capacity from 18,768,996 to 23,568,996 tonnes. (Revised Application, (Exhibits JPN-6/IND-20), p. 15).
[310] Final Findings, (Exhibits JPN-11/IND-11), paras. (i)(cc) and 56, pp. 174 and 201.
[311] Final Findings, (Exhibits JPN-11/IND-11), paras. 49(d) and 50, pp. 199-200.
[312] Japan also argues that the decrease in the market share of the domestic industry might have been due to the fact that the increase in demand was for products that were not produced by the domestic industry. (Japan's first written submission, para. 280). We do not view such an enquiry to be necessary in the context of Article 4.2(a). We consider that the increase in demand for certain products or change in consumer preferences may be regarded as a non-attribution factor under the second sentence of Article 4.2(b).

it "enhances" the ability of the investigating authorities to make an appropriate determination about the state of the domestic industry as a whole.[313] The examination of only one part of the domestic industry may lead "[to] highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry".[314] The Appellate Body stated that "the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[315] We find that these considerations are equally applicable to the similarly worded provisions concerning injury analysis in the Agreement on Safeguards.

7.191. As we indicated above, the Indian competent authority considered both captive and non-captive segments in its evaluation of market shares. The facts of the present case do not suggest that the deterioration of the situation of the domestic industry in the non-captive market happened due to shift of sales from non-captive to captive markets, as Japan alleged.[316]

Table 4: Domestic industry's market share

Year	Domestic Industry			Total Demand
	Non-Captive	Captive	Total	
2013-2014	10,342,565 (45%)	4,274,000 (19%)	14,616,565 (64%)	22,864,053
2014-2015	9,949,214 (39%)	5,019,741 (20%)	14,968,955 (59%)	25,528,003
2015-2016 (A)	10,359,716 (37%)	5,285,988 (19%)	15,645,704 (56%)	28,157,248

Source: Japan's first written submission, p. 82.

7.192. As indicated in the Final Findings, the domestic industry's market share in the non-captive market decreased by eight percentage points during the POI, from 45% to 37%. The data on the domestic industry's captive sales show that the market share of the domestic industry represented by the captive segment remained stable over the POI (19%). Notably, the market share of the domestic industry covering both the captive and the non-captive segments also decreased by eight percentage points from 64% to 56%. Even though the share of captive sales increased by one percentage point in 2014-2015 in comparison to 2013-2014, this change does not fully explain the decrease of the domestic industry's market share by eight percentage points over the POI and thus does not distort the findings of the Indian competent authority.

7.193. In light of the foregoing, we conclude that Japan has not demonstrated that the Indian competent authority failed to properly evaluate and provide reasoned and adequate explanations regarding the effect of the decline in the domestic industry's market share on the situation of the domestic industry.

7.8.3.2.2 Profits and losses

7.194. Article 4.2(a) of the Agreement on Safeguards specifies "profits and losses" among the relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry that a competent authority must evaluate in its serious injury analysis. In the Final Findings, the Indian competent authority found that the profitability of the domestic industry declined sharply in the first quarter of 2015-2016 and the domestic industry recorded losses.[317] The Indian competent authority considered that "[t]he major reason for decline in profitability of domestic industry is the increased imports at reduced prices".[318] Article 4.2(a) of the Agreement on Safeguards does not list prices among the mandatory factors that a competent authority must evaluate in its injury analysis. The list of relevant factors provided in Article 4.2(a), however, is not exhaustive and a competent authority can and should evaluate any other relevant factors that have a bearing on the situation of the domestic industry. Japan challenges the Indian competent

[313] Appellate Body Report, *US – Hot-Rolled Steel*, para. 207.
[314] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[315] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[316] Japan's first written submission, para. 280; second written submission, para. 155.
[317] Final Findings, (Exhibits JPN-11/IND-11), para. 49(f), p. 199.
[318] Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

authority's evaluation of domestic industry "profits and losses" as well as the effect the import prices had on the domestic industry's prices.

7.195. First, Japan submits that the Indian competent authority failed to provide an adequate explanation regarding the effect of the decrease in the domestic industry's prices (from 100 to 83) on its financial condition, considering that the costs of sales also decreased (from 100 to 94) (all indexed). For Japan, the indication that the domestic prices declined "much more sharply" is not a sufficient explanation of the effect of this factor on the domestic industry, especially given that it is based exclusively on indexed data.[319] Second, Japan submits that the Indian competent authority failed to consider the data on profitability pertaining to the entire POI, because it focused only on the recent data. In particular, the Indian competent authority referred to the decrease in profitability in the first quarter of 2015-2016 and failed to take into account the increase in profitability in 2013-2014 and 2014-2015.[320] Third, Japan argues that the Indian competent authority failed to evaluate these two factors with regard to the entire domestic industry, when it excluded information regarding price trends and profitability in the captive segment of the market.[321]

7.196. India refers to the Final Findings that the import prices declined sharply from 100 to 78 and the domestic industry's prices declined from 100 to 83, while the domestic industry's cost of sales decreased only from 100 to 94 (all indexed), which led to a decline in profitability for the domestic industry. India notes that the domestic industry's prices declined more sharply than the cost of sales.[322] India further submits that profitability declined substantially in the first quarter of 2015-2016, leading to losses.[323] India argues that the domestic industry's profitability was analysed over the entire POI, and the fact that the domestic industry was profitable in the preceding two years of the POI and had losses at the end of the POI indicates that there was a serious injury to the domestic industry. India adds that the data from the most recent past have special importance.[324] With regard to Japan's argument on the captive market, India replies that the captive production was considered when evaluating production, demand, inventory, and capacity utilization. India argues that captive production cannot be considered for sales data and profitability, because the captive segment does not involve sales transactions.[325]

7.197. In the Final Findings, the Indian competent authority stated that:

> [T]he domestic Industry was always under consistent pressure to either reduce their prices to match the import prices or to hold on to their prices. The penetration of increased imports at an unprecedented high level was such that even after reducing the prices, the domestic industry was not able to keep on to its market share. This has resulted into losses during 2015-16(Q1) for the domestic industry.[326]

7.198. The Indian competent authority considered the changes in import prices, and in the domestic industry's prices, costs, and profitability as follows:

[319] Japan's first written submission, paras. 292-296; second written submission, para. 158.
[320] Japan's first written submission, para. 302; second written submission, paras. 162-163.
[321] Japan's first written submission, paras. 297 and 303; second written submission, paras. 159-160 and 164.
[322] India's first written submission, paras. 217-218 and 222 (referring to Final Findings, (Exhibit IND-11), paras. 49(f) and 49(g), pp. 199-200).
[323] India's first written submission, paras. 218 and 222.
[324] India's first written submission, para. 223 (referring to the Appellate Body Report, *US – Lamb*, para. 138).
[325] India's response to Panel question No. 49.
[326] Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(a), pp. 199-200.

Table 5: Changes in prices and profitability

Components (Indexed)	Unit	2013-14	2014-15	2015-16 (Q1)
Cost of Sales	INR/MT	100	97	94
Weighted average sales realization[327]	INR/MT	100	99	83
Landed price of imports	INR/MT	100	95	78
Profit/ (Loss)	INR/MT	100	136	(114)

Source: Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(a), p. 200.

7.199. Based on the above data, the Indian competent authority noted that:

> It is seen from above that while the Index of cost of sales come down from 100 to 94, the landed price of imports declined sharply from 100 to 78 leading to reduction in sales realization which declined from 100 to 83. While comparing the sales realization vis-à-vis cost of sales, it is observed that the sales realization declined much more sharply than the cost of sales. There was as substantial decline in profitability index from 136 in 2014-15 to (114) in 2015-16 (Q1).[328]

7.200. In its examination of the situation of the domestic industry, the Indian competent authority concluded that "[t]he major reason for decline in profitability of domestic industry is the increased imports at reduced prices".[329]

7.201. Similarly to its arguments regarding the market share analysis, Japan submits that the Indian competent authority failed to consider the captive segment of the domestic industry in its evaluation of the domestic industry's prices and profitability.

7.202. As India noted, since the captive market does not involve commercial transactions, there are no price data available for the captive market. Furthermore, as discussed above, the Indian competent authority considered the domestic industry's sales in both the captive and the non-captive segments of the market, and found that the domestic industry lost sales to imports in the non-captive market. Given that the domestic industry competes with imports in the non-captive market, we consider that it was reasonable to compare import prices with the domestic industry's prices, and associated profitability, in the non-captive market. Therefore, we do not think that an additional explanation with regard to prices and profitability in the captive market was necessary in light of the facts of this case.

7.203. We also disagree with Japan's argument that the use of indexed data distorted the evaluation of prices, given that the Indian competent authority's conclusion is based on the analysis of trends in costs and prices of the domestic industry as well as trends in import prices. India explained that its competent authority conducted the price analysis on the basis of actual data from the domestic industry and indexed figures were used in published reports in order to comply with the confidentiality requirement under Article 3.2 of the Agreement on Safeguards.[330]

7.204. Nonetheless, a sharp decline in prices occurred only in the first quarter of 2015-2016, as compared to the preceding full financial years, where the domestic industry's prices were stable and declined marginally from 100 to 99 (indexed). These trends warrant a reasoned and adequate explanation from the Indian competent authority as to why valid conclusions may be drawn by comparing the average prices of full financial years to the average prices of a quarter. In particular, the Indian competent authority should have provided a sufficient explanation of why it could exclude

[327] In response to Panel question No. 114, India clarified that "[w]eighted average sales realization" refers to "the weighted average of the average sales realization of all the applicant companies. The average sales realization and the quantity of all the applicant companies were multiplied respectively and the combined total then divided by the total sales quantity to arrive at the weighted average sales realization. The cost of sale is also weighted similarly".

[328] Final Findings, (Exhibits JPN-11/IND-11), para. 49(g)(ii)(b), p. 200.

[329] Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

[330] India's first written submission, para. 265.

the fact that the higher rate of price decrease in the first quarter of 2015-2016 might reflect a seasonal or temporal downturn in prices in a given quarter of the year.[331]

7.205. Furthermore, the data on profitability show that the domestic industry remained profitable during most of the POI and experienced losses only during the last three months, i.e. the first quarter of 2015-2016. The Indian competent authority relied on the losses suffered by the domestic industry in the first quarter of 2015-2016 as one of the main indicators of serious injury to the domestic industry. It considered that the decline in market share of the domestic industry and the decline in import prices led to the financial losses recorded by the domestic industry. In our view, even though the losses in the first quarter of 2015-2016 refer to the most recent data available over the POI, the competent authority should have evaluated this information in the context of the entire POI.[332] As seen from the above table, the domestic industry's profits increased considerably from 100 to 136 (indexed) in 2014-2015 compared to base year of 2013-2014. The losses in the first quarter 2015-2016 refer to three months only, April-June 2015, and were compared with the profitability rate of full financial years of 2013-2014 and 2015-2016. In our view, this analysis warrants an explanation by the Indian competent authority of why a comparison of three-months data of the first quarter of 2015-2016 to the full financial years is valid, especially considering the sharp change between gaining considerable profits during the most of the POI and suffering losses during the last three months of the POI. In particular, the Indian competent authority should have provided a reasoned and adequate explanation of why it could exclude the fact that the losses in the first quarter of 2015-2016 might reflect a seasonal or temporal circumstance.

7.206. We conclude that the Indian competent authority failed to properly evaluate and sufficiently explain the changes in import prices and their effect on the domestic industry's prices and therefore on profitability.

7.8.3.2.3 Evaluation of injury factors showing stable or positive trends

7.207. Japan argues that the Indian competent authority failed to explain its finding of serious injury suffered by the domestic industry, given the positive trends in certain injury factors.[333] Japan submits that most of the injury factors, such as production, sales, capacity utilization, employment, productivity, and inventories, showed stable or positive trends. Japan contends that the Indian competent authority should have explained why it determined the existence of serious injury for the domestic industry, despite the evidence that these factors showed stable or positive trends.[334]

7.208. India responds that a competent authority is not required to explain in detail how each factor individually supports the finding of serious injury for the domestic industry or to show a negative trend in each factor to justify its finding of serious injury.[335] India disagrees with Japan that its competent authority failed to provide an adequate explanation regarding changes in the level of sales, capacity utilization, employment, productivity, and inventories. According to India, its competent authority considered that, regardless of the increase in demand, the production, employment, and sales of the domestic industry "have remained stagnant", which indicates the existence of serious injury to the domestic industry.[336]

---

[331] In the context of our examination of Japan's claims under Article 4.2(b), we also conclude that the Indian competent authority failed to properly examine the price competition between imported and domestic products, when it based its price comparison on the average unit price of imported products and the average unit price of the like or directly competitive domestic products (see para. 7.256 below).

[332] The Appellate Body in *US – Lamb* stated that:

> 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.

(Appellate Body Report, *US – Lamb*, para. 138).

[333] Japan's first written submission, para. 275.

[334] Japan's first written submission, paras. 306-309 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.313); second written submission, paras. 165-167.

[335] India's first written submission, paras. 194-195 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 139; and Panel Report, *US – Lamb*, para. 7.203).

[336] India's first written submission, para. 197 (referring to Final Findings, (Exhibit IND-11), para. 56, p. 201).

7.209. We recall that pursuant to Article 4.2(a) of the Agreement on Safeguards a competent authority must determine serious injury on the basis of the overall position of the domestic industry, considering all the relevant factors having a bearing on the situation of that industry.[337] A competent authority should take into account the totality of the trends in injury factors and their interaction.[338] If a number of injury trends show a positive trend or an improvement in the situation of the domestic industry, the competent authority would need to provide a compelling explanation of why and how the domestic industry is injured despite such positive trends.[339] Therefore, we will examine whether, in its evaluation of positive trends of the domestic industry and their interaction with other trends, the Indian competent authority provided a reasoned and sufficient explanation in its Final Findings.

7.210. The Indian competent authority evaluated the following factors having a bearing on the situation of the domestic industry: production, changes in the level of sales, market share, capacity utilization, employment, productivity, profits and losses, inventories, and price effects. It found that several factors remained "stagnant" over the POI:

Table 6: Factors analysed by India

Injury Factor	2013-2014	2014-2015	2015-2016(Q1)	2015-2016 (Annualized)
Production (MT)	17,881,187	17,836,937	4,456,795	17,827,180
Production (trend)	100	100		100
Capacity utilization	75.9	75.7	-	75.7
Number of Employees (Indexed)	100	100	100	100
Productivity (Indexed) Per employee (MT)	100	100	-	100
Inventories (MT)	636,879	648,290	657,099	-
Inventories (MT) (Indexed)	100	102	103	-

Source: Final Findings, (Exhibits JPN-11/IND-11), pp. 198-199.

7.211. In addition, as noted above, the Indian competent authority observed that the total sales of the domestic industry increased over the POI from 14,616,565 tonnes to 15,645,704 tonnes, mainly due to the increase in captive sales by 1,011,988 tonnes. However, relative to growing consumption, captive sales remained the same (19% of the market share), and non-captive sales went down (market share decreased from 45% to 37%). The domestic industry's prices declined and the domestic industry suffered financial losses.

7.212. The Indian competent authority provided an overall assessment of the situation of the domestic industry, stating:

> From the above analysis it is seen that the demand for the [product under consideration] in India has increased in the injury analysis period. Despite increase in demand, the production, employment and sales of domestic industry have remained stagnant, while inventories have somewhat increased. Imports have taken away most of share of the increase in demand of the subject goods. In 2014-15, while demand excluding captive increased by [1,303,069] MT and imports increased much more by [1,392,470] MT. This shows the aggressive manner in which imports of the [product under consideration] are entering the Indian market. The domestic industry had raised its capacities foreseeing the increasing demand in India. However, the domestic industry is unable to increase its capacity utilization, production and sales. The profitability has gone down drastically and even turned to losses during 2015-16(Q1). The major reason for decline in profitability of domestic industry is the increased imports at reduced prices. If the same trend continues, the domestic industry fears that they would be forced to shut down their operations.[340]

[337] Panel Reports, *US – Wheat Gluten*, para. 8.80; *US – Lamb*, para. 7.188.
[338] Panel Report, *US – Wheat Gluten*, para. 8.85.
[339] Panel Reports, *Thailand – H-Beams*, para. 7.249; *China – Cellulose Pulp*, para. 7.129 (in the context of a similar provision in the Anti-Dumping Agreement).
[340] Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201.

7.213. We disagree with Japan that India failed to provide any explanation regarding the positive trends in certain injury factors. The fact that several factors showed some amelioration or did not show a deteriorating trend at all does not necessarily imply an improvement in the performance of the domestic industry. The Indian competent authority explained that, despite the increase in demand, many factors remained "stagnant" during the POI. The Indian competent authority found that the demand for the product concerned had increased from 22,864,053 tonnes to 28,157,248 tonnes (a 23% increase) over the POI. The domestic industry increased its production capacity anticipating the market expansion[341], but was not able to increase its production, non-captive sales, and capacity utilization. In our view, it is not unreasonable for a competent authority to consider that "stagnant" trends in several injury factors in light of a considerable increase in demand, may constitute negative trends in the overall situation of the domestic industry. In the present case, the Indian competent authority noted that the domestic industry increased its production capacity and had available capacity to meet the growing demand, but its performance did not improve in step with the increasing demand.

