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EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS (DS595)

REPORT OF THE PANEL

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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
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Australia – Anti-Dumping Measures on Paper	Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R and Add.1, adopted 28 January 2020
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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 – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, p. 803
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, p. 6499
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, p. 6793
EC – Export Subsidies on Sugar (Thailand)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, p. 7071
EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
EC – Trademarks and Geographical Indications (US)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, p. 3499
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EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017, DSR 2017:III, p. 1067
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
India – Iron and Steel Products	Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R and Add.1, circulated to WTO Members 6 November 2018 [appealed by India 14 December 2018 – the Division suspended its work on 10 December 2019]
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
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
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021 [appealed by Pakistan 22 February 2021]
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 – 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 Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Cotton Yarn	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R, DSR 2001:XII, p. 6067
US – Fur Felt Hats	GATT Working Party Report, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, adopted 22 October 1951, GATT/CP/106
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 – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, p. 2623
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)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489
US – Safeguard Measure on PV Products (China)	Panel Report, *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WT/DS562/R and Add.1, circulated to WTO Members 2 September 2021 [appealed by China 16 September 2021]

Short Title	Full Case Title and Citation
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
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US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short title (if any)	Description
EU-2		WTO statistics on antidumping initiations by sector
EU-3		WTO statistics on countervailing initiations by sector
EU-7	Presentation at the 83rd session of the OECD Steel Committee	H. Otsuka, "Recent developments in steel trade and trade policies" presentation at the 83rd session of the OECD Steel Committee held in Paris on 28 September 2017
EU-8	Chair's statement at the 83rd session of the OECD Steel Committee	Statement dated 28 September 2017 of L. Top, Chair of the OECD Steel Committee at the 83rd session of the OECD Steel Committee
EU-9	Chair's statement at the 84th session of the OECD Steel Committee	Statement dated 5 March 2018 of the Chair at the 84th session of the OECD Steel Committee
EU-10		Cover letter (11 April 2018)
EU-12		Calculation deflection
EU-13		Estimate of imports to the US that will be deflected
EU-16	Presentation at the 84th session of the OECD Steel Committee	OECD presentation, "Steel trade and trade policy developments: a closer look at NTMs", 84th session of the OECD Steel Committee
EU-17		Global Forum on Steel Excess Capacity Report (30 November 2017)
EU-23	European Commission's Communication "Steel: Preserving Sustainable Jobs and Growth"	Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, "Steel: Preserving sustainable jobs and growth in Europe" (16 March 2016)
TUR-1	Notice of initiation	Notice of initiation of a safeguard investigation concerning imports of steel products, Official Journal of the European Union, C Series, No. 111 (26 March 2018) pp. 29-35
TUR-2	Amendment to the notice of initiation	Notice amending the notice of initiation of a safeguard investigation concerning the imports of steel products, Official Journal of the European Union, C Series, No. 225 (28 June 2018), pp. 54-56
TUR-3	Provisional determination	Commission Implementing Regulation (EU) No. 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products, Official Journal of the European Union, L Series, No. 181 (18 July 2018), pp. 39-83
TUR-5	Definitive determination	Commission Implementing Regulation (EU) No. 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, Series L, No. 31 (1 February 2019), pp. 27-74
TUR-7	Double remedy regulation	Commission Implementing Regulation (EU) No. 2019/1382 of 2 September 2019 amending certain regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures, Official Journal of the European Union, Series L, No. 227 (3 September 2019), pp. 1-25
TUR-9	First review regulation	Commission Implementing Regulation (EU) No. 2019/1590 of 26 September 2019 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, Series L, No. 248 (27 September 2019), pp. 28-64
TUR-10	European Commission Implementing Regulation (EU) 2020/35	Commission Implementing Regulation (EU) 2020/35 of 15 January 2020 amending Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, Series L, No. 12 (16 January 2020), pp. 13-16
TUR-12	Second review regulation	Commission Implementing Regulation (EU) No. 2020/894 of 29 June 2020 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, Series L, No. 206 (30 June 2020), pp. 27-62
TUR-14	Questionnaire for exporting producers	European Commission, safeguard questionnaire for exporting producers
TUR-15	Questionnaire for domestic producers	European Commission, safeguard questionnaire for Union producers
TUR-18		Note to the file (11 April 2018)
TUR-19		Updated note to the file (2 July 2018)
TUR-21	Global Trade Alert Report, "Going Spare"	S. Evenett and J. Fritz, *Going Spare: Steel, Excess Capacity, and Protectionism (The 22nd Global Trade Alert Report*) (CEPR Press, May 2018)
TUR-39		Commission Regulation (EC) No 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products, Official Journal of the European Union, L Series, No. 261 (28 September 2002), pp. 1-123