7.214. We conclude that Japan has not demonstrated that India failed to explain its finding of serious injury suffered by the domestic industry, given the positive trends in certain injury factors.

7.8.3.2.4 Conclusion

7.215. We note that the Indian competent authority based its conclusion on the situation of the domestic industry largely on the fact that the domestic industry's market share and prices decreased leading to financial losses. We have found above that the Indian competent authority failed to properly evaluate the domestic industry's prices and profitability and to provide a reasoned and adequate explanation of these factors in light of its overall conclusion on the situation of the domestic industry. For these reasons, we find that Japan has demonstrated that India acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards in its assessment of the situation of the domestic industry.

7.8.3.3 Whether the Indian competent authority failed to base its serious injury determination on objective data

7.216. Japan contends that India acted inconsistently with Article 4.2(a) of the Agreement on Safeguards by failing to base its determination of serious injury on objective data. Japan submits that the Indian competent authority based its analysis of the injury factors in 2015-2016 on the data pertaining to the first quarter of 2015-2016. Japan argues that the Indian competent authority failed to explain its assumption that the data for the first quarter of 2015-2016 are representative of the entire year and thus could be annualized.[342] India denies Japan's claim that the serious injury analysis was not based on objective data. India submits that the data for the first quarter of 2015-2016 have been annualized to make a proper comparison with the data for previous years.[343]

7.217. We recall that the POI in the underlying investigation covered three financial years (i) 2013-2014, (ii) 2014-2015, and (iii) 2015-2016 (annualized). Before the Panel, India asserts that the POI was, in fact, from 1 April 2013 to 30 June 2015, covering two financial years and three months.[344] India asserts that the first quarter of 2015-2016 was only annualized to make the data of this period comparable to the full year data of the preceding periods.[345] The Indian competent authority used annualized data for the last financial year of POI, when it evaluated most of the injury factors, namely production, changes in the level of sales, market share, capacity utilization, employment, and productivity.[346] These factors are listed in Article 4.2(a) of the Agreement on Safeguards among the relevant factors "of objective and quantifiable nature" having a bearing on

[341] According to the domestic industry's application, in 2011-2013, the domestic industry increased its production capacity from 18,768,996 to 23,568,996 tonnes. (Revised Application, (Exhibits JPN-6/IND-20), p. 15).
[342] Japan's first written submission, paras. 310-315; second written submission, paras. 171-173.
[343] India's first written submission, paras. 228-230.
[344] India's response to Panel question No. 29.
[345] India's first written submission, para. 230; responses to Panel question Nos. 29 and 31.
[346] Final Findings, (Exhibits JPN-11/IND-11), para. 49, pp. 199-200.

the situation of the domestic industry that a competent authority must evaluate in its serious injury analysis.

7.218. We recall that the phrase "factors of objective and quantifiable nature" in Article 4.2(a) implies that the injury factors must be evaluated based on objective data and evidence.[347] We have found above that the Indian competent authority failed to evaluate the rate and amount of increase in imports on the basis of objective data, when it based its analysis of the increase in imports at least partly on annualized data.[348] We reach the same conclusion with regard to use of the annualized data in the Indian competent authority's serious injury analysis. Since data were annualized in order to make them comparable with those of previous years, this required a compelling explanation from the Indian competent authority as to why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. The Preliminary and Final Findings do not contain any explanation in this respect.

7.219. Therefore, we find that India acted inconsistently with Article 4.2(a) of the Agreement on Safeguards, when it based its analysis of injury factors at least partly on annualized data.[349]

7.8.4 Threat of serious injury

7.220. Article 2.1 of the Agreement on Safeguards provides that a Member can apply safeguard measures when the product concerned "is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions *as to cause or threaten to cause serious injury* to the domestic industry that produces like or directly competitive products".[350] Article 4.1(a) defines the term "serious injury" as "a significant overall impairment in the position of a domestic industry". Article 4.1(b) defines the term "threat of serious injury" as follows:

> "[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[.]

7.221. Japan argues that the Indian competent authority does not appear to have made findings on a threat of serious injury, however to the extent it did, Japan submits that such determination of threat of serious injury is inconsistent with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards.[351] Japan submits that the alleged determination of "further threat of greater serious injury" lacks any legal basis under the Agreement on Safeguards and is, in any case, irrelevant.[352] India asserts that its competent authority made a finding of both serious injury and threat of serious injury.[353]

7.222. The question of simultaneous determinations of serious injury and threat of serious injury was discussed by the Appellate Body in *US – Line Pipe*. The Appellate Body stated that the phrase "cause or threaten to cause serious injury" in Article 2.1 covers a finding of serious injury, threat of

---

[347] See para. 7.137 above. In *US – Lamb*, the Appellate Body noted that:

> We recognize that the clause "of an objective and quantifiable nature" refers expressly to "factors", but not expressly to data. We are, however, convinced that factors can only be "of an objective and quantifiable nature" if they allow a determination to be made, as required by Article 4.2(b) of the *Agreement on Safeguards*, on the basis of "objective evidence". Such evidence is, in principle, objective data. The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors.

(Appellate Body Report, *US – Lamb*, para. 130. (emphasis original)).

[348] See para. 7.145 above.

[349] We also note Japan's argument that the Indian competent authority failed to base its decision on objective data, because the figures for inventories, production, and sales for any given year of the POI do not match. India responds that these figures were duly verified from the records of the domestic industry and are correct. Since we have already found that India acted inconsistently with Article 4.2(a), by failing to base its injury analysis on objective data, we do not need to address this argument.

[350] Emphasis added.

[351] Japan's first written submission, paras. 325-331; second written submission, paras. 181-183.

[352] Japan's first written submission, para. 324; second written submission, paras. 177-180.

[353] India's response to Panel question No. 47.

serious injury, or both in combination.[354] The Appellate Body clarified that "serious injury" is often "the realization of a threat of serious injury" and it may be difficult to discern the precise point where a "threat of serious injury" becomes "serious injury":

> [T]here is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the *Agreement on Safeguards*, the precise point where a "threat of serious injury" becomes "serious injury" may sometimes be difficult to discern. But, clearly, "serious injury" is something *beyond* a "threat of serious injury".[355]

7.223. In other words, a threat of serious injury means a significant overall impairment in the position of a domestic industry, which has not yet materialized, but it is "clearly imminent".[356] The threat of serious injury emerges before and precedes a serious injury. The use of the word "imminent" means that "the anticipated 'serious injury' must be on the very verge of occurring".[357] Article 4.1(b) specifies that a threat of serious injury must be based on "facts and not merely on allegation, conjecture or remote possibility". Accordingly, a finding of threat of serious injury "whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation" and "supported by specific evidence and adequate analysis".[358]

7.224. Turning to the facts of this dispute, in the last section of its Final Findings titled "Recommendations", the Indian competent authority concluded that the increased imports of the product concerned into India "have caused serious injury or are threatening to cause serious injuries" to the domestic industry and that it would be in the public interest to impose safeguard duties on imports of the product concerned into India for a period of two years and six months.[359]

7.225. Earlier, in the section titled "Determination of Serious Injury and Threat of Serious Injury", the Indian competent authority noted that the determination of "serious injury or threat of serious injury" must include evaluation of all relevant factors having a bearing on the situation of the domestic industry.[360] After considering all relevant factors, the Indian competent authority found that there was a "significant overall impairment" in the situation of the domestic industry, and that the domestic industry "suffered serious injury as a result of the increased imports of the [product concerned]". The Indian competent authority further considered that, due to the surplus production capacities available to foreign producers, the imports would continue to increase. Considering the likelihood of a further increase in imports, it concluded that there was "a threat of further serious injury to the domestic market".[361] The Final Findings provide as follows:

> [A]n evaluation of the overall position of the DI, in light of all the relevant factors having a bearing on the situation of the DI, shows a 'significant overall impairment'. It is thus concluded that *Domestic Industry has suffered serious injury as a result of increased imports of the* [product under consideration].
>
> There is a serious injury to the domestic industry due to the surge of imports and the most recent trend of import volumes entering India. The volume of imports continues to increase, despite already being at high levels. The market share of imports has also substantially increased over the period. Considering the surplus production capacities available with the foreign producers, the imports will continue to increase, as is evident from the post POI analysis at Para-100 resulting in further injury to the domestic

[354] Appellate Body Report, *US – Line Pipe*, para. 171.
[355] Appellate Body Report, *US – Line Pipe*, para. 168. (emphasis original; fn omitted)
[356] Panel Report, *Ukraine – Passenger Cars*, para. 7.224.
[357] Appellate Body Report, *US – Lamb*, para. 125.
[358] Panel Report, *Argentina – Footwear (EC)*, paras. 8.283-8.285.
[359] Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 208.
[360] Final Findings, (Exhibits JPN-11/IND-11), paras. 48-49, p. 198.
[361] Final Findings, (Exhibits JPN-11/IND-11), para. 59, p. 201.

> industry. The likelihood of further increased import leads to a conclusion that there is *a threat of further serious injury to the domestic market*. In view of the fact, that the domestic industry is unable to make profitable sales in the Indian market, I am of the view that in absence of levy of safeguard duty, the Domestic Industry faces serious injury and *a further threat of greater serious injury*.[362]

7.226. Therefore, the Indian competent authority concluded that the domestic industry suffered "serious injury" and there was "a further threat of greater serious injury". In other words, it found the existence of serious injury to the domestic industry and that there was a risk of a further deterioration of the situation of this industry. The Indian competent authority did not make any finding that the serious injury had not yet materialized. On the contrary, the Final Findings clearly state that there was a "significant overall impairment" in the situation of the domestic industry and that the latter suffered serious injury.

7.227. In response to a question from the Panel on where a finding of threat of serious injury could be found in the Final Findings, India referred to its analysis of the relevant injury factors provided for in Article 4.2(a).[363] It is true that when making a determination of serious injury or threat of serious injury, a competent authority must evaluate all relevant factors identified in Article 4.2(a). However, when making a determination of threat of serious injury, such evaluation must involve "a fact-based assessment of likely developments in the very near future with respect to all the relevant factors".[364] The Indian competent authority's evaluation of the relevant injury factors does not include any evidence or assessment of their likely developments in the near future. As discussed above, following the evaluation of all relevant injury factors, the Indian competent authority explicitly concluded that the domestic industry suffered serious injury.

7.228. India also submits that the finding of threat of serious injury is reflected in the evaluation of post POI data.[365] The Indian competent authority evaluated changes in some injury factors in the period between the first and the second quarters of 2015-2016 in order to "draw a clear inference about the possibility of accentuation of the injury to the domestic industry".[366] This analysis showed that in the second quarter of 2015-2016 the volume of imports increased by 30% and the market share of imports grew by 2 percentage points. In the same period, the domestic industry increased its sales by only 1%, while its market share and production declined by 2 percentage points and 6% respectively. The domestic industry increased its inventories and suffered financial losses.[367] The Indian competent authority reiterated that "the domestic industry has suffered serious injury" and that the analysis of post POI data showed that "the position of domestic industry further deteriorated".[368]

7.229. In our view, the examination of post POI data has been provided by the Indian competent authority in support of its conclusion of the current serious injury and further deterioration of the situation of the domestic industry, and does not constitute a stand-alone analysis of threat of serious injury within the meaning of Article 4.1(b).

7.230. In light of the foregoing, we consider that the Indian competent authority's findings refer to the existence of serious injury. On their face, the Final Findings do not show that the Indian competent authority conducted an analysis of the "threat of serious injury" within the meaning of Article 4.1(b), i.e. a "serious injury that is clearly imminent". Rather, the Indian competent authority found that the domestic industry suffered serious injury and that there was a threat that the serious injury would continue to exist in the future and that the situation of the domestic industry might deteriorate to a greater extent due to the surplus production capacities available to foreign producers and the likelihood of a further increase in imports. The Indian competent authority's reference to a "threat of serious injury" in its conclusions and recommendations is not supported by any analysis or evidence in the Final Findings. Therefore, we find that the Indian competent authority's conclusion that the increased imports of the product concerned are threatening to cause serious injury to the

[362] Final Findings, (Exhibits JPN-11/IND-11), paras. 58-59, p. 201. (emphasis added)
[363] India's response to Panel question No. 47.
[364] Panel Report, *Ukraine – Passenger Cars*, para. 7.234.
[365] India's response to Panel question No. 47.
[366] Final Findings, (Exhibits JPN-11/IND-11), para. 100, p. 207.
[367] Final Findings, (Exhibits JPN-11/IND-11), para. 101, p. 208. We also note that the analysis of the post POI data does not include evaluation of all relevant factors listed in Article 4.2(a).
[368] Final Findings, (Exhibits JPN-11/IND-11), paras. 102(ii) and (vi), p. 208.

domestic industry is inconsistent with Articles 4.1(b) and 4.2(a), because the existence of a threat of serious injury was not adequately addressed or analysed in the Final Findings.

7.8.5 Consequential claim under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

7.231. We have found above that India acted inconsistently with Articles 4.1(a) and (b), and 4.2(a) of the Agreement on Safeguards. In the preceding sections of this Report, we have also found that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In light of this, we see no need to address Japan's consequential claims that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to its assessment of the situation of the domestic industry. We therefore exercise judicial economy and decline to make findings on these claims.

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

7.9.1 Introduction

7.232. Japan claims that India acted inconsistently with Article 4.2(b) of the Agreement on Safeguards by failing to determine the existence of a causal link between the increased imports and the serious injury and to ensure that the injury caused by other factors was not attributed to the injury caused by the increased imports. As a consequence, Japan also claims that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[369] Having concluded that the Indian competent authority's findings on the increased imports and the existence of serious injury are inconsistent with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards, it would normally not be necessary to address Japan's claims whether the Indian competent authority demonstrated the existence of the causal link between the increased imports and serious injury.[370] Nevertheless, in light of the circumstances of the present case and with a view to assisting the parties to arrive at a positive solution to the dispute, we will consider Japan's claims on the causal link and non-attribution analyses.

7.9.2 Article 4.2(b) of the Agreement on Safeguards

7.233. Article 4.2(b) of the Agreement on Safeguards reads as follows:

> The determination referred to in subparagraph (a) [that increased imports have caused or are threatening to cause serious injury to a domestic industry] shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. 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.

7.234. Article 4.2(b) of the Agreement on Safeguards provides two distinct legal requirements. First, a competent authority should demonstrate that there is a causal link between the increased imports and the serious injury to the domestic industry (causation requirement). Second, the serious injury caused by factors other than the increased imports must not be attributed to the increased imports (non-attribution requirement).[371]

7.235. The Agreement on Safeguards does not provide any specific methodology as to how the existence of a causal link has to be determined. The Panel will have to consider whether the Indian competent authority provided a reasoned and adequate explanation of its finding that there is a causal link between the increased imports and the serious injury suffered by the domestic industry. Previous panels in assessing whether a Member has fulfilled the causation requirement considered,

[369] Japan's first written submission, paras. 334-335; second written submission, para. 187.
[370] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145; Panel Reports, *Argentina – Preserved Peaches*, para. 7.135; *Dominican Republic – Safeguard Measures*, paras. 7.327-7.329.
[371] Appellate Body Report, *US – Line Pipe*, para. 208.

among other factors (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned, and reasonable explanation was provided as to why nevertheless the data show causation; and (ii) whether the conditions of competition between the imported and domestic products as analysed demonstrate the existence of a causal link between the imports and any serious injury.[372]

7.236. Upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist.[373] A coincidence in trends by itself cannot prove causation. However, an absence of coincidence would create "serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present".[374] Apart from the coincidence analysis, the competent authority may also use other analytical tools to determine the existence of a causal link, for instance, an analysis of the conditions of competition between imported and domestic products.[375] The relevance of the conditions of competition is confirmed by the text of Article 2.1 of the Agreement on Safeguards, which refers to the increased imports occurring "under such conditions" as to cause or threaten to cause serious injury to the domestic industry.[376]

7.237. The second sentence of Article 4.2(b) requires that a competent authority examine factors other than increased imports which are causing injury to the domestic industry simultaneously with the increased imports, and ensure that the injury caused by such other factors not be attributed to the increased imports. The Appellate Body clarified that in order to comply with this requirement a competent authority must "make an appropriate assessment" of the injury caused to the domestic industry by the other factors and provide a "satisfactory explanation of the nature and extent of the injurious effects of the other factors".[377] Once a competent authority determines that there are other factors causing injury to the domestic industry, it "must separate and distinguish" the injurious effects of the increased imports from the injurious effects of other factors, and "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports".[378]

7.238. In order to demonstrate that increased imports are causing serious injury, a competent authority must find a "sufficiently clear contribution" by those imports and explain its determination in that regard. The Appellate Body has stated, however, that the increased imports do not need to be the sole cause of injury, and that the causal link between increased imports and serious injury may exist even though other factors are also contributing at the same time to the situation of the domestic industry.[379] In addition, when a competent authority considers that there are no other factors causing injury to the domestic industry, this must be clearly indicated and explained in its determination.[380]

---

[372] Panel Reports, *Argentina – Footwear (EC*), para. 8.229 (confirmed in Appellate Body Report, *Argentina – Footwear (EC)*, para. 145); *US – Wheat Gluten*, para. 8.91; and *US – Lamb*, para. 7.232.

[373] Panel Reports, *US – Steel Safeguards*, para. 10.299. That panel also recognized that in some cases a lag may exist between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry. (Ibid.).

[374] Panel Report, *Argentina – Footwear (EC)*, para. 8.238 (emphasis original). See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[375] Panel Reports, *US – Steel Safeguards*, paras. 10.314-10.316.

[376] Appellate Body Report, *US – Wheat Gluten*, paras. 76-78.

[377] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 226; *US – Line Pipe*, para. 215.

[378] Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

[379] The Appellate Body in *US – Wheat Gluten* stated:

> Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that "*other* factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing, "at the same time", to the situation of the domestic industry*.

(Appellate Body Report, *US – Wheat Gluten*, para. 67 (emphasis original); see also Panel Report, *China – Cellulose Pulp*, paras. 7.26-7.27).

[380] Panel Report, *Ukraine – Passenger Cars*, para. 7.334.

7.9.3 Causal link analysis

7.239. Japan contends that India acted inconsistently with the first sentence of Article 4.2(b) by failing to determine the existence of a causal link between the increased imports and the serious injury and threat thereof to the domestic industry.

7.240. First, Japan submits that in the present case movements in imports and movements in injury factors did not coincide in time and were not directly correlated.[381] Japan argues that in its causal link analysis the Indian competent authority compared import trends with changes in only two injury factors, namely market share and domestic prices, and failed to take into account all injury factors in order to demonstrate the "overall coincidence".[382] Japan submits that most of the injury factors remained stable or even improved during the POI (i.e. production, sales, capacity utilization, employment, productivity, and inventories).[383] Japan further submits that while the imports increased continuously over the POI, the profitability also increased and turned into losses only in the first quarter of 2015-2016. Similarly, the domestic prices remained stable over most of the POI and decreased only in the first quarter of 2015-2016. Japan adds that the Indian competent authority examined the relationship between movements in imports and injury factors by comparing the data at the beginning and at the end of the POI, without considering intermediate import trends and corresponding changes in injury factors over the POI.[384]

7.241. Second, Japan argues that if there is no overall coincidence between trends in imports and injury factors, a competent authority should provide a compelling explanation as to why the causal link exists.[385] Japan submits that the Indian competent authority failed to explain why factors mentioned in the Final Findings showed that the increased imports of the product concerned caused serious injury to the domestic industry. In particular, Japan takes issue with the conclusion that imports (i) prevented the domestic industry from sustaining its prices; (ii) prevented the domestic industry from increasing its production and sales to meet the increased demand; and (iii) led to a sharp decline in profitability and to the losses suffered by the domestic industry.[386] With respect to price analysis, Japan argues that the Indian competent authority's price analysis is distorted, since it is based on a simple comparison between a unit average price of imported products and a unit average price of domestic products, without addressing differences in categories and prices between various products.[387] Japan also argues that the Indian competent authority based its analysis on an end-to-end comparison of prices and failed to consider intermediate trends.[388] With respect to domestic production and sales, Japan submits that the Indian competent authority failed to explain its assumption that, in the absence of the increased imports, the domestic industry should have been able to increase its production and sales in proportion to the increase in demand.[389] With respect to profitability, Japan argues that an end-to-end point comparison between profitability and import volumes and prices cannot show the existence of a causal link. Japan submits that between 2013-2014 and 2014-2015 the domestic industry was able to increase profitability and maintain its sales and prices, while the volume of imports increased and the import prices decreased.[390] According to Japan, the Indian competent authority failed to take into account other factors that might have had an impact on the domestic industry's prices, profitability, and ability to increase its production and sales.[391]

---

[381] Japan's first written submission, para. 350; second written submission, para. 193.
[382] Japan's first written submission, para. 355; second written submission, para. 194.
[383] Japan's first written submission, paras. 355-356; second written submission, paras. 194-195.
[384] Japan's first written submission, para. 354; second written submission, para. 196.
[385] Japan's first written submission, paras. 345 and 357; second written submission, para. 197.
[386] Japan's first written submission, paras. 357-359; second written submission, paras. 197-198.
[387] Japan's first written submission, paras. 360-362; second written submission, para. 201.
[388] Japan's first written submission, para. 363; second written submission, para. 202. Japan also argues that the Indian competent authority's price analysis did not allow drawing any meaningful conclusion because it was based on indexed data. (Japan's first written submission, para. 365; second written submission, paras. 203-204). We have rejected the same argument of Japan in para. 7.203 above in the context of Japan's claim under Articles 4.1(a) and 4.2(a). The same reasoning with regard to this argument stands in the context of Japan's claim under Article 4.2(b) and we see no reason to address this argument again.
[389] Japan's first written submission, paras. 368-369; second written submission, paras. 205-206.
[390] Japan's first written submission, paras. 371-375; second written submission, paras. 208-209.
[391] E.g. decline in the prices of raw materials (coal and iron ore), the increase of sales by the Indian producers outside the domestic industry, insufficient domestic production capacity, the domestic

7.242. India responds that its authority has established the existence of a causal link between the increase in imports and serious injury consistently with Article 4.2(b). India submits that an "overall" coincidence in movements in imports and injury factors is what matters in a causal link analysis. In India's view, a slight absence of coincidence in the changes of individual injury factors in relation to import trends does not preclude a finding of a causal link between increased imports and serious injury.[392] India submits that its authority recorded a coincidence of the increase in imports and changes in injury factors. In particular, when the imports increased, the domestic industry's market share and profitability declined. India underlines that the volume of imports in absolute terms increased almost three times while the domestic industry lost its market share (from 45% to 37%), the domestic prices declined, and the domestic industry suffered losses.[393] India also argues that a competent authority is required to establish a relationship between movements in imports and those factors which are indicative of injury. India disagrees with Japan that a causation analysis with regard to all injury factors is required.[394]

7.243. India submits that the domestic industry's price declined from 100 to 83 and the import prices also declined from 100 to 78 (indexed). India argues that import and domestic prices moved in tandem throughout the POI, which demonstrates that the domestic industry could not have increased its prices in the presence of the increased imports.[395] Regarding Japan's argument that the Indian competent authority failed to take into account different categories and prices of various products, India submits that the Agreement on Safeguards provides for a comparison of like or directly competitive products and Japan does not claim that the products subject to the safeguard measure are not "like or directly competitive" in terms of Article 2.1 of the Agreement on Safeguards.[396] India clarifies that profitability had increased at the beginning of the POI due to a slight decrease in the costs (100 to 97 in 2014-2015), while the prices remained on the same level (100 to 99). This resulted in higher per unit profitability, but also in a loss of market share to the increased imports.[397]

7.244. In the present case, the Indian competent authority noted that the following factors indicated that the increased imports caused serious injury to the domestic industry:

a. the volume of imports increased significantly from 100 points (1,252,441 tonnes) to 281 points (3,524,932 tonnes);

b. the market share of imports increased from 5% to 13%, while the market share of the domestic industry declined from 45% to 37%;

c. the decreasing import prices prevented the domestic industry from sustaining its prices;

d. due to the low prices of the increased imports, the domestic industry was unable to increase its production and sales as compared to the rate of increase in demand of the product concerned in India; and

e. the profitability of the domestic industry declined sharply during 2015-2016 (Q1) and the domestic industry recorded losses due to the increased imports.[398]

7.245. In the Final Findings, the Indian competent authority found that:

> [T]here is a direct correlation between the increase in imports and serious injury suffered by the domestic industry as import in absolute term increased approximately three times during the year 2015-16 ([a]nnualised on the basis of Q1) as compared to base year 2013-14 and domestic industry is losing market share which has declined from 45% to 37%. The landed price of imports per ton has declined sharply.

industry's decision to increase captive transactions, and the increase in the demand for products that were not produced by the domestic industry. (Japan's first written submission, paras. 366, 369, and 375).

[392] India's first written submission, paras. 254-256 (quoting Panel Report, *US – Wheat Gluten*, para. 8.101).

[393] India's first written submission, paras. 252 and 259 (referring to Final Findings, (Exhibit IND-11), para. 49(g)(ii)(b), p. 198).

[394] India's first written submission, para. 261.

[395] India's first written submission, para. 262.

[396] India's first written submission, para. 263.

[397] India's first written submission, paras. 272-273.

[398] Final Findings, (Exhibits JPN-11/IND-11), para. 65, p. 202.

> Consequently, the domestic industry has suffered losses. It is, thus, evident that injury to the domestic industry has been caused by the increased imports.[399]

7.246. The Indian competent authority concluded that there was "a direct correlation" between the import surge and the serious injury, given that the imports increased and the domestic industry's market share and prices declined, which led to the losses suffered by the domestic industry.

7.247. First, as discussed above, the Final Findings show that the volume of imports considerably increased and the domestic industry's market share declined over the POI. Japan does not dispute the fact that there was a coincidence between the increase in imports and the decrease in the domestic industry's market share.[400] However, while the volume of imports was increasing during the entire POI, the domestic industry's prices remained stable during most of the POI and decreased only in the first quarter of 2015-2016. The domestic industry's profits grew significantly from 100 to 136 (indexed) in 2014-2015 compared to 2013-2014, while the imports increased from 100 to 211 (indexed) at the same time. The domestic industry experienced losses only in the first quarter of 2015-2016, while imports continued to increase, but at a lower rate. We recall that other injury factors did not show any significant change over that POI and remained stable, while the imports were increasing during the entire POI. Furthermore, there was no correlation between the decrease of the domestic industry's market share and the domestic industry's prices, although both were declining, but at considerably different levels, and with profits, because when the market shares and prices were declining, the domestic industry's profits grew significantly from 100 to 136. These findings of the Indian competent authority show that there was no overall coincidence in trends between movements in imports and movements in injury factors.

7.248. An overall coincidence in trends does not require an exact correlation since in some cases a lag may exist between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.[401] However, in such cases the competent authority should provide sufficient explanations to justify how an overall coincidence in movements has been found. We therefore conclude that the Indian competent authority failed to provide a sufficient explanation of why a causal link exists despite the lack of overall coincidence in trends between movements in imports and movements in injury factors.

7.249. Second, we recall that according to Article 4.2(b) of the Agreement on Safeguards, the determination regarding the existence of the causal link between the increased imports and serious injury shall be made "on the basis of objective evidence". The trends in imports and injury factors were examined during the POI, which includes two financial years, 2013-2014 and 2014-2015, and the first quarter of 2015-2016. For the purpose of examining the volume of imports and most of the injury factors, the Indian competent authority annualized the data for the first quarter of 2015-2016 to compare them to the full previous financial years.

7.250. As we have found in the preceding sections of this Report, the Indian competent authority failed to explain why such methodology was reliable and why the figures corresponding to the first quarter of 2015-2016 could be extrapolated for the entire financial year. For the same reasons, we conclude that the examination of a correlation between movements in imports and movements in injury factors was not based on objective evidence, since such examination was based at least partly on annualized data. In our view, the POI of two years and three months did not allow the Indian competent authority to examine a coincidence in trends, because in effect it provides only two points of comparison between movements in imports and movements in injury trends in 2013-2014 and in 2014-2015. With respect to the third point of comparison, 2015-2016, the Indian competent authority did not have objective evidence for the full financial year.

7.251. In addition, certain injury factors, including prices and profitability, were examined by comparing the data for the full two financial years to the first quarter of 2015-2016. As we have found above, the Indian competent authority failed to explain why valid conclusions may be drawn by comparing the average prices of full financial years to the average prices of a quarter.

---

[399] Final Findings, (Exhibits JPN-11/IND-11), para. 66, p. 202.
[400] Japan's second written submission, para. 195.
[401] Panel Reports, *US – Steel Safeguards*, para. 10.299.

7.252. Accordingly, we consider that the Indian competent authority failed to base its analysis of trends in imports and trends in injury factors on objective evidence, when it relied at least partly on annualized data and compared data for full financial years to data for a quarter.

7.253. Third, in its causation analysis, the Indian competent authority considered the price competition between imported and domestic products. In particular, the Indian competent authority stated that "[t]he decreasing import prices are preventing the Domestic Industry from sustaining its prices" and "[d]ue to increased imports on low prices, the Domestic Industry is unable to increase its production and sales as compared to the rate of increase in demand/consumption of product under consideration in India".[402]

7.254. The Indian competent authority compared price trends based on the average unit price of imported products and the average unit price of the like or directly competitive domestic products. During the investigation, several interested parties argued that the imported product included a heterogeneous group of products. Specifically, some of the importers of the subject goods in India (Maruti Suzuki India Limited) argued that the product concerned included a "heterogeneous set of products imported and thus they cannot be included in the same grade for comparison with the products manufactured by the domestic producers/petitioners".[403] Several producers and exporters added that "[i]n the present investigation, the products classified under subheading 7225 are materially different from the articles classified under subheading 7208. Therefore, the products under the two headings which are not identical and which are plural or heterogeneous in nature cannot be put together in one basket to determine a single [product under consideration]".[404] In response to a question from the Panel on whether and how the Indian competent authority addressed these arguments, India referred to the section of the Final Findings titled "Product under consideration".[405] In this section the Indian competent authority considered the interested parties' arguments on whether certain products should be excluded from the scope of the investigation. However, this section does not discuss whether all products included into the scope of the investigation are alike and compete with each other.[406]

7.255. India argues that once products are included into the scope of a safeguard investigation, no further categorization is required, because the Agreement on Safeguards does not provide for the collection of detailed price information as it does not envisage any detailed price analysis.[407] Although it is correct that the Agreement on Safeguards does not require a separate analysis of the prices of imports and domestic products, it also does not exclude such an analysis. In the present case, the Indian competent authority based its causation analysis fundamentally on price considerations. In the context of a safeguard investigation, if a competent authority supports its injury determination by relying on price trends of imported and domestic products, it should ensure that the products on both sides are sufficiently similar and that any price difference can reflect the conditions of competition between imported and domestic products, rather than differences in the composition of the two baskets of products being compared.[408] This approach is consistent with the statement of

---

[402] Final Findings, (Exhibits JPN-11/IND-11), para. 65, p. 202.

[403] See the arguments by Maruti Suzuki India Limited in Final Findings, (Exhibits JPN-11/IND-11), section B, XXXV(i), p. 146.

[404] See the arguments by China Iron and Steel Association and several other producers and exporters in Final Findings, (Exhibits JPN-11/IND-11), section C, X(b), p. 154. See also the arguments by POSCO in Final Findings, (Exhibits JPN-11/IND-11), section D, XIV(j), p. 187.

[405] India's response to Panel question No. 57.

[406] Final Findings, (Exhibits JPN-11/IND-11), paras. 18-23, pp. 192-194.

[407] India's responses to Panel question Nos. 58 and 114.

[408] In the context of the anti-dumping investigation, the panel in *China – Broiler Products* stated:

> Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products. … In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared.

(Panel Report, *China – Broiler Products*, para. 7.483).

In addition, in *China – X-Ray Equipment*, the panel noted:

the panel in *Argentina – Footwear (EC)* regarding the determination of like or directly competitive products in the context of causation analysis:

> We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market.[409]

7.256. For the above reasons, we conclude that the Indian competent authority failed to properly examine the price competition between imported and domestic products, when it based its price comparison on the average unit price of imported products and the average unit price of the like or directly competitive domestic products.[410]

7.257. In light of the foregoing, we conclude that India acted inconsistently with the first sentence of Article 4.2(b) of the Agreement on Safeguards, by failing to demonstrate the existence of a causal link between the increased imports and serious injury suffered by the domestic industry.

7.9.4 Non-attribution analysis

7.9.4.1 Introduction and general considerations relevant to Japan's claims on non-attribution analysis

7.258. Japan claims that India acted inconsistently with the second sentence of Article 4.2(b) of the Agreement on Safeguards, because it failed to examine "other factors" allegedly causing injury to the domestic industry at the same time with the increased imports and to ensure that the injury caused by those other factors was not attributed to the increased imports.[411]

7.259. Japan argues that the Indian competent authority failed to properly examine or to examine at all the following "other factors"[412]:

a. captive sales of the domestic industry and changes in the market share of other Indian producers not included in the definition of the domestic industry;

b. the domestic industry's "own internal factors" (including high interest costs, depreciation, and fixed cost burden; high freight costs and poor infrastructure; raw material crisis; low capacity utilization; inability to meet the quality requirements of specific downstream industry); and

c. other factors causing the decline in profitability (including stagnant sales, higher salaries and wages, higher usage of imported coal and higher depreciation of capitalization of new facilities, and reduction in interest earning on term deposits).

> However, a number of panels have clarified that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration.

(Panel Report, *China – X-Ray Equipment*, para. 7.65 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.13-7.76).

[409] Panel Report, *Argentina – Footwear (EC)*, fn 557.

[410] We note the argument of Japan that the Indian competent authority failed to take into account other factors that might have had an impact on the domestic industry's prices, profitability, and ability to increase its production and sales. The enquiry regarding other factors causing serious injury to the domestic industry simultaneously with the increased imports is subject to the second sentence of Article 4.2(b). Such other factors, challenged by Japan under the second sentence of Article 4.2(b), are addressed in section 7.9.4 below.

[411] Japan's first written submission, paras. 378 and 388; second written submission, paras. 210-211.

[412] Japan's first written submission, paras. 391-394; second written submission, paras. 222-229.