Exhibit	Short title (if any)	Description
TUR-40		Questionnaire response of ThyssenKrupp Steel Europe GmbH
TUR-49		List of anti-dumping and countervailing measures in place at the time of the imposition of the provisional safeguard measures

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD/CV	anti-dumping/countervailing
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
MRP	most recent period
POI	period of investigation
PV	photovoltaic
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	sanitary and phytosanitary
TRQ	tariff-rate quota
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Turkey

1.1. On 13 March 2020, Turkey requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 29 April 2020 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 16 July 2020, Turkey requested the establishment of a panel pursuant to Article 6 of the DSU and Article 14 of the Agreement on Safeguards with standard terms of reference.[2] At its meeting on 28 August 2020, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey in document WT/DS595/3, in accordance with Article 6 of the DSU.[3]

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 Turkey in document WT/DS595/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 29 September 2020, the parties agreed that the panel would be composed as follows:

Chairperson:	Mr William Davey
Members:	Ms Silvia Lorena Hooker Ortega Mr Marco Tulio Molina Tejeda

1.6. Argentina, Brazil, Canada, China, India, the Republic of Korea, Japan, Norway, the Russian Federation, Switzerland, Chinese Taipei, Ukraine, the United Arab Emirates, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] on 26 October 2020, the Additional Working Procedures of the Panel for the first substantive meeting[6] on 31 March 2021, and the Additional Working Procedures of the Panel for the second substantive meeting[7] on 2 June 2021. To give effect to certain requests made jointly by the parties on 22 March 2022, and after consulting the parties, the Panel also adopted further Additional Working Procedures on 1 April 2022.[8]

1.8. After consultation with the parties, the Panel adopted a partial timetable on 26 October 2020 and revised the timetable on 25 November 2020, 9 February 2021, 22 March 2021, 2 June 2021, 25 October 2021, and 3 November 2021. The timetable adopted by the Panel on 26 October 2020 envisaged that the European Union would file its first written submission by 22 December 2020. However, on 23 November 2020, the European Union requested the Panel to extend the deadline for the submission of its first written submission to 15 January 2021. On 24 November 2020,

[1] Request for consultations by Turkey, WT/DS595/1 (Turkey's consultation request).
[2] Request for establishment of a panel by Turkey, WT/DS595/3 (Turkey's panel request).
[3] DSB, Minutes of the meeting held on 28 August 2020, WT/DSB/M/444.
[4] Constitution note of the Panel, WT/DS595/4.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel for the first substantive meeting (Annex A-2).
[7] Additional Working Procedures of the Panel for the second substantive meeting (Annex A-3).
[8] See Agreed procedures for arbitration under Article 25 of the DSU, WT/DS595/10; Additional Working Procedures of the Panel (Annex A-4); and paragraph 1.9 below.

Turkey opposed the European Union's request. After considering both parties' positions, the Panel granted the European Union's request and accordingly revised the timetable on 25 November 2020. On 8 February 2021, the European Union requested the Panel to extend (a) the deadline for filing responses to the questions sent by the Panel to the parties on 5 February 2021 from 12 February 2021 to 26 February 2021; and (b) the deadline for filing the second written submission from 5 March 2021 to 19 March 2021. On 9 February 2021, Turkey opposed the European Union's request. After considering both parties' positions, the Panel revised the timetable on 9 February 2021, partially granting the European Union's request by changing the two deadlines to 19 February 2021 and 12 March 2021, respectively. On 27 May 2021, the European Union asked the Panel to extend the deadline for filing comments on the other party's responses to the Panel's questions after the first substantive meeting from 4 June 2021 to 18 June 2021. On 27 May 2021, Turkey opposed the European Union's request. After considering both parties' positions, the Panel partially granted the European Union's request by changing the deadline to 8 June 2021. The revised timetable issued by the Panel on 25 October 2021 set the date for the parties to request review of precise aspects of the interim report and/or to request an interim review meeting as 5 November 2021, and the deadline for the parties to comment on the other party's review requests and for the interim review meeting (if requested) as 12 November 2021. On 2 November 2021, Turkey requested the Panel to change the two dates to 12 November 2021 and 19 November 2021 respectively. The European Union did not object to Turkey's request. In light of both parties' positions, the Panel revised the timetable on 3 November 2021, granting Turkey's request.