7.260. India's main response to Japan's claim on the alleged lack of a non-attribution analysis is that the Indian competent authority did not consider that the "other factors" alleged by the interested parties during the investigation were "relevant". India submits that Articles 4.2(a) and 4.2(b) should be interpreted in a mutually consistent way.[413] India asserts that Article 4.2(a) requires a competent authority to evaluate all relevant factors "of an objective and quantifiable nature" which are "having a bearing on the situation" of the domestic industry. According to India, a competent authority has discretion to determine whether "other factors", apart from those specifically listed in Article 4.2(a), are "relevant" based on criteria "of an objective and quantifiable nature" and "have a bearing on the situation" of the domestic industry. India argues that the obligation to conduct a non-attribution analysis pursuant to the second sentence of Article 4.2(b) only arises when a competent authority has determined that a specific factor is "relevant".[414]

7.261. We reject India's argument that the phrase "factors other than increased imports" in Article 4.2(b) has to be understood to refer to only those factors that have been found by a competent authority to be "relevant" under Article 4.2(a). The second sentence of Article 4.2(b) and Article 4.2(a) are interrelated to the extent that the analyses required under these provisions contribute to the ultimate determination whether the increased imports are causing or threatening to cause serious injury to the domestic industry.[415] Some "relevant factors" evaluated under Article 4.2(a) might be related to the "factors other than increased imports" allegedly causing injury to the domestic industry.[416] However, Article 4.2(a) and the second sentence of Article 4.2(b) set out different requirements that a competent authority must satisfy towards its determination that the increased imports are causing or threatening to cause serious injury to the domestic industry. Under Article 4.2(a) a competent authority must evaluate all "relevant factors" of objective and quantifiable nature having a bearing on the situation of the domestic industry. The second sentence of Article 4.2(b) requires a competent authority to examine "factors other than increased imports" that may be simultaneously causing serious injury to the domestic industry and to ensure that the injuries caused by such other factors are not attributed to increased imports. We recall that the increased imports do not need to be the sole source of injury caused to the domestic industry. A competent authority must appropriately assess any other sources of injury and "separate and distinguish" the injurious effects of those "other factors" from the injurious effects of the increased imports.[417]

7.262. Therefore, in addressing Japan's claim under Article 4.2(b), we will consider whether the Indian competent authority properly examined factors other than increased imports allegedly causing injury to the domestic industry and whether the injury caused by those "other factors", if any, was distinguished and separated from the injurious effects of the increased imports.[418]

7.263. Before turning to Japan's specific arguments, we note that the sections on causal link in the Preliminary and Final Findings do not contain any non-attribution analysis. However, the different sections of the Final Findings include a discussion of the interested parties' arguments regarding other factors causing injury to the domestic industry. Indeed, the section of the Final Findings regarding the causal link between the increased imports and the serious injury does not include an examination of "other factors" causing injury to the domestic industry. We recall that it is not decisive how a competent authority structures its report, as long as the competent authority's analysis, considered in its totality establishes the existence of both a serious injury and a causal link between the increased imports and such injury consistently with the Agreement on Safeguards.[419] Therefore, we will consider the Indian competent authority's entire determination in reviewing Japan's claims regarding the non-attribution analysis.

---

[413] India's first written submission, para. 276 (referring to Panel Reports, *US – Steel Safeguards*, para. 10.318).

[414] India's first written submission, para. 279; second written submission, paras. 16-19.

[415] Panel Report, *China – Cellulose Pulp*, para. 7.10 (in the context of Article 3 of the Anti-Dumping Agreement).

[416] E.g. capacity utilization is a factor to be evaluated under Article 4.2(a), while overcapacity may be an "other factor" causing injury to the domestic industry.

[417] Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

[418] Appellate Body Reports, *US – Line Pipe*, paras. 215 and 217; *US – Lamb*, paras. 179-180; *US – Wheat Gluten*, para. 66; and *US – Hot-Rolled Steel*, para. 226.

[419] Panel Reports, *US – Lamb*, para. 7.184; *China – Cellulose Pulp*, para. 7.155.

7.9.4.2 The captive sales of domestic industry and sales of producers outside the domestic industry

7.264. Japan refers to the argument made by the European Union during the investigation that captive sales and sales by other domestic producers should have been examined. Japan also argues that, although the Indian competent authority noted that the domestic industry's market share decreased by 2 percentage points while other Indian producers' market share increased by 2 percentage points, it failed to determine that this factor was not a cause of injury suffered by the domestic industry and failed to provide a reasoned and adequate explanation on this issue. According to Japan, the data show that the domestic industry's market share was partially taken by other Indian producers and that competition with other domestic producers is likely to be one of the causes of injury. Japan underlines the importance of providing sufficient explanation on this issue, given that the Indian competent authority relied on the decline in the domestic industry's market share in its finding of serious injury. Japan also argues that the Indian competent authority failed to consider whether the increase in captive sales by the domestic industry was one of the causes of the alleged injury.[420]

7.265. India responds that increased imports do not need to be the sole cause of serious injury. India refers to Japan's statement that the domestic industry's market share was only partially taken by other Indian producers. Regarding the analysis of captive sales, India reiterates that the Indian competent authority was required only to examine the "share of domestic market taken by the increased imports".[421]

7.266. During the underlying investigation, the European Union noted that Indian producers that were not included into the domestic industry increased their "open market sales" by 42%. In this regard, the Indian competent authority observed that the market share of other Indian producers increased by 2 percentage points, while the market share of the domestic industry decreased by 2 percentage points during the period 2014-2015 and the first quarter of 2015-2016. It further stated that the increased imports had taken all the increase in demand of the product concerned. Specifically, in 2014-2015 demand (excluding captive) increased by 1,303,069 tonnes and imports increased by 1,392,470 tonnes.[422] The Indian competent authority did not examine further these two alleged "other factors".

7.267. The fact that other domestic producers gained market share, while the domestic industry was losing it, suggests that the performance of other producers might have contributed to the injury caused to the domestic industry. The Indian competent authority failed to explain whether performance of producers outside the domestic industry was a factor causing injury to the domestic industry and how it made sure that injury, if any, caused by this factor was not attributed to the increased imports. Regarding captive sales, the Indian competent authority simply restated its finding that imports increased along with the increase in demand, but failed to explain whether captive sales were a factor causing injury to the domestic industry.

7.268. If the Indian competent authority considered that the factors the interested parties raised were not causing injury to the domestic industry at the same time with the increased imports, it was nevertheless required to examine the alleged "other factors" and provide a reasoned and adequate explanation as to why these factors were not a source of injury to the domestic industry. As noted by the panel in *Ukraine – Passenger Cars*:

> When the competent authorities determine that there are no other factors causing injury at the same time as increased imports, or that factors argued to be causing injury are not, in fact, doing so, this, too, must be stated explicitly in the published report, accompanied by a clear, explicit, and adequate explanation. Otherwise, it would be impossible to determine whether the imposing Member has properly considered whether factors other than imports are causing injury to the domestic industry, and if so, whether that Member has ensured that such injury is not attributed to the increased imports.[423]

[420] Japan's first written submission, paras. 392-393; second written submission, paras. 226-228.
[421] India's first written submission, paras. 288-290.
[422] Final Findings, (Exhibits JPN-11/IND-11), para. 97, p. 207.
[423] Panel Report, *Ukraine – Passenger Cars*, para. 7.334. (fn omitted)

7.269. Therefore, we conclude that the Indian competent authority failed to provide a reasoned and adequate explanation as to why the captive sales of the domestic industry and the sales of domestic producers outside the domestic industry were not a source of injury to the domestic industry.

7.9.4.3 The domestic industry's own internal factors

7.270. Japan submits that the Indian competent authority failed to properly examine the following "other factors" the interested parties raised during the investigation (i) high interest costs, depreciation, and fixed cost burden; (ii) high freight costs and poor infrastructure; (iii) raw material crisis; (iv) low capacity utilization; and (v) inability to meet the quality requirements of specific downstream industry.[424] Japan argues that the Final Findings do not include a clear determination that the identified factors are not causing injury to the domestic industry nor any explanation in this regard.[425] India responds that its authority considered that the factors raised by the interested parties were "very general" or were not supported by the facts. India submits that the domestic industry has existed for many years and performed well in the past.[426]

7.271. In paragraph 51 of the Final Findings, in the section regarding the determination of serious injury, the Indian competent authority noted the interested parties' arguments that the serious injury suffered by the domestic industry was due to the domestic industry's "own internal factors", including (i) high interest costs, depreciation, and fixed cost burden; (ii) high freight costs and poor infrastructure; (iii) raw material crisis; (iv) low capacity utilization; and (v) inability to meet the quality requirements of specific downstream industries.[427] The Indian competent authority addressed these arguments in paragraph 52 of the Final Findings, as follows:

> These claims are very general and without any facts and figures to support. The fact that injury has been caused due to increased quantities of imports of the [product under consideration] in India has already been established above. I find that the domestic industry has been in existence since many years and has been doing well in the past. Infrastructure and capacities are in place with the domestic industry to meet the demand of the [product under consideration]. The efficiency of a unit depends on several factors and if their efficiencies were of a higher order, probably there was no need for the DI to ask for safeguard action. Mere existence of inefficiencies in certain areas cannot be a reason to deny safeguard protection to the Domestic Industry. The very reason why safeguard protection is sought and given and is provided for under [the Agreement on Safeguards] is that the DI is unable to handle competition and can get some time to adjust to the International competition over a period of time. The main determining factor is that there should be a serious injury or threat of serious injury and there is a causal link with the increased imports. I observe that there is a significant increase in imports of the subject goods which have caused serious injury to the domestic industry which has been duly substantiated in the foregoing paras.[428]

7.272. The Indian competent authority noted that it had already found that the increased imports caused serious injury to the domestic industry and that the "[m]ere existence of inefficiencies in certain areas" was not a reason for not applying the safeguard measure. This statement of the Indian competent authority is not dispositive of the question of whether other factors were simultaneously contributing to the injury caused by the increased imports. As noted above, the increased imports do not need to be the sole source of injury caused to the domestic industry and a competent authority must assess other sources of injury and not attribute that injury to the increased imports. Having said that, paragraphs 51 and 52 of the Final Findings show that the Indian competent authority considered arguments made by the interested parties and rejected them, because in its view they were "very general and without any facts and figures to support".[429] The Indian competent authority also stated that "the domestic industry has been in existence since many years and has been doing well in the past. Infrastructure and capacities are in place with the domestic industry to meet the

[424] Japan's first written submission, para. 391 (referring to Final Findings, (Exhibit JPN-11), para. 51, p. 200).
[425] Japan's first written submission, para. 391; second written submission, paras. 222-225.
[426] India's first written submission, para. 278.
[427] Final Findings, (Exhibits JPN-11/IND-11), para. 51, p. 200.
[428] Final Findings, (Exhibits JPN-11/IND-11), para. 52, p. 200.
[429] Final Findings, (Exhibits JPN-11/IND-11), paras. iv(mm) and 52, pp. 176 and 200.

demand of the [product under consideration]".[430] In response to a question from the Panel on the specific arguments the interested parties raised during the underlying investigation, Japan referred to the general summaries of interested parties' submissions provided in the Final Findings.[431] Japan failed to identify any specific evidence or facts on the record of the investigation that in its view the Indian competent authority failed to address. Although the Final Findings would have benefited from more elaborate and detailed explanation, Japan did not establish what facts or evidence the Indian competent authority failed to consider and what explanation is lacking regarding these factors.

7.273. Therefore, we conclude that Japan has not established that the Indian competent authority failed to provide a reasoned and adequate explanation regarding the following alleged "other factors" causing injury to the domestic industry: high interest costs, depreciation, and fixed cost burden; high freight costs and poor infrastructure; raw material crisis; low capacity utilization; and inability to meet the quality requirements of specific downstream industry.

7.9.4.4 Other factors causing the decline in profitability

7.274. Japan additionally submits that the Indian competent authority failed to consider the interested parties' arguments that the decline in profitability of the domestic industry was caused by factors other than the increased imports. Japan argues that consideration of these arguments is important given the different trends in the increase in imports and changes in profitability discussed above. Japan adds that the Final Findings state that the increased imports were the "major reason" for the decline in profitability, which suggests that there were other reasons for the losses suffered by the domestic industry.[432] India responds that increased imports do not need to be the sole cause of deterioration of the state of domestic industry.[433] India refers to paragraph 52 of the Final Findings to note that any minor or insignificant factors affecting profitability were not "having a bearing" on the situation of the domestic industry.[434]

7.275. In the section titled "Submissions by Embassies and Delegations from countries", the Indian competent authority noted Turkey's submission that the profitability of the domestic industry declined due to factors other than the increased imports, such as "stagnant sales, higher salaries and wages[,] higher usage of imported coal and higher depreciation of capitalisation of new facilities, and reduction in interest earning on term deposits".[435] The Indian competent authority did not provide any further examination of Turkey's argument. In response to a question from the Panel, India noted that these arguments were addressed in paragraphs 51 and 52 of the Final Findings together with other arguments of the interested parties regarding the domestic industry's own internal factors.[436] The factors indicated in paragraph 51 do not include specific "other factors" affecting profitability raised by Turkey (see paragraph 7.271 above). Neither does paragraph 52 of the Final Findings include any discussion of the specific arguments relating to the domestic industry's internal factors Turkey raised regarding other factors affecting the domestic industry's profitability.

7.276. Furthermore, the Indian competent authority found that "[t]he *major* reason for decline in profitability of domestic industry is the increased imports at reduced prices".[437] India admitted that there might have been other factors affecting profitability than the increased imports at reduced prices, but they were minor or insignificant and did not have a bearing on the situation of the domestic industry.[438] As noted above, the increased imports do not need to be the sole source of injury to the domestic industry.[439] Nonetheless, the Indian competent authority should have addressed any other alleged factors affecting profitability and to provide a reasoned and adequate

[430] Final Findings, (Exhibits JPN-11/IND-11), para. 52, p. 200. See also ibid. para. iv(mm), p. 176.
[431] Japan's responses to Panel question Nos. 122 and 123 (referring to Final Findings, (Exhibit JPN-11), para. IX(m), p. 133; paras. XII(l), XII(m), XIII(h), and XIII(j), p. 136; paras. VIII(f) and IX(f), pp. 153-154; and para. XIII(g), p. 186).
[432] Japan's first written submission, para. 394; second written submission, para. 229.
[433] India's first written submission, para. 290.
[434] India's first written submission, para. 290 (referring to Final Findings, (Exhibit IND-11), para. 52).
[435] Final Findings, (Exhibits JPN-11/IND-11), section C, VIII(f), pp. 153-154.
[436] India's response to Panel question No. 61.
[437] Final Findings, (Exhibits JPN-11/IND-11), para. 56, p. 201. (emphasis added)
[438] India's first written submission, para. 290 (referring to Final Findings, (Exhibit IND-11), para. 52).
[439] See para. 7.238 above.

explanation of whether these factors were causing injury to the domestic industry and how it made sure that injury, if any, caused by these factors was not attributed to the increased imports.

7.277. We conclude that the Indian competent authority failed to provide a reasoned and adequate explanation regarding other factors causing a decline in the profitability of the domestic industry.

7.9.4.5 Conclusion

7.278. In light of the foregoing, we conclude that India acted inconsistently with the second sentence of Article 4.2(b) of the Agreement on Safeguards, by failing to conduct a proper non-attribution analysis.[440]

7.9.5 Consequential claims

7.279. Japan submits that the fact that India acted inconsistently with Article 4.2(b) also leads to a violation of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[441] We have found above that India acted inconsistently with its obligations under Article 4.2(b) with regard to its causation and non-attribution analyses. In the preceding sections of this Report, we have also found that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In light of this, we see no need to address Japan's consequential claims whether India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its causation and non-attribution analyses. We therefore exercise judicial economy and decline to make findings on these claims.

7.10 Whether India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

7.280. Japan claims that India acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 by failing to impose the safeguard measure only to the extent and for such time necessary to prevent or remedy serious injury. Japan argues that the second sentence of Article 4.2(b) serves as a context for interpreting Article 5.1 and that the phrase "to the extent necessary to prevent or remedy serious injury" means that safeguard measures shall be applied only to the extent that they address serious injury "attributed" to increased imports.[442] Japan refers to its claim under Article 4.2(b) of the Agreement on Safeguards and argues that since the Indian competent authority failed to demonstrate the causal link between the increased imports and the serious injury, it was consequently unable to ensure that the safeguard measure was applied only to the extent necessary to prevent or remedy serious injury caused by the increased imports.[443]

7.281. Japan further submits that the second sentence of Article 4.2(b) of the Agreement on Safeguards also serves as a context for interpreting Article 7.1. Japan argues that the requirement in Article 7.1 that safeguard measures shall be applied "only for such period of time as may be necessary to prevent or remedy serious injury" refers to the injury "attributed" to increased imports. Japan considers that this requirement also applies to Article XIX:1(a) of the GATT 1994. In Japan's view, considering that the Indian competent authority's causation and non-attribution analysis was inconsistent with Article 4.2(b), the Indian competent authority was consequently unable to ensure that the safeguard measure was applied "only for such period of time as may be necessary to prevent or remedy serious injury". Therefore, Japan submits that India acted

[440] We also note Japan's argument that, for the purpose of non-attribution analysis, India failed to distinguish the impact of imports caused by unforeseen developments and the effect of the obligations incurred under the GATT 1994 from the impact of imports caused by other reasons. (Japan's first written submission, para. 395). We have found above that India acted inconsistently with Article XIX:1(a) of the GATT 1994 with respect to its consideration of unforeseen developments and the effect of GATT obligations. We have also found that India's non-attribution analysis is inconsistent with Article 4.2(b). In light of these findings, we see no need to address this argument of Japan.

[441] Japan's first written submission, paras. 396-399; second written submission, para. 232.

[442] Japan's first written submission, para. 404 (referring to Appellate Body Report, *US – Line Pipe*, paras. 252 and 260).

[443] Japan's first written submission, paras. 410-411; second written submission, para. 240.

inconsistently with Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[444]

7.282. India responds that the obligation to justify that safeguard measures are applied "to the extent necessary" arises only in case of safeguard measures in the form of quantitative restrictions, as provided in the second sentence of Article 5.1.[445] India submits that Japan failed to show that there is any obligation in Article 5.1 for competent authorities to provide explanations with respect to duties imposed as safeguards.[446] India argues that a non-attribution analysis conducted under Article 4.2(b) itself ensures that the safeguard duties applied address only the serious injury attributed to the increased imports. India contends that the Appellate Body's interpretation of Articles 4.2(b) and 5.1 in *US – Line Pipe* means that once a non-attribution analysis has been conducted in accordance with Article 4.2(b), the measure *ipso facto* complies with Article 5.1.[447] India argues that neither the Agreement on Safeguards nor Article XIX:1(a) of the GATT 1994 provide for the period of time that could be sufficient to remedy serious injury or to facilitate adjustment. India submits that it has fully complied with Article 4.2(b) and that Japan failed to substantiate its claim that India acted inconsistently with Article 7.1.[448]

7.283. The first sentence of Article 5.1 of the Agreement on Safeguards reads:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.284. Article 7.1 of the Agreement on Safeguards provides:

> A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

7.285. Japan's claims under Articles 5.1 and 7.1 of the Agreement on Safeguards relate to the duration of the safeguard measure at issue and the level of the duties imposed. Since we have found above that the safeguard measure was inconsistent with Articles 2.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(b) of the Agreement on Safeguards, as well as Article XIX:1(a) of the GATT 1994, we do not consider it necessary for the purposes of resolving this dispute to make additional findings on whether India has also acted inconsistently with its obligations under Articles 5.1 and 7.1. We therefore exercise judicial economy and make no findings on these claims. We also exercise judicial economy with regard to Japan's consequential claim in this regard under Article XIX:1(a) of the GATT 1994.

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

7.286. Japan refers to its previous claims that the Indian competent authority failed to provide in its Preliminary Findings and Final Findings a reasoned and adequate explanation of its various determinations, namely concerning (i) unforeseen developments, (ii) the effects of the obligations incurred under the GATT 1994, (iii) the increase in imports, (iv) the definition of the domestic industry, (v) the serious injury and threat thereof, (vi) the existence of a causal link, and (vii) the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury. Consequently, Japan argues that India acted inconsistently with the last sentence of Article 3.1 and Article 4.2(c) of the Agreement on Safeguards by failing to set forth findings and reasoned conclusions for all pertinent issues of fact and law.[449] India responds that it has demonstrated that its competent authority fully complied with the obligations under the Agreement

[444] Japan's first written submission, paras. 417-419.
[445] India's first written submission, paras. 293 and 296 (referring to Appellate Body Report, *Korea – Dairy*, paras. 98-100).
[446] India's first written submission, para. 297.
[447] India's first written submission, paras. 298-300.
[448] India's first written submission, paras. 302-305.
[449] Japan's first written submission, paras. 425-426; second written submission, para. 244.

on Safeguards and Article XIX of the GATT 1994 and provided reasoned and adequate explanations of its determination concerning "all pertinent issues of fact and law".[450]

7.287. Article 3.1 of the Agreement on Safeguards, in relevant part, reads as follows:

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

7.288. Article 4.2(c) of the Agreement on Safeguards, provides:

> The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.[451]

7.289. We have found above that India (i) acted inconsistently with Article XIX:1(a) of the GATT 1994, by failing to provide a reasoned and adequate explanation that the increase in imports of the product concerned into India occurred as a result of unforeseen developments and the effect of the relevant obligations of the GATT 1994; (ii) acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994, by failing to objectively examine trends in imports and to provide a reasoned and adequate explanation with regard to its conclusions on increased imports; (iii) acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation regarding its evaluation of certain injury factors and its assessment of the situation of the domestic industry; (iv) acted inconsistently with Articles 4.1(b) and 4.2(a) of the Agreement on Safeguards, because the existence of a threat of serious injury was not adequately addressed or analysed in the findings of the competent authority; and (v) acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, by failing to conduct a proper causation and non-attribution analysis. We consequently conclude that India acted inconsistently with its obligations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards, by failing to provide reasoned conclusions on all pertinent issues of fact and law.

7.290. We have also found above that Japan has not demonstrated that India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards with regard to its definition of the domestic industry. Accordingly, we reject Japan's consequential claims in this regard under Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.291. Finally, we did not make findings on Japan's claims that India acted inconsistently under Articles 5.1 and 7.1 of the Agreement on Safeguards, by imposing the measure to the extent and for the time necessary to prevent or remedy serious injury. According, we also exercise judicial economy and make no findings in this regard under Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.12 Whether India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards

7.292. Japan refers to its claims above that the safeguard measure imposed by India is inconsistent with various provisions of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. Consequently, Japan argues that India acted inconsistently with Article 11.1(a) of the Agreement on Safeguards.[452]

7.293. Article 11.1(a) of the Agreement on Safeguards provides that:

> A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

---

[450] India's first written submission, para. 314.

[451] In *US – Steel Safeguards*, the panel found that Article 4.2(c) of the Agreement on Safeguards is an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report. (Panel Reports, *US – Steel Safeguards*, para. 289).

[452] Japan's first written submission, para. 429; second written submission, para. 245.

7.294. We recall our findings above that the safeguard measure at issue is inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. We therefore do not consider it necessary, for the purposes of resolving this dispute, to make additional findings on whether India has also acted inconsistently with its obligations under Article 11.1(a) of the Agreement on Safeguards. We therefore exercise judicial economy and make no findings on this claim.

7.13 Whether India acted inconsistently with Article 12 of the Agreement on Safeguards in notifying its measure and providing opportunities for consultations

7.13.1 Japan's claim under Article 12.4 of the Agreement on Safeguards

7.13.1.1 Introduction

7.295. Japan claims that India acted inconsistently with Article 12.4 of the Agreement on Safeguards, because it notified the provisional safeguard measure to the WTO Committee on Safeguards after the measure had been taken.[453]

7.296. India does not dispute the facts. India argues, however, that its competent authority concluded that the provisional measure had to be imposed "on an urgent basis", because of the injury suffered by the domestic production, and because any delay in the application of a provisional safeguard duty would have caused damage which would have been difficult to repair. India adds that the provisional measure was imposed only for 200 days, which have since lapsed.[454] India also argues that the notification requirement in Article 12.4 "is, at best, a procedural requirement" and that "the substantive right of a Member to address the 'critical circumstances' as envisaged in Article 6 would be substantially diluted if an action in terms of this Article is made contingent upon a mere notification requirement under Article 12.4".[455]

7.297. In response, Japan argues that India's defence "does not have any legal basis in the Agreement on Safeguards and must therefore be rejected by the Panel".[456] Japan adds that the fact that the circumstances of the case necessitated an urgent imposition of the provisional safeguard measure does not relieve India from its obligation under Article 12.4. Japan also argues that provisional safeguard measures are by nature "urgent". In its view, "urgency" does not constitute an argument to escape the notification obligation under Article 12.4.[457]

7.298. The parties do not disagree on the relevant facts.

7.299. The Indian competent authority initiated the safeguard investigation at issue on 7 September 2015.[458]

7.300. On 9 September 2015, the Indian competent authority issued its Preliminary Findings, in which it concluded that (i) increased imports of the products concerned into India caused and threatened to cause serious injury to the domestic industry; and (ii) critical circumstances existed when any delay in the application of safeguard measures would cause serious damage which would be difficult to repair. The Indian competent authority imposed a provisional safeguard duty of 20% *ad valorem* for 200 days.[459]

7.301. On 14 September 2015, the Department of Revenue, Ministry of Finance, after considering the Indian competent authority's Preliminary Findings, imposed a provisional safeguard duty of 20% *ad valorem* on imports into India of the products concerned. The duty would have a

[453] Japan's first written submission, paras. 438-439; second written submission, para. 246.
[454] India's first written submission, para. 336.
[455] India's response to Panel question No. 128.
[456] Japan's opening statement at the first meeting of the Panel, para. 103. See also response to Panel question No. 65, para. 104; and comments on India's response to Panel question No. 128, para. 81.
[457] Japan's second written submission, paras. 248-249; response to Panel question No. 65, para. 105.
[458] Notice of Initiation, (Exhibits JPN-4/IND-4), pp. 5-8.
[459] Preliminary Findings, (Exhibits JPN-7/IND-7), pp. 12-19.

200-day duration. The measure entered into force on 14 September 2015, the date in which the notification imposing the provisional safeguard measure was published in The Gazette of India.[460]

7.302. On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.[461] On 28 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.4 and Article 9, footnote 2, of the Agreement on Safeguards, of the application of the provisional safeguard measure.[462]

7.13.1.2 Evaluation by the Panel

7.303. Article 12.4 of the Agreement on Safeguards provides in relevant part that:

> A Member shall make a notification to the Committee on Safeguards *before taking a provisional safeguard measure* referred to in Article 6.[463]

7.304. As noted above, the parties do not disagree on the relevant facts. The provisional safeguard measure at issue entered into force on 14 September 2015, whereas India notified the Committee on Safeguards of this measure on 28 September 2015, i.e. two weeks later. Both parties agree that the measure in question is a provisional safeguard measure of the type referred to in Article 6 of the Agreement on Safeguards. Consequently, as a matter of fact, India did not notify the Committee on Safeguards *before* taking the provisional safeguard measure at issue.

7.305. The circumstances that India raised (namely, that its competent authority concluded that provisional measures had to be imposed "on an urgent basis") do not exempt India from its obligation under Article 12.4.

7.13.1.3 Conclusion

7.306. For the reasons explained above, we conclude that India acted inconsistently with Article 12.4 of the Agreement on Safeguards by failing to notify the Committee on Safeguards before taking the provisional safeguard measure at issue.

7.13.2 Japan's claim under Article 12.1 of the Agreement on Safeguards

7.13.2.1 Introduction

7.307. Japan claims that India acted inconsistently with Article 12.1 of the Agreement on Safeguards, because it failed to notify the WTO Committee on Safeguards immediately upon (i) initiating the investigation relating to serious injury or threat thereof, (ii) making a finding of serious injury or threat thereof caused by increased imports, and (iii) taking a decision to apply a safeguard measure.

7.308. With respect to Article 12.1(a), Japan notes that India published the notice of the initiation of the safeguard investigation in The Gazette of India on 7 September 2015, while the WTO Committee on Safeguards was notified on 15 September 2015. Japan argues that the term "immediately" used in Article 12.1 should be examined on a case by case basis "considering in particular the complexity of the notification being made and the need for translation into one of the WTO's official languages".[464] Japan submits that, in the present case there was no issue of translation since the Notice of Initiation was originally published in English in The Gazette of India. Moreover, the notification made to the WTO was relatively short (450 words), compared to previous cases, and the elements contained in the notification were the usual, were not complex, and were

[460] Notification imposing a provisional safeguard measure, (Exhibits JPN-8/IND-8), p. 2.
[461] Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).
[462] Notification under Article 12.4 of the SA (28 September 2015), (Exhibits JPN-10/IND-10).
[463] Emphasis added. Article 6 of the Agreement on Safeguards is the provision on Provisional Safeguard Measures.
[464] Japan's first written submission, paras. 447 and 454. See also ibid. para. 443; and second written submission, para. 252 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 105).

already included in the Notice of Initiation itself.[465] Japan concludes that the notification that India made to the Committee on Safeguards after eight days of the initiation of the safeguard investigation was not "immediate" and was therefore inconsistent with Article 12.1(a) of the Agreement on Safeguards.[466] Japan adds that this 8-day delay is all the more problematic as India imposed the provisional safeguard duty on 14 September 2015, that is, before India notified the Committee on Safeguards of the initiation of the investigation. According to Japan, considering such a delay as an "immediate" notification would go against the purpose of Article 12, which is to ensure transparency, as WTO Members were not even informed of the initiation of the investigation at the time of the imposition of the provisional safeguard duty.[467]

7.309. With respect to Article 12.1(b), Japan notes that India published the Final Findings for the safeguard investigation in The Gazette of India on 15 March 2016, while the WTO Committee on Safeguards was notified on 21 March 2016. Japan argues again that the examination of the term "immediately" should be done considering the complexity of the notification being made and the need for translation into one of the WTO's official languages.[468] Japan submits that, in the present case there was no issue of translation since the Final Findings were originally published in English in The Gazette of India. Moreover, the notification made to the WTO was relatively short (1,300 words).[469] Japan concludes that the notification that India made to the Committee on Safeguards after six days of the Final Findings for the safeguard investigation was not "immediate" and was therefore inconsistent with Article 12.1(b) of the Agreement on Safeguards.[470]

7.310. With respect to Article 12.1(c), Japan notes that India published the decision to apply a definitive safeguard measure in The Gazette of India on 29 March 2016, while the WTO Committee on Safeguards was notified on 4 April 2016. Japan submits that, in the present case there was no issue of translation since the decision to apply the safeguard measure was originally published in English in The Gazette of India. Moreover, the notification made to the WTO was very short (330 words).[471] Japan concludes that the notification that India made to the Committee on Safeguards after six days of the decision to apply a definitive safeguard measure was not "immediate" and was therefore inconsistent with Article 12.1(c) of the Agreement on Safeguards.[472]

7.311. India does not dispute the facts as described by Japan. India states that it notified the Committee on Safeguards of each of the relevant decisions within six to eight days (four to six working days) from the date of initiation, the date of the findings of serious injury, and from the date of the imposition of the definitive safeguard measure, respectively.[473]

7.312. India notes that, once the competent authority under Indian legislation adopts the relevant decision, this decision is published in the Gazette of India and then notified with the relevant documents to the Ministry of Commerce, which is the department in charge of making notifications to the WTO. The Ministry of Commerce prepares a summary of the relevant decision in order to fulfill the requirements of Article 12 of the Agreement on Safeguards. The duration of this step depends on the complexities of the case. Once the notification is prepared, it must be approved by senior officials. The relevant documents are then sent to the Permanent Mission of India to the WTO, which files the relevant notification to the Committee.[474]

[465] Japan's first written submission, para. 455. See also second written submission, para. 253.
[466] Japan's first written submission, para. 455; second written submission, para. 255.
[467] Japan's first written submission, para. 456.
[468] Japan's first written submission, para. 458; second written submission, para. 252.
[469] Japan's first written submission, para. 459. See also second written submission, para. 253.
[470] Japan's first written submission, paras. 457 and 459; second written submission, para. 255.
[471] Japan's first written submission, para. 461. See also second written submission, para. 253.
[472] Japan's first written submission, paras. 460-461; second written submission, para. 255.
[473] India's first written submission, paras. 323-326.
[474] India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final findings in a safeguard investigation. (Japan's comments on India's response to Panel question No. 129, para. 82). There is no reason to assume, however, that those steps are different when notifying the initiation of an investigation or the decision to apply a safeguard measure.

7.313. In India's view, there was no undue delay in keeping the Members informed of the various steps of the investigation and therefore, India complied with the requirements of Article 12.1 of the Agreement on Safeguards.[475]

7.314. The parties do not disagree on the relevant facts.

7.315. The notice of the initiation of the safeguard investigation at issue by the Indian competent authority was published in The Gazette of India on 7 September 2015.[476] On 15 September 2015, India notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) of the Agreement on Safeguards, of the initiation of the safeguard investigation.[477] In other words, India notified the Committee on Safeguards eight days after the initiation of the investigation.

7.316. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016.[478] On 21 March 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(b) of the Agreement on Safeguards, of the findings of serious injury or threat thereof caused by increased imports.[479] In other words, India notified the Committee on Safeguards six days after making a finding of serious injury or threat thereof caused by increased imports.

7.317. On 29 March 2016, the Department of Revenue's Notification No. 1/2016-Customs (SG), whereby a definitive safeguard measure was imposed, was published in The Gazette of India.[480] On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c) of the Agreement on Safeguards, of its decision to impose a measure.[481] In other words, India notified the Committee on Safeguards six days after taking a decision to apply a safeguard measure.

7.13.2.2 Evaluation by the Panel

7.318. Article 12.1 of the Agreement on Safeguards provides that:

> A Member shall immediately notify the Committee on Safeguards upon:
>
> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
>
> (b) making a finding of serious injury or threat thereof caused by increased imports; and
>
> (c) taking a decision to apply or extend a safeguard measure.

7.319. As noted above, the parties do not disagree on the relevant facts. India notified the Committee on Safeguards (i) eight days after initiating the investigation, (ii) six days after making a finding of serious injury or threat thereof caused by increased imports, and (iii) six days after taking a decision to apply a safeguard measure.