1.9. The Panel held a first substantive meeting with the parties on 4, 5, and 6 May 2021. A session with the third parties took place on 5 May 2021. According to paragraph 15 of the Working Procedures adopted by the Panel, the Panel retained the discretion to hold a second substantive meeting with the parties upon request by either party. On 17 May 2021, the European Union requested the Panel to hold a second substantive meeting. On 20 May 2021, Turkey opposed the European Union's request. After considering both parties' positions, the Panel granted the European Union's request and held a second substantive meeting with the parties on 22 and 23 June 2021. Because of restrictions due to the COVID-19 pandemic, the Panel conducted both substantive meetings via secure videoconference.[9] On 19 August 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 October 2021. The Panel issued its Final Report to the parties on 10 December 2021. The Panel Report was scheduled to be circulated on 21 December 2021. On 20 December 2021, Turkey requested the Panel to suspend its work, pursuant to Article 12.12 of the DSU, until 21 January 2022, and the European Union did not object. The Panel granted the suspension request.[10] Subsequently, Turkey filed three requests to extend the suspension of the Panel's work pursuant to Article 12.12 of the DSU, until 11 February 2022, 25 February 2022, and 25 March 2022, respectively. The European Union did not object to any of the three requests. The Panel granted these requests.[11] On 22 March 2022, the European Union and Turkey transmitted to the Panel a document signed by both parties entitled "Agreed Procedures for Arbitration under Article 25 of the DSU" (Agreed Procedures).[12] Through the Agreed Procedures, the parties jointly requested the Panel to extend indefinitely the suspension of its work pursuant to Article 12.12 of the DSU, except to the extent necessary for the Panel to effect certain steps set out in the Agreed Procedures. On 24 March 2022, the Panel decided to grant that suspension request.[13] To give effect to the parties' requests, made through the Agreed Procedures, that the Panel undertake certain steps relating to the report of the Panel and to the record of the Panel proceedings, the Panel adopted the Additional Working Procedures referred to at paragraph 1.7 above. Through the Agreed Procedures, paragraph 6, the parties also jointly requested the Panel to resume its work if neither party initiated arbitration under the Agreed Procedures within 30 days from the date on which the Agreed Procedures were notified to the DSB. Neither party initiated such arbitration, and on 26 April 2022 the parties confirmed their request that the Panel resume its work. The Panel Report was therefore circulated on 29 April 2022.

[9] The Panel adopted additional working procedures for each of these meetings. (See fns 6-7 above).

[10] See Suspension of Panel Work dated 21 December 2021, WT/DS595/6.

[11] See Suspension of Panel Work dated 20 January 2022, WT/DS595/7; Suspension of Panel Work dated 10 February 2022, WT/DS595/8; and Suspension of Panel Work dated 25 February 2022, WT/DS595/9.

[12] See Agreed procedures for arbitration under Article 25 of the DSU, WT/DS595/10.

[13] See Communication from the Panel dated 24 March 2022, WT/DS595/11.

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. In its panel request, Turkey identified the measures at issue as "the provisional and definitive safeguard measures imposed by the European Union on the imports of certain steel products and the investigation leading to the imposition of those measures". Turkey indicated that those measures "cover[ed] all decisions, notices, notifications and regulations" specifically mentioned in the panel request, and "include[d] any amendments, supplements, reviews, replacement, renewals, extensions, implementing measures and any other related measures taken by the European Union in relation to the investigation and/or the safeguard measures at issue".[14] Turkey repeated this formulation in its first written submission.[15]

2.2. In response to a question from the Panel, Turkey clarified that its challenge to the "investigation" leading to the imposition of the provisional and definitive safeguards was not distinct from its challenge to the provisional and definitive safeguards themselves.[16]

2.3. The legal instrument setting out the provisional safeguard measures on certain steel products (the "provisional safeguard") is Commission Implementing Regulation (EU) No. 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products (the "provisional determination").[17]

2.4. The legal instruments setting out the definitive safeguard measures on certain steel products ("definitive safeguard"[18]) include:

a. Commission Implementing Regulation (EU) No. 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (the "definitive determination")[19];

b. Commission Implementing Regulation (EU) No. 2019/1382 of 2 September 2019 amending certain regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures (the "double remedy regulation")[20];

c. Commission Implementing Regulation (EU) No. 2019/1590 of 26 September 2019 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products (the "first review regulation")[21];

d. Commission Implementing Regulation (EU) No. 2020/35 of 15 January 2020 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products[22]; and

e. Commission Implementing Regulation (EU) No. 2020/894 of 29 June 2020 amending Implementing Regulation (EU) No. 2019/159 imposing definitive safeguard measures against imports of certain steel products (the "second review regulation").[23]

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[14] Turkey's panel request, para. 17. Paragraph 17 of the panel request refers to sections 1.1-1.4 of the panel request, which describe in more detail the legal instruments comprising the challenged measures. (See also Turkey's request for consultations, para. 17).