7.320. Article 12.1 requires that the notifications in question be made "immediately" upon the occurrence of the specified events. The word "immediately" can be defined as "without delay, at once, instantly".[482] The Appellate Body in *US – Wheat Gluten* stated that the word "immediately" "implies a certain urgency" and that the degree of urgency required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification at issue and the character of the information supplied. The Appellate Body clarified in

[475] India's first written submission, para. 326.
[476] Notice of Initiation, (Exhibits JPN-4/IND-4), pp. 5-8.
[477] Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).
[478] Final Findings, (Exhibits JPN-11/IND-11), pp. 119-209.
[479] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[480] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.
[481] Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).
[482] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1330.

particular that relevant factors in assessing the degree of urgency may include the complexity of the notification to be made and the need for translation into one of the WTO's official languages. The Appellate Body also cautioned that the amount of time to prepare and submit a notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".[483]

7.321. The Appellate Body has also stated that an "immediate" notification is that which allows the Committee on Safeguards, and Members in general, the fullest possible period to reflect upon and react to an ongoing safeguard investigation.[484] This suggests that a determination of whether a notification was "immediate" does not require consideration of whether the Committee or Members had sufficient time to review the notification or whether individual Members suffered prejudice through an insufficiency in the notification period.[485]

7.13.2.2.1 Japan's claim under Article 12.1(a)

7.322. Japan asserts that by notifying the Committee on Safeguards of the initiation of the investigation eight days after the publication of the notice of the initiation of the safeguard investigation in The Gazette of India, India failed to comply with the requirement of "immediate" notification.[486]

7.323. India responds that it notified the initiation of the investigation at issue to the Committee on Safeguards within eight days (six working days) from the date in which the decision was published in The Gazette of India.[487] India has referred to the internal administrative process by which the decision to initiate an investigation is notified to the Committee on Safeguards.[488] In India's view, there was no undue delay in keeping the Members informed of the initiation of the investigation. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.[489]

7.324. As noted, the parties do not disagree on the relevant facts. The notice of the initiation of the safeguard investigation was published in The Gazette of India on 7 September 2015 and the Committee on Safeguards was notified on 15 September 2015. Accordingly, India's notification to the Committee on Safeguards of the initiation of the safeguard investigation occurred eight calendar days after the relevant triggering event (the publication of the initiation of the investigation in The Gazette of India).

7.325. The notification that India filed is a relatively short document (one and a half pages), which contains (i) the date of initiation of investigation, (ii) the POI, (iii) the product under investigation, (iv) the reasons for the initiation of the investigation, (v) the point of contact, and (vi) the deadlines for interested parties to make their views known and for any other party to submit a request to be considered as an interested party.[490] The information is extracted from the notice of the initiation of the safeguard investigation which was published in English in The Gazette of India. The notification, however, does not merely reproduce the notice of the initiation of the investigation. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.326. Finally, we keep in mind that, in previous cases, the following periods between the initiation of a safeguard investigation and the notification to the Committee on Safeguards under Article 12.1(a) were found by the respective panels not to have been "immediate" (i) a 14-day period

[483] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[484] Appellate Body Report, *US – Wheat Gluten*, para. 106.
[485] Appellate Body Report, *US – Wheat Gluten*, para. 106.
[486] Japan's first written submission, paras. 454-455; second written submission, para. 255.
[487] India's first written submission, para. 323.
[488] India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final decision to apply a safeguard measure. (See Japan's comments on India's response to Panel question No. 129). There is no reason to assume, however, that those steps differ considerably when notifying the initiation of an investigation.
[489] India's first written submission, paras. 323 and 326.
[490] Notification under Article 12.1(a) of the SA (15 September 2015), (Exhibits JPN-9/IND-9).

by the panel on *Korea – Dairy*[491], (ii) a 16-day period by the panel on *US – Wheat Gluten*[492], and (iii) an 11-day period by the panel on *Ukraine – Passenger Cars*.[493]

7.327. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(a) of the Agreement on Safeguards of the initiation of the investigation eight days after the publication of the notice of initiation is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.2.2 Japan's claim under Article 12.1(b)

7.328. Japan asserts that by notifying the Committee on Safeguards of the Final Findings for the safeguard investigation six days after their publication in The Gazette of India, India failed to comply with the requirement of "immediate" notification.[494]

7.329. India responds that it notified its findings of serious injury or threat thereof caused by the increased imports to the Committee on Safeguards within six days (four working days) from the date in which the decision was published in The Gazette of India.[495] India has referred to the internal administrative process by which the findings of serious injury or threat thereof are notified to the Committee on Safeguards.[496] In India's view, there was no undue delay in keeping the Members informed of its findings of serious injury. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.[497]

7.330. As noted, the parties do not disagree on the relevant facts. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016 and the Committee on Safeguards was notified on 21 March 2016. Accordingly, India's notification to the Committee on Safeguards of the findings of serious injury or threat thereof occurred six calendar days after the relevant triggering event (the publication of the findings in The Gazette of India).

7.331. The notification that India filed is a four-page document, which contains (i) information on whether there is an absolute increase in imports (including information on the share of imports relative to production); (ii) information on serious injury or threat thereof caused by increased imports; (iii) information on the evidence of serious injury (including information on the market share, production, the change in level of domestic sales, capacity utilization, profits and losses, employment and productivity, inventories, and unforeseen developments); (iv) information on an adjustment plan; (v) information on the product involved; (vi) description of the proposed measure; (vii) further information; and (viii) proposed date of imposition of the safeguard measure. The same document also contains a notification pursuant to Article 9, footnote 2, of the Agreement on Safeguards.[498] The information is extracted from the Final Findings for the safeguard investigation which was published in English in The Gazette of India. The notification, however, does not merely reproduce the Final Findings. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.332. Finally, we keep in mind that, in previous cases, the respective panels found the following periods between a determination of serious injury and the notification to the Committee on Safeguards under Article 12.1(b) not to have been "immediate" (i) a 40-day period by the panel on

[491] Panel Report, *Korea – Dairy*, para. 7.134.
[492] Panel Report, *US – Wheat Gluten*, para. 8.197. This finding was upheld by the Appellate Body. (Appellate Body Report, *US – Wheat Gluten*, para. 112).
[493] Panel Report, *Ukraine – Passenger Cars*, para. 7.476.
[494] Japan's first written submission, paras. 457-459; second written submission, para. 255.
[495] India's first written submission, para. 324.
[496] India's response to Panel question No. 129. India's response refers to the internal procedures and steps that are adopted to notify to the Committee on Safeguards the final decision to apply a safeguard measure. (See Japan's comments on India's response to Panel question No. 129). There is no reason to assume, however, that those steps differ considerably when notifying findings of serious injury or threat thereof caused by increased imports.
[497] India's first written submission, paras. 323-324 and 326.
[498] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).

Korea – Dairy[499], (ii) a 26-day period by the panel on *US – Wheat Gluten*[500], and (iii) a period of more than 10 months by the panel on *Ukraine – Passenger Cars*.[501]

7.333. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(b) of the Agreement on Safeguards of the findings of serious injury six calendar days after the publication of those findings is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.2.3 Japan's claim under Article 12.1(c)

7.334. Japan asserts that by notifying the Committee on Safeguards of the decision to apply a definitive safeguard measure six days after its publication in The Gazette of India, India failed to comply with the requirement of "immediate" notification.[502]

7.335. India responds that it notified its definitive safeguard measure to the Committee on Safeguards within six days (four working days) from the date in which the decision was published in The Gazette of India.[503] India has referred to the internal administrative process by which the decision to apply a safeguard measure is notified to the Committee on Safeguards.[504] In India's view, there was no undue delay in keeping the Members informed of its decision to apply a safeguard measure. India submits that this was an immediate notification in the sense of Article 12.1 of the Agreement on Safeguards and that it therefore acted consistently with its obligations under this provision.[505]

7.336. As noted, the parties do not disagree on the relevant facts. The decision to apply a definitive safeguard measure was published in The Gazette of India on 29 March 2016 and the Committee on Safeguards was notified on 4 April 2016. Accordingly, India's notification to the Committee on Safeguards of the decision to apply a safeguard measure occurred six calendar days after the relevant triggering event (the publication of the findings in The Gazette of India).

7.337. The notification that India filed is a relatively short document (one and a half pages), which contains (i) the classification of the product under consideration, (ii) a description of the safeguard measure imposed, (iii) the date of introduction of the measure, (iv) the duration of the measure, and (v) further information (the website where the text of the decision can be accessed).[506] The information is extracted from the notification on the imposition of a definitive safeguard measure which was published in English in The Gazette of India. The notification to the Committee on Safeguards, however, does not merely reproduce the notice published in The Gazette of India. We also note India's explanation as to the administrative steps that must be completed before a notification is filed.

7.338. Finally, in a previous case, a 23-day period between the decision to apply a safeguard measure and the notification to the Committee on Safeguards under Article 12.1(c) was found by the panel on *Korea – Dairy* not to have been "immediate".[507] In contrast, the Appellate Body in *US – Wheat Gluten* found that a notification to the Committee on Safeguards made by the United States five days after having taken the decision to apply the safeguard measure (and one day after the decision had been published in the US Federal Register) was not inconsistent with Article 12.1(c).[508] The panel on *Ukraine – Passenger Cars* also found that a notification to the

[499] Panel Report, *Korea – Dairy*, para. 7.137.
[500] Panel Report, *US – Wheat Gluten*, para. 8.199. This finding was upheld by the Appellate Body. (Appellate Body Report, *US – Wheat Gluten*, para. 116).
[501] Panel Report, *Ukraine – Passenger Cars*, para. 7.494.
[502] Japan's first written submission, paras. 460-461; second written submission, paras. 253-255.
[503] India's first written submission, para. 325.
[504] India's response to Panel question No. 129.
[505] India's first written submission, paras. 323 and 325-326.
[506] Notification under Article 12.1(b) and Article 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).
[507] Panel Report, *Korea – Dairy*, para. 7.145.
[508] Appellate Body Report, *US – Wheat Gluten*, paras. 128-130.

Committee on Safeguards that Ukraine made seven days after having taken the decision to apply the safeguard measure was not inconsistent with Article 12.1(c) of the Agreement on Safeguards.[509]

7.339. Having considered the above, and although we are aware that the amount of time to prepare and submit a notification must be kept to a minimum, we find that the notification under Article 12.1(c) of the Agreement on Safeguards of the decision to apply a definitive safeguard measure six calendar days after the publication of that decision is not unreasonable. Accordingly, Japan has not demonstrated that the notification was not "immediate".

7.13.2.3 Conclusion

7.340. For the reasons explained above, we conclude that Japan has failed to demonstrate that India acted inconsistently with Articles 12.1(a), (b) and (c) of the Agreement on Safeguards by failing to immediately notify the Committee on Safeguards, respectively, of the initiation of a safeguard investigation relating to serious injury or threat thereof, the findings of serious injury in the investigation, and the decision to apply a definitive safeguard measure.

7.13.3 Japan's claim under Article 12.2 of the Agreement on Safeguards

7.13.3.1 Introduction

7.341. Japan claims that India acted inconsistently with Article 12.2 of the Agreement on Safeguards, because in making the notifications pursuant to Articles 12.1(b) and 12.1(c), it failed to provide the WTO Committee on Safeguards with "all pertinent information". According to Japan, India's notification of 21 March 2016 does not contain the following information (i) information on the causal link between the increased imports and the serious injury or threat thereof, (ii) a precise description of the product involved, (iii) a precise description of the scope of the proposed measure, and (iv) the proposed date of introduction of the proposed measure.[510]

7.342. With respect to causation, Japan argues that in section 2 of its notification, entitled "serious injury or threat thereof caused by increased imports"[511], India only explained the injury suffered by the domestic industry in general and the amount of increase in imports but not the causal link between the increased imports and the serious injury or threat thereof.[512]

7.343. With respect to the description of the product involved, Japan argues that, by failing to identify in its notification the product types excluded from the general definition of the "product under consideration", India failed to provide a precise description of the product involved. Japan notes that, in section 5 of its notification, India describes the product under consideration as follows: "[h]ot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more … classified under Chapter 72 of the Customs Tariff Act, 1975 under tariff heading 7208 and tariff item 72253090".[513] In Japan's view, this description does not reflect the product exclusion as listed in paragraph 2 of the Final Findings, at least with respect to American Petroleum Institute (API) grade steel.[514]

7.344. Japan also argues that India failed to provide a precise description of the scope of the proposed measure. Japan states that section 6 of India's notification, entitled "Precise description of the proposed measure", only indicates that the Indian competent authority recommended the imposition of a "safeguard duty at the rate of 20% *ad valorem* for the first year, 18% *ad valorem* for the second year (for first 6-months), 15% *ad valorem* for second year (for next 6-months) and 10% *ad valorem* for third year (for 6-months)" on the products concerned.[515] According to

[509] Panel Report, *Ukraine – Passenger Cars*, para. 7.502.
[510] Japan's first written submission, paras. 462 and 469; second written submission, para. 256.
[511] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[512] Japan's first written submission, para. 470; second written submission, para. 258; response to Panel question No. 131, paras. 79-80; and comments on India's responses to Panel question Nos. 130 and 131, paras. 84-88.
[513] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.
[514] Japan's first written submission, paras. 471-473; second written submission, para. 259; and response to Panel question No. 132, paras. 81-82.
[515] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.

Japan, the notification did not mention that any anti-dumping duty paid would be deducted from the safeguard duty rates listed or that the safeguard duty should not be imposed on the subject goods imported at or above the Minimum Import Price set out in Notification No. 38/2015-2020 of 5 February 2016. In Japan's view, these elements determine the scope of the proposed measure.[516]

7.345. Finally, Japan argues that India failed to notify the "proposed date of introduction" of the proposed measure. Japan states that section 8 of India's notification, entitled "proposed date of imposition of safeguard measure", only indicates that "[t]he safeguard measure will be applicable from the date of issue of notification in this regard by the Department of Revenue, Ministry of Finance, Government of India".[517] According to Japan, this does not amount to the identification of the proposed date of introduction of the safeguard measure as the notification does not identify any date.[518]

7.346. In response, India submits that its notification to the WTO Committee on Safeguards of 21 March 2016 fully complied with the requirements under Article 12.2 of the Agreement on Safeguards.[519] India argues that section 2 of its notification specifically deals with the serious injury or threat thereof caused by "increased imports".[520] In India's view, Article 12 does not require that a Member include in the notification any information with respect to the existence of a causal link between increased imports and the serious injury, nor with respect to non-attribution.[521]

7.347. India also argues that, although its notification does not detail the exclusions from the product under consideration, this does not imply that the precise description of the product involved was not provided. In India's view, the description required under Article 12.2 refers only to the "product under consideration", which India detailed, while the exclusions are only as regards what was not included in the "product under consideration".[522] India adds that the requirement in Article 12.2 to provide the description of the product is to ensure that the exporting Member's right to defend itself is not hampered. According to India, when there are exclusions in the product covered by the investigation, no such right gets affected.[523]

7.348. India argues further that Article 12.2 only requires a description of the proposed measure, which was included in section 6 of its notification, and not of the manner of operation of the proposed measure. In India's view, the fact that any anti-dumping duty paid would be deducted from the safeguard duty rates listed, and that the safeguard duty should not be imposed on subject goods which were imported at or above the Minimum Import Price set out in Notification No. 38/2015-2020 of 5 February 2016, refer to the manner of operation of the measure and not to the description of the proposed measure.[524] India adds that the precise description of the applied measure, which was less burdensome than the proposed measure, was contained in the Department of Revenue's Notification No. 1/2016-Customs (SG), dated 29 March 2016, which India notified on 4 April 2016.[525]

7.349. India additionally argues that its notification clearly indicates that the measure would be applicable from the date of notification by the Department of Revenue, Government of India, which corresponds to the identification of the "proposed date of introduction of the proposed measure".[526] India submits that its notification, not only satisfies the requirements of Article 12.2, but also informs all interested Members where any further information would be available.[527] India adds that, under

[516] Japan's first written submission, paras. 474-476; second written submission, para. 260; and comments on India's response to Panel question No. 133, paras. 89-91.
[517] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), p. 4.
[518] Japan's first written submission, paras. 477-478; second written submission, para. 261; response to Panel question No. 134, paras. 83-86; and comments on India's response to Panel question No. 134, paras. 92-93.
[519] India's first written submission, paras. 327-328.
[520] India's first written submission, paras. 329-330; response to Panel question No. 130.
[521] India's responses to Panel question Nos. 130 and 131; comments on Japan's response to Panel question No. 131, paras. 63-64.
[522] India's first written submission, para. 331.
[523] India's comments on Japan's response to Panel question No. 132, paras. 65-66.
[524] India's first written submission, para. 332.
[525] India's response to Panel question No. 133 (referring to Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibit IND-14)).
[526] India's first written submission, para. 333.
[527] India's first written submission, para. 334.