[15] Turkey's first written submission, para. 34.

[16] Turkey's response to Panel question No. 15, para. 1.

[17] Provisional determination, (Exhibit TUR-3).

[18] Turkey requested the Panel to refer to this as "definitive safeguards", in the plural. (Turkey's comments on the descriptive part of the Panel Report, para. 2.4). The Panel has rejected the request, without prejudice to the Panel's consideration of the question whether there is a single definitive safeguard or multiple definitive safeguards, which the Panel discusses in paras. 7.43-7.57 below. Turkey made an equivalent request also for the provisional safeguard. (Turkey's comments on the descriptive part of the Panel Report, para. 2.3).

[19] Definitive determination, (Exhibit TUR-5). The definitive determination incorporates by reference certain findings and reasoning set out in the provisional determination.

[20] Double remedy regulation, (Exhibit TUR-7).

[21] First review regulation, (Exhibit TUR-9).

[22] European Commission Implementing Regulation (EU) 2020/35, (Exhibit TUR-10).

[23] Second review regulation, (Exhibit TUR-12).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Turkey requests the Panel to find that the measures at issue are inconsistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1, 5.2(a), 6, 7.1, and 7.4 of the Agreement on Safeguards, and with Articles II:1(b), XIII:2 *chapeau*, XIII:2(d), and XIX:1(a) of the GATT 1994.[24]

3.2. Turkey requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the European Union bring its measures into conformity with its obligations under the Agreement on Safeguards and the GATT 1994.[25] In addition, Turkey requests the Panel to suggest, pursuant to the second sentence of Article 19.1 of the DSU, that the European Union implement that recommendation by revoking the measures at issue.[26]

3.3. The European Union requests that the Panel reject Turkey's claims in this dispute in their entirety.[27]

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 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Brazil, Canada, Japan, the Republic of Korea, Switzerland, Ukraine, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, and C-9). China, India, Norway, the Russian Federation, Chinese Taipei, and the United Arab Emirates did not provide the Panel with a third-party submission and did not make an opening oral statement at the third-party session of the first substantive meeting with the Panel.

6 INTERIM REVIEW

6.1. On 29 October 2021, the Panel issued its Interim Report to the parties. On 12 November 2021, Turkey and the European Union submitted their written requests for review. On 19 November 2021, the parties submitted comments on the other parties' written 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-5.

7 FINDINGS

7.1. Turkey claims that the provisional and definitive safeguards on certain steel products adopted by the European Union in July 2018 and January 2019, respectively, are inconsistent with a number of provisions of the Agreement on Safeguards and the GATT 1994.

7.2. Below, we begin by considering whether we should make findings on both these measures, or only on the definitive safeguard, and we decide to make findings only on the definitive safeguard (section 7.1).

7.3. Our subsequent discussion follows the structure of Turkey's arguments. We therefore examine[28], in turn, the following aspects of the definitive safeguard: the European Commission's approach to product scope (section 7.2); unforeseen developments (section 7.3); the effect of obligations under the GATT 1994 (section 7.4); the increase in imports (section 7.5); threat of injury (section 7.6); causation (section 7.7); whether the safeguard was

[24] Turkey's first written submission, para. 381; second written submission, para. 268.
[25] Turkey's first written submission, para. 382; second written submission, para. 269.
[26] Turkey's first written submission, para. 382; second written submission, para. 269.
[27] European Union's first written submission, para. 313.
[28] In some instances, we exercise economy.

applied beyond the extent and time necessary to prevent serious injury (section 7.8); the allocation of shares in the tariff rate quotas that are one element of the definitive safeguard (section 7.9); whether the European Union did not progressively liberalize the safeguard and in fact made it more restrictive over time (section 7.10); and whether the out-of-quota duty that is another element of the definitive safeguard is a duty or charge inconsistent with Article II:1(b) of the GATT 1994 (section 7.11).

7.1 The measures on which the Panel will make findings

7.4. We recall that Turkey challenged (a) the provisional safeguard and (b) the definitive safeguard applied by the European Union on imports of certain steel products, as set out in more detail in section 2 above. Below, we discuss whether we should make findings on the provisional safeguard.