Article 12.2, the notifying Member has the flexibility to introduce the safeguard measure in accordance with its domestic procedures and laws and there is no requirement to provide a precise date of introduction.[528]

7.350. The parties do not disagree on the basic relevant facts.

7.351. On 21 March 2016, India notified the Committee on Safeguards of its finding of serious injury or threat thereof caused by increased imports and of the measure it had proposed to impose pursuant to Article 12.1(b) and Article 9, footnote 2, of the Agreement on Safeguards.[529]

7.352. On 29 March 2016, the Department of Revenue's Notification No. 1/2016-Customs (SG), whereby a definitive safeguard measure was imposed, was published in The Gazette of India.[530] On 4 April 2016, India notified the Committee on Safeguards, pursuant to Article 12.1(c) of the Agreement on Safeguards, of its decision to impose a measure.[531]

7.13.3.2 Evaluation by the Panel

7.353. Article 12.2 of the Agreement on Safeguards provides in relevant part that:

> In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

7.354. As noted above, the parties do not disagree on the basic relevant facts. India notified the Committee on Safeguards of its findings of serious injury or threat thereof and of its proposed measure on 21 March 2016 pursuant to Article 12.1(b) of the Agreement on Safeguards. The notification that India filed is a four-page document, which contains sections on (i) information on whether there is an absolute increase in imports (including information on the share of imports relative to production); (ii) information on serious injury or threat thereof caused by increased imports (including information on serious injury and on threat of serious injury); (iii) information on the evidence of serious injury (including information on the market share, production, the change in level of domestic sales, capacity utilization, profits and losses, employment and productivity, inventories, and unforeseen developments); (iv) information on an adjustment plan; (v) information on the product involved; (vi) description of the proposed measure, including a timetable for its progressive liberalization; (vii) further information with respect to the date of publication of the Final Findings in The Gazette of India; and (viii) proposed date of imposition of the safeguard measure.[532]

7.355. On 4 April 2016, India notified its decision to impose a measure to the Committee on Safeguards, pursuant to Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards. The notification that India filed is a two-page document, which contains sections on (i) product classification, (ii) the safeguard measure imposed, including a timetable for its progressive liberalization, (iii) the date of introduction of the measure, (iv) the duration of the measure, and (v) further information on where the Department of Revenue's Notification No. 1/2016-Customs (SG), dated 29 March 2016, whereby the definitive safeguard measure was imposed, may be accessed.[533]

7.356. In a statement supported by the Appellate Body, the panel in *Korea – Dairy* noted that the notification in Article 12 serves essentially a transparency and information purpose:

> In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding

[528] India's response to Panel question No. 134.
[529] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[530] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.
[531] Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).
[532] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[533] Notification under Articles 12.1(b) and 12.1(c) of the SA (4 April 2016), (Exhibits JPN-14/IND-14).

> of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions. This allows any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation.[534]

7.357. In the same case, regarding the object and purpose of the notification requirements in Article 12, the Appellate Body added:

> We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the *Agreement on Safeguards*. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it.[535]

7.358. *With respect to causation*, Japan argues that India failed to provide pertinent information on the causal link between the increased imports and the serious injury or threat thereof. Sections 2 and 3 of India's notification of 21 March 2016 are entitled respectively "Serious injury or threat thereof caused by increased imports" and "Evidence of serious injury". In the relevant part, section 2 states that:

> Evidence of serious injury has been analysed & explained in subsequent paragraphs. It is thus concluded that [the domestic industry] has suffered serious injury and increased imports of the product under consideration threaten to cause serious injury to the [domestic industry].[536]

7.359. Section 3 of the 21 March notification, entitled "Evidence of serious injury", also states that "[t]he increased imports of [the product under consideration] into India have caused serious injury to the domestic producers as reflected by the following parameters …".[537]

7.360. Article 12.2 provides in its relevant part that, in making the notifications referred to in Articles 12.1 (b) and (c), the notifying Member shall provide the Committee on Safeguards with all pertinent information, *which shall include evidence of serious injury or threat thereof caused by increased imports*. In this respect, the Appellate Body noted in *Korea – Dairy* that:

> To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting "all pertinent information", as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.[538]

7.361. The factors that Article 4.2 of the Agreement on Safeguards requires competent authorities to evaluate in an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry are all relevant factors of an objective and quantifiable nature that have a bearing on the situation of that industry. The provision lists in particular the following (i) the rate and amount of the increase in imports of the product concerned in absolute and relative terms, (ii) the share of the domestic market taken by the increased imports,

---

[534] Panel Report, *Korea – Dairy*, para. 7.126 (fn omitted). See also Appellate Body Report, *Korea – Dairy*, para. 111.

[535] Appellate Body Report, *Korea – Dairy*, para. 111.

[536] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 2, p. 2.

[537] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 3, p. 2.

[538] Appellate Body Report, *Korea – Dairy*, para. 109. (emphasis original)

(iii) changes in the level of sales, (iv) production, (v) productivity, (vi) capacity utilization, (vii) profits and losses, and (viii) employment.

7.362. Article 4.2(b) also provides that a competent authority may not reach a determination that increased imports have caused or are threatening to cause serious injury to a domestic industry unless (i) the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and the serious injury or threat thereof; and (ii) when factors other than increased imports are causing injury to the domestic industry at the same time, the injury has not been attributed to increased imports.

7.363. We note that India's notification of 21 March 2016 explicitly refers to the competent authority's determination that the domestic industry suffered serious injury caused by increased imports of the product under consideration into India, and that increased imports of the product under consideration also threatened to cause serious injury to the domestic industry. We consider that the information contained in this notification fulfils the requirement in Article 12.2 with respect to providing all pertinent information regarding the evidence of serious injury or threat thereof caused by increased imports. A Member who makes a notification under Articles 12.1 (b) and (c) may provide the Committee on Safeguards with pertinent information with respect to the determination of the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof and with respect to a non-attribution analysis. We find nothing in Article 12.2, however, that requires such information to be provided in a notification to the Committee on Safeguards under Articles 12.1 (b) and (c).

7.364. *With respect to the description of the product involved*, Japan argues that India failed to identify the products excluded from the general definition of the "product under consideration", at least with respect to API grade steel.

7.365. Section 5 of India's notification of 21 March 2016 is entitled "Product Involved" and notes:

> The Product Under Consideration (PUC) is *"Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more"* and is classified under Chapter 72 of the Customs Tariff Act, 1975 under tariff heading 7208 and tariff item 72253090.[539]

7.366. However, API grade steel was excluded from the scope of the product under consideration from the beginning of the investigation.[540] The Final Findings explicitly note that API grade steel is "not included in the scope of the product under consideration".[541]

7.367. The precise description of the product involved is among the pertinent information that Members must provide in making a notification to the Committee on Safeguards under Articles 12.1 (b) and (c). This involves not only identifying the product at issue, but also the specific sub-products that are excluded from the definition of the product concerned. By not indicating the products that were excluded from the scope of the investigation, India failed to provide the Committee on Safeguards with a precise description of the product involved.

7.368. *With respect to the description of the proposed measure*, Japan argues that India failed to mention that any anti-dumping duty paid would be deducted from the safeguard duty rates listed and that the safeguard duty would not be imposed on the subject goods imported at or above the Minimum Import Price approved in February 2016.

7.369. Section 6 of India's notification of 21 March 2016 is entitled "Precise Description of the Proposed Measure" and states:

> DG Safeguards, the competent authority, has recommended to impose safeguard duty at the rate of 20% *ad valorem* for the first year, 18% *ad valorem* for the second year (for first 6-months), 15% *ad valorem* for second year (for next 6-months) and 10% *ad*

[539] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 5, p. 4. (emphasis added)
[540] Notice of Initiation, (Exhibits JPN-4/IND-4), para. 3, p. 6.
[541] Final Findings, (Exhibits JPN-11/IND-11), para. 2, p. 119.

> *valorem* for third year (for 6-months) on imports of **Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more**.[542]

7.370. The 21 March notification at issue does not mention that anti-dumping duties would be deducted from the safeguard duty rates. In contrast, the Final Findings of the Indian competent authority explicitly state that for each of the periods, the corresponding safeguard duty recommended would be "minus Anti-dumping duty, if any".[543]

7.371. The 21 March notification also fails to mention anything about subject goods imported at or above Minimum Import Prices. The fact that the proposed safeguard duties should not be imposed on subject goods imported at or above Minimum Import Prices is not mentioned in the Final Findings of the Indian competent authority either. Accordingly, this particular aspect does not seem to be part of the measure as recommended in the Final Findings. The notification of the definitive safeguard measure, however, does mention that:

> The safeguard duty shall not be imposed on the subject goods which are imported at or above the Minimum Import Price in terms of the notification of the Government of India in the Ministry of Commerce and Industry (Department of Commerce) (Directorate General of Foreign Trade) No. 38/2015-2020, dated the 5th February, 2016 published in the Gazette of India (Extraordinary), Part II, Section 3, Sub-section (ii) vide S.O. 391(E) dated the 5th February, 2016.[544]

7.372. Article 12.2 requires a Member proposing to apply a safeguard measure to provide the Committee on Safeguards with all pertinent information, including at a minimum the items listed in the provision. As noted above, the panel in *Korea – Dairy* referred to the role that notifications under Article 12 play in informing Members of the circumstances of the case. This allows any interested Member to decide whether to request consultations with the importing country that may lead to modification of the proposed measures or compensation.[545] As noted by Article 12.1, notifications to the Committee on Safeguards must be made immediately upon making a finding of serious injury or threat thereof caused by increased imports or upon taking a decision to apply a safeguard measure. Notifications must at the same time be complete, in the sense of providing all the pertinent information required by Article 12.2, and timely, to allow interested Members adequate opportunity to engage in consultations to review the information provided, to exchange views on the measure, and to exercise their rights under the Agreement on Safeguards.

7.373. As noted above, the fact that anti-dumping duties should be deducted from the respective safeguard duties is included in the proposed measure as described in the 15 March Final Findings of the Indian competent authority. This aspect should in our view be part of the precise description of the proposed measure, as it would affect the manner in which the safeguard measure would apply to different imports of the product at issue.

7.374. In contrast, there is no evidence that the measure as proposed in the Final Findings of the Indian competent authority contemplated that the safeguard duties should not be imposed on subject goods imported at or above the set Minimum Import Prices. The first mention on record to the exclusion of safeguard duties from goods imported at or above Minimum Import Prices is contained in the Ministry of Finance's notification imposing a definitive safeguard measure, dated 29 March 2016. Accordingly, it does not seem unreasonable to us that India's notification of 21 March 2016 did not include a mention to this aspect. Indeed, the desirability of a detailed notification that provides as much information as possible must be balanced against the requirement for a timely notification that, while providing all pertinent information required by Article 12.2, allows interested Members adequate opportunity to exercise their rights under the Agreement on Safeguards.

[542] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 6, p. 4. (emphasis original)
[543] Final Findings, (Exhibits JPN-11/IND-11), section R(a), p. 209.
[544] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), para. 2, pp. 6-7.
[545] Panel Report, *Korea – Dairy*, para. 7.126; Appellate Body Report, *Korea – Dairy*, para. 111.

7.375. Accordingly, we consider that, by not indicating that any anti-dumping duties would be deducted from the safeguard duties imposed, India failed to provide the Committee on Safeguards with a precise description of the proposed measure.

7.376. *With respect to the proposed date of introduction of the measure*, Japan argues that India failed to identify a precise date, by indicating only that the safeguard measure would be applicable from the date of issue of the respective notification by the Department of Revenue, Ministry of Finance.

7.377. Section 8 of India's notification of 21 March 2016 is entitled "Proposed date of Imposition of Safeguard Measure" and states:

> The safeguard measure will be applicable from the date of issue of notification in this regard by the Department of Revenue, Ministry of Finance, Government of India.[546]

7.378. A "date" can be defined as "[t]he day of the month; the day of the month, the month, or the year of an event; the time or period at which something happened or the time at which something is to happen".[547] On its face, the notification does not identify a date, expressed in terms of a day of the month, the month and the year, from which the safeguard measure would apply. It does, however, refer to an event, namely the date of issuance of the respective notification by the Department of Revenue of India's Ministry of Finance.

7.379. Article 12.2 of the Agreement on Safeguards requires the Member making a notification to the Committee on Safeguards under Articles 12.1 (b) and (c) to provide all pertinent information, including the proposed date of introduction of the proposed safeguard measure. In our view, it would be desirable that a notification provide the date of introduction of the measure in a manner as precise as possible. In some cases, however, it may not be possible to identify the precise day of the month, the month, and the year, in which the measure will be introduced, as the introduction of the measure may depend on some condition, such as a notification, a publication in an official journal, or even an approval by some other authority. In these cases, the date of introduction of the proposed safeguard measure may be expressed with reference to the act or event that must occur for the measure to enter into effect. Here too the desirability of a more precise date, which may only become known once the Department of Revenue adopts the final decision, must be balanced against the requirement for a timely notification that allows interested Members adequate opportunity to exercise their rights under the Agreement on Safeguards.

7.380. In any event, we note that, in contrast with the description of the product involved and of the proposed measure, Article 12.2 does not require a *precise* date of introduction. We are unconvinced that by referring to the date of issuance of the notification by the Department of Revenue of India's Ministry of Finance, India failed to provide the Committee on Safeguards a proposed date of introduction of the proposed measure.

7.13.3.3 Conclusion

7.381. For the reasons explained above, we conclude that India acted inconsistently with Article 12.2 of the Agreement on Safeguards by failing to provide the Committee on Safeguards with (i) a precise description of the product involved, and (ii) a precise description of the proposed measure. We also conclude that Japan has failed to demonstrate that India acted inconsistently with Article 12.2 by failing to provide the Committee on Safeguards with pertinent information with respect to (i) the determination of the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof and with respect to a non-attribution analysis; and (ii) a proposed date of introduction of the proposed measure.

---

[546] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12), section 8, p. 4.

[547] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 607.

7.13.4 Japan's claim under Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994

7.13.4.1 Introduction

7.382. Japan claims that India acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. In Japan's view, in its notification to the Committee on Safeguards made on 21 March 2016, India failed to provide Japan with an opportunity for prior consultations in respect of the proposed measure, and in particular with sufficient time and sufficient information to allow for the possibility for a meaningful exchange of views.[548]

7.383. Japan argues that India failed to provide *any opportunity* for prior consultations since in its 21 March notification it did not indicate the proposed date of introduction of the measure, which made it impossible for Japan to organize itself with a view to have consultations with India with regard to the safeguard measure at issue.[549]

7.384. Japan also argues that India failed to provide Japan with an *adequate opportunity* for consultations since it failed to provide exporting Members with sufficient time and sufficient information to allow for the possibility for a meaningful exchange on the issues identified.[550] In Japan's view, India failed to provide Japan with *sufficient time* to allow for a meaningful exchange of views, because: (i) India notified the Committee on Safeguards eight days before the application of the safeguard measure, which did not provide Japan enough time to prepare itself for consultations with India; and (ii) Japan could not anticipate that the measure would be introduced so soon after the 21 March notification since India did not indicate the proposed date of introduction of the measure.[551] Japan also states that India failed to provide Japan with *sufficient information* to allow for the possibility of meaningful prior consultations, because it did not provide all pertinent information required by Article 12.2.[552]

7.385. In response, India submits that it has complied with the requirements in Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. According to India, its notification to the Committee on Safeguards made on 21 March 2016 provided all "pertinent information" as required by Article 12.2. India also argues that the notification provided Japan an eight-day advance period for consultations.[553]

7.386. The parties do not disagree on the relevant facts.

7.387. The Final Findings of the Indian competent authority for the safeguard investigation were published in The Gazette of India on 15 March 2016.[554] On 21 March 2016, India notified the Committee on Safeguards of the findings of serious injury or threat thereof caused by increased imports pursuant to Article 12.1(b) of the Agreement on Safeguards.[555]

7.388. On 29 March 2016, Notification No. 1/2016 from Customs, whereby the definitive safeguard measure was imposed, was published in The Gazette of India.[556]

7.389. In other words, India notified the Committee on Safeguards of the proposed measure eight days before the safeguard measure entered in force.

7.390. The relevant facts with respect to the content of India's notification to the Committee on Safeguards of 21 March 2016 have been discussed in the preceding section.

---

[548] Japan's first written submission, paras. 480 and 492-502; second written submission, paras. 263-266.
[549] Japan's first written submission, para. 496.
[550] Japan's first written submission, para. 497.
[551] Japan's first written submission, paras. 498-499; second written submission, para. 265; and responses to Panel question No. 135, para. 87-89, and No. 136, paras. 90-91.
[552] Japan's first written submission, paras. 500-501; second written submission, paras. 263-264.
[553] India's first written submission, para. 335.
[554] Final Findings, (Exhibits JPN-11/IND-11).
[555] Notification under Article 12.1(b) of the SA (21 March 2016), (Exhibits JPN-12/IND-12).
[556] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), pp. 6-7.

7.13.4.2 Evaluation by the Panel

7.391. Article 12.3 of the Agreement on Safeguards provides that:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

7.392. In turn, Article XIX:2 of the GATT 1994 in relevant part reads as follows:

> Before any [Member] shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the [Members acting jointly] as far in advance as may be practicable and shall afford the [Members acting jointly] and those [Members] having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.

7.393. As noted by the Appellate Body in *US – Wheat Gluten*, Article 12.3 of the Agreement on Safeguards requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. Accordingly, Article 12.3 requires that information on a proposed measure be provided in advance of the consultations, so that the consultations can adequately address that measure. In turn, Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3.[557]

7.394. The Panel has already found that, in its notification made on 21 March 2016, India failed to provide the Committee on Safeguards with a precise description of the product involved and a precise description of the proposed measure. To the extent that India failed to provide all pertinent information as required by Article 12.2 of the Agreement on Safeguards with respect to such aspects, India also failed to provide information that was needed to enable meaningful consultations to occur under Article 12.3.