7.5. In response to a question from the Panel, Turkey has confirmed that the provisional safeguard is no longer in force, having been replaced by the definitive safeguard.[29] The European Union has not argued otherwise. It is therefore undisputed that the provisional safeguard is no longer in force.

7.6. At the same time, Turkey has observed that the regulation that applied the provisional safeguard (which we refer to as the provisional determination) is still in force.[30] In response to a further question from the Panel, Turkey has indicated that this means that "the legal basis remains to collect provisional safeguard measures retroactively" and, in support for this proposition, refers to findings of the panel in *India – Iron and Steel Products*.[31]

7.7. In this regard, we note that in these proceedings whether the provisional determination continues to provide the basis to collect out-of-quota safeguard duties is a question of fact. The findings of a different panel regarding the effects of a different safeguard adopted by a different Member cannot serve to establish as a matter of fact the effects of the provisional determination adopted by the European Union. In this case, we note that the reference to the findings of the panel in *India – Iron and Steel Products* is the only support that Turkey has provided for its statement that duties could still be collected retroactively under the provisional safeguard. In other words, Turkey has not provided the Panel with any evidence that duties are either continuing to be collected, or could be collected, by the European Union under the provisional safeguard at issue, and it has also stated that the provisional safeguard is no longer in force.[32]

7.8. Article 6.2 of the DSU does not limit to measures still in existence "the specific measures at issue" that can be brought before a panel. A panel may, therefore, issue findings on an expired measure where the panel believes it is necessary to do so to resolve a dispute. Conversely, a panel need not make findings on an expired measure where such findings are not necessary to resolve the dispute.[33] In addition, we note that when a panel does make findings on an expired measure, the fact that the measure has expired may affect the recommendations a panel may make pursuant to Article 19.1 of the DSU, which requires panels to make recommendations "to bring *the measure* into conformity" with the covered agreements.[34]

7.9. In this instance, Turkey concedes that the provisional safeguard is no longer in force. Turkey claims that the provisional safeguard is inconsistent with Article 6 for a subset of the reasons for which it claims the definitive safeguard is inconsistent with other provisions of the Agreement on Safeguards. Indeed, Turkey makes no distinction between its arguments against the provisional safeguard and the corresponding arguments against the definitive safeguard.[35] Given that the provisional safeguard is no longer in force, and that Turkey challenges the provisional safeguard for some of the same reasons for which it challenges the definitive safeguard, we do not consider that

[29] Turkey's response to Panel question No. 1, paras. 2 and 4.
[30] Turkey's response to Panel question No. 1, para. 4.
[31] Turkey's response to Panel question No. 16, para. 2 (referring to Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018]).
[32] We also note that Article 9 of the definitive determination provides that any amounts paid under the provisional determination "shall be definitively collected", which indicates that it is the definitive determination that provides the basis for the definitive collection of duties on imports covered by the provisional safeguard.
[33] See e.g. Panel Reports, *China – Electronic Payment Services*, paras. 7.226-7.229; and *Argentina – Textiles and Apparel*, para. 6.15.
[34] DSU, Article 19.1 (emphasis added). See e.g. Appellate Body Report, *US – Certain EC Products*, para. 81; and Panel Report, *EU – PET (Pakistan)*, para. 8.3.
[35] See e.g. Turkey's first written submission, paras. 49-76.

making findings on the consistency of the provisional safeguard with the covered agreements is necessary to resolve the dispute, and we therefore refrain from making such findings.

7.10. Notwithstanding this, we note that the provisional determination forms part of the record in the underlying investigation that led to the adoption of the definitive safeguard, and that the definitive determination refers to part of the findings and reasoning set out in the provisional determination. Therefore, although we decline to make findings on the consistency with the covered agreements of the provisional safeguard as a challenged measure, we still consider the provisional determination as appropriate when examining Turkey's claims against the definitive safeguard.

7.2 Product scope

7.11. Turkey claims that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards, based on two sets of arguments.

7.12. First, Turkey argues that the European Commission applied 26 distinct safeguards, on 26 products, but did not examine whether the circumstances and conditions for imposing a safeguard existed for each of those products individually. We refer to this as the "mismatch" argument. According to Turkey, this gives rise to an inconsistency with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.[36]

7.13. Second, Turkey argues that the European Commission adopted an internally inconsistent approach to product scope at different stages of the investigation and application of the measures. We refer to this as the "internal inconsistency" argument. According to Turkey, this gives rise to an inconsistency with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards.[37]

7.14. We note that within each of these sets of arguments, Turkey presents its arguments for the most part without distinguishing among the various claims it has raised. That is, Turkey sets out its arguments typically without specifying