7.13.4.3 Conclusion

7.395. For the reasons explained above, we conclude that India acted inconsistently with Article 12.3 of the Agreement on Safeguards by failing to provide Japan, and other Members with a substantial export interest in the product subject to the proposed safeguard measure, with adequate opportunity for prior consultations with a view to reviewing all pertinent information within the meaning of Article 12.2, which includes a precise description of the product involved and a precise description of the proposed measure.

7.14 Whether India acted inconsistently with Article II:1(b) of the GATT 1994

7.14.1 Introduction

7.396. Japan claims that India acted inconsistently with Article II:1(b) of the GATT 1994 because, through the measure at issue, it imposed "other duties or charges" in terms of the second sentence of Article II:1(b).[558]

7.397. Japan argues that the duties resulting from the safeguard measure at issue constitute "other duties or charges" within the meaning of the second sentence of Article II:1(b) of the GATT 1994, rather than "ordinary customs duties" under the first sentence, because they are of an "exceptional" or "extraordinary" nature and applied for a limited period of time in addition to the MFN applied tariff.[559] Japan also submits that these duties are not recorded in India's Schedule of Concessions in

[557] Appellate Body Report, *US – Wheat Gluten*, paras. 136-137.
[558] Japan's first written submission, para. 503.
[559] Japan's first written submission, paras. 512-519 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.86-7.87); second written submission, para. 269.

the column "other duties or charges" and they do not correspond to duties or charges that India applied at the date of entry into force of the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date, and therefore the duties resulting from the safeguard measure at issue are inconsistent with Article II:1(b) of the GATT 1994.[560]

7.398. India replies that the measure at issue was imposed in accordance with Article XIX of the GATT 1994, and therefore the obligation under Article II:1(b) *ipso facto* gets suspended and the question of its violation does not arise.[561] India also disagrees with Japan that under Article II:1(b) the measure should have been recorded in India's Schedule of Concessions in the column "other duties or charges".[562]

7.14.2 Article II:1(b) of the GATT 1994

7.399. We recall that Article II:1(b) of the GATT 1994 provides as follows:

> The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.400. The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides that:

> 1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
>
> 2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date …
>
> 3. "Other duties or charges" shall be recorded in respect of all tariff bindings.
>
> …
>
> 7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.

7.14.3 Evaluation by the Panel

7.401. Japan alleges that India acted inconsistently with the second sentence of Article II:1(b) of the GATT 1994. This sentence provides that imported goods shall "be exempt from all other duties or charges of any kind imposed on or in connection with the importation" if such duties or charges of any kind exceed those applied on the date of entry into force of the GATT 1994 or "those directly

[560] Japan's first written submission, para. 520; second written submission, para. 270.
[561] India's first written submission, para. 344.
[562] India's first written submission, para. 350.

and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date".

7.402. We have already concluded that the safeguard measure at issue resulted in duties levied in customs on the importation of the products concerned into the territory of India.[563] We have also concluded that such duties are not part of the measures listed in Article II:2 of the GATT 1994, which are carved out from the obligations in Article II.[564] We have indicated that the duties resulting from the measure at issue do not constitute "ordinary customs duties" for the purposes of Article II:1(b).[565] Accordingly, the duties resulting from the measure at issue are "other duties or charges … imposed on or in connection with the importation", within the meaning of Article II:1(b) of the GATT 1994.[566]

7.403. Having found that the measure at issue resulted in "other duties or charges" in the sense of Article II:1(b) of the GATT 1994, the Panel must consider whether these duties were in excess of the other duties or charges imposed on the date of the GATT 1994 or "those directly or mandatorily required to be imposed thereafter by the legislation in force in the importing territory on that date", as they were recorded in India's Schedule of Concessions. In this connection, we note that pursuant to paragraphs 1, 2, 3, 4 and 7 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, Members were required to record in their Schedules of Concessions any other duties and charges applied in respect of all bound tariff lines.

7.404. In this respect, the panel in *Dominican Republic – Import and Sale of Cigarettes* noted that:

> Reading Article II:1(b) together with paragraphs 1, 2, 7 and 4 of the Understanding as context, the Panel considers that the obligation under Article II:1(b), second sentence is for Members to record in their Schedules, within six months of the date of deposit of the instrument, all ODCs [other duties and charges] as applied on 15 April 1994 unless those levels breach previous bound levels of ODCs. In case any Member did not record the ODCs in the Schedule within six months of the date of deposit of the said instrument, the right to record it in the Schedule and to invoke it expired after six months. In the context of the recording requirements as prescribed in the Understanding, the meaning of Article II:1(b), second sentence is specifically that *imported products shall be exempted from all "other duties or charges" of any kinds in excess of those as validly recorded in the Schedule of the Member concerned*.[567]

7.405. In other words, a Member that maintains or introduces an "other duty or charge" without having recorded it in the appropriate column in its Schedule of Concessions acts in a manner inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

7.406. In the present case, it is a fact undisputed by the parties that the column corresponding to other duties or charges in India's Schedule of Concessions in relation to the products concerned does not contain any record.[568] In other words, India did not record in its Schedule of Concessions any duty corresponding to "other duties or charges" within the six months following the date on which the instrument was deposited. The Panel recalls its finding that the duties resulting from the measure at issue form part of other duties or charges and notes that India applied these duties during the time the safeguard measure was in force. In this respect, therefore, by applying on imports a duty that constitutes an "other duty or charge", India is acting inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

[563] See section 7.4.2 above.
[564] See section 7.4.3.1 above.
[565] See section 7.4.2 above.
[566] See section 7.4.3.1 above.
[567] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.88 (emphasis original; fn omitted). A similar conclusion was reached by the panel in *Chile – Price Band System*, para. 7.107.
[568] Excerpt from India's Schedule of Concessions with respect to customs heading 7208, (Exhibit IND-21); India's opening statement at the first meeting of the Panel, para. 44. See also Japan's first written submission, para. 520; second written submission, para. 270; opening statement at the first meeting of the Panel, para. 113; and response to Panel question No. 11, para. 4.

7.407. As noted above, India has argued that, when a measure is applied under Article XIX of the GATT 1994, "there can be no question of violation" of Article II:1(b) of the GATT 1994.[569]

7.408. Although Article XIX of the GATT 1994 allows WTO Members to suspend obligations incurred by a Member under the GATT 1994, such suspension would only be valid when the safeguard measure at issue has not been found to be inconsistent with the respective Member's obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.409. Since we have already concluded that the measure at issue is inconsistent with India's obligations under Article XIX of the GATT 1994 and certain provisions of the Agreement on Safeguards, the measure at issue did not result in a valid suspension of India's obligation under Article II:1(b), second sentence, of the GATT 1994.

7.14.4 Conclusion

7.410. For the reasons explained above, we conclude that India has acted inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

7.15 Whether India acted inconsistently with Article I:1 of the GATT 1994

7.15.1 Introduction

7.411. Japan claims that India acted inconsistently with Article I:1 of the GATT 1994 when it did not apply the measure at issue to the products originating in certain countries. According to Japan, this constitutes an advantage that was not accorded immediately and unconditionally to like products originating in other WTO Members, including Japan.[570]

7.412. India responds that Article XIX of the GATT 1994 allows a Member to suspend obligations incurred under the GATT 1994, if the conditions in Article XIX are met. India also notes that, although the measure at issue does not apply to imports from developing countries (with the exception of China and Ukraine), Article 9 of the Agreement on Safeguards provides for an exception from the MFN principle contained in Article I:1 of the GATT 1994.[571]

7.15.2 Article I:1 of the GATT 1994

7.413. We recall that Article I:1 of the GATT 1994 provides as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.15.3 Evaluation by the Panel

7.414. Japan alleges that India acted inconsistently with Article I:1 of the GATT 1994. According to this provision, any advantage granted by a Member to products from any other country must be accorded immediately and unconditionally to the like products originating in all other Members.

7.415. The Appellate Body has indicated that the following elements must be demonstrated to establish an inconsistency with Article I:1 of the GATT 1994 (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products

[569] India's first written submission, para. 337.
[570] Japan's first written submission, paras. 531-535; second written submission, paras. 273-275.
[571] India's first written submission, paras. 342-343. Japan does not challenge the consistency of the measure at issue with Article 9 of the Agreement on Safeguards.

within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded has not been extended "immediately" and "unconditionally" to the "like" products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members.[572]

7.416. With respect to the first element, we have already concluded that the duties resulting from the safeguard measure at issue were duties or charges imposed on the importation of products into the territory of India. Accordingly, they fall within the scope of application of Article I:1.

7.417. With respect to the second element, we have already noted that the Ministry of Finance notification of 29 March 2016, which imposed the definitive safeguard measure, provided that:

> Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries under clause (a) of sub-section (6) of section 8B of the Customs Tariff Act, other than [the] People's Republic of China and Ukraine.[573]

7.418. Notification No. 19/2016 published by the Ministry of Finance on 5 February 2016 contains a list of 132 developing countries which are in principle exempted from safeguard duties pursuant to Section 8B of the Customs Tariff Act, 1975.[574]

7.419. In previous cases, panels have found that when origin is the sole criterion distinguishing the products, it is unnecessary to establish the likeness of the relevant products in terms of the traditional criteria.[575] In the present case, the measure at issue differentiates between (i) the treatment granted to the subject goods originating from certain developing countries listed in Notification No. 19/2016; and (ii) the treatment granted to the subject goods from all other origins, including developed countries, China, and Ukraine. Because the sole criterion differentiating what are essentially the same subject goods is the origin, the relevant products may be considered to be "like" products within the meaning of Article I:1.

7.420. With respect to the third element, the measure at issue exempted from the application of the resulting duties imports of the subject products originating in those developing countries listed in Notification No. 19/2016 (with the exception of China and Ukraine). This exemption constitutes the benefit or advantage conferred by the measure at issue.

7.421. With respect to the fourth element, the exemption granted to the subject goods imported from the developing countries listed in Notification No. 19/2016 was not extended to the like subject products originating in the territory of all WTO Members. Therefore, it was also not extended "immediately" and "unconditionally".

7.422. India has argued that "Article 9 [of the Agreement on Safeguards] provides for exceptions or waivers [from the] MFN principle".[576] It has also indicated that, when a measure is applied under Article XIX of the GATT 1994, "there can be no question of violation" of Article I:1 of the GATT 1994.[577]

7.423. Paragraph 1 of Article 9 of the Agreement on Safeguards states that:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country

[572] Appellate Body Reports, *EC – Seal Products*, para. 5.86.
[573] Notification imposing a definitive safeguard measure, (Exhibits JPN-13/IND-13), p. 7.
[574] Notification No. 19/2016-Customs (5 February 2016), (Exhibits JPN-3/IND-3).
[575] See, for example, Panel Report, *US – Poultry (China)*, para. 7.427.
[576] India's first written submission, para. 342.
[577] India's first written submission, para. 337.

> Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[578]

7.424. Conversely, paragraph 2 of Article 2 of the Agreement on Safeguards provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source".

7.425. Accordingly, the provision of Article 9.1 contains at the same time an obligation and an exception. In terms of the obligation, a Member applying a safeguard measure must exclude developing countries exporting less than the *de minimis* level provided in Article 9.1.[579] Article 9.1 also contains an exception from the rule that safeguard measures should be applied in a non-discriminatory manner contained in Article 2.2 of the Agreement on Safeguards and from the MFN rule in Article I:1 of the GATT 1994.

7.426. For the purpose of this dispute, we note that Japan has not raised a claim that the measure at issue was applied in a manner inconsistent with India's obligations under Article 9.1 of the Agreement on Safeguards.

7.427. Nevertheless, India has suggested that Article 9.1 is an exemption from any discriminatory application of the safeguard measure at issue. Article 9.1 of the Agreement on Safeguards, however, can only operate as a valid exception for any discriminatory treatment of imports when the safeguard measure at issue has not been found to be inconsistent with the obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards. Similarly, although Article XIX of the GATT 1994 allows WTO Members to suspend obligations incurred by a Member under the GATT 1994, such suspension would only be valid when the safeguard measure at issue has not been found to be inconsistent with the obligations in Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.428. Since we have already concluded that the measure at issue is inconsistent with India's obligations under Article XIX of the GATT 1994 and certain provisions of the Agreement on Safeguards, the discriminatory application of the safeguard measure cannot be excused by Article 9.1. Likewise, the measure at issue did not result in a valid suspension of India's obligation under Article I:1 of the GATT 1994.

7.15.4 Conclusion

7.429. For the reasons explained above, we conclude that India has acted inconsistently with its obligations under Article I:1 of the GATT 1994. The discriminatory application of the measure at issue cannot be excused by Article 9.1 of the Agreement on Safeguards.

7.16 Special and differential treatment

7.430. Pursuant to Article 12.11 of the DSU:

> [W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.431. Article 12.10 of the DSU also provides the following:

> [I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.

7.432. In the present proceedings, and except for arguments concerning Article 9 of the Agreement on Safeguards which the Panel has already noted, none of the parties has referred to any provision in the WTO Agreements on special and differential treatment for developing country Members. In any event, when adopting and reviewing the timetable for the proceedings, the Panel made sure

[578] Fn omitted.
[579] Appellate Body Report, *US – Line Pipe*, para. 132.

that all parties, including India as a developing country respondent, had sufficient time to prepare and submit their respective arguments. The Panel found that no other provisions on differential and more favourable treatment for developing country Members were relevant for the resolution of the matter in the dispute.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. For the reasons explained in this Report, the Panel concludes that the measure at issue resulted in a suspension of obligations incurred by India under the GATT 1994. This measure was adopted by India as a temporary emergency action designed to remedy an alleged situation of serious injury to the domestic industry brought about by an increase in imports of the subject products. We accordingly conclude that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination of the claims raised in the present dispute.

8.2. The Panel concludes that India has acted inconsistently with the following provisions:

a. Article XIX:1(a) of the GATT 1994, by failing to demonstrate that the increase in imports of the product concerned into India occurred as a result of unforeseen developments and the effect of relevant obligations of the GATT 1994;

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

c. Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards, with respect to the determination of serious injury and the threat of serious injury;

d. Article 4.2(b), first and second sentences, of the Agreement on Safeguards, by failing to demonstrate the existence of a causal link between the increased imports and the alleged serious injury suffered by the domestic industry and by failing to conduct a proper non-attribution analysis;

e. Articles 3.1 and 4.2(c) of the Agreement on Safeguards, by failing to provide reasoned conclusions on all pertinent issues of fact and law;

f. Article 12.4 of the Agreement on Safeguards, by failing to notify the Committee on Safeguards before taking the provisional safeguard measure at issue;

g. Article 12.2 of the Agreement on Safeguards, by failing to provide the Committee on Safeguards with a precise description of the product involved and a precise description of the proposed measure;

h. Article 12.3 of the Agreement on Safeguards, by failing to provide Japan, and other Members with a substantial export interest in the product subject to the proposed safeguard measure, with adequate opportunity for prior consultations with a view to reviewing all pertinent information;

i. Article II:1(b), second sentence, of the GATT 1994, by imposing measures on the importation of products which constitute "other duties or charges", which were not recorded in its Schedule of Concessions; and

j. Article I of the GATT 1994, by having failed to extend immediately and unconditionally to the products of all WTO Members certain advantages granted to products originating in some countries. The discriminatory application of the measure at issue is not excused by Article 9.1 of the Agreement on Safeguards.

8.3. The Panel also concludes that Japan failed to demonstrate that India acted inconsistently with the following provisions:

a. Articles 2.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, and consequentially Articles 3.1 and 4.2(c) of the Agreement on Safeguards, with respect to the determination of the domestic industry; and

b. Articles 12.1(a), (b) and (c) and 12.2 of the Agreement on Safeguards, with respect to the notifications to the Committee on Safeguards of the initiation of a safeguard investigation relating to serious injury or threat thereof, the findings of serious injury in the investigation, and the decision to apply a definitive safeguard measure.

8.4. In light of the findings above, the Panel has exercised judicial economy with respect to the following claims:

a. Japan's consequential claim that India acted inconsistently with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with regard to its assessment of the situation of the domestic industry;

b. Japan's consequential claim that India acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 with respect to its causation and non-attribution analyses;

c. Japan's claims under Articles 3.1, 4.2(c), 5.1, and 7.1 of the Agreement on Safeguards, and Japan's consequential claim under Article XIX:1(a) of the GATT 1994, with respect to the duration of the safeguard measure at issue and the level of the duties imposed; and

d. Japan's consequential claim under Article 11.1(a) of the Agreement on Safeguards.

8.5. In accordance with Article 3.8 of the DSU, in cases when there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under the agreement in question. In view of the foregoing, the Panel concludes that, insofar as India has acted in a manner inconsistent with Article XIX:1 of the GATT 1994 and several provisions of the Agreement on Safeguards, it has nullified or impaired benefits accruing to Japan under those agreements.

8.2 Recommendation

8.6. Pursuant to Article 19.1 of the DSU, having found that India acted inconsistently with certain provisions of the GATT 1994 and the Agreement on Safeguards, we recommend that, to the extent that the measure continues to have any effects, India bring it into conformity with its obligations under those agreements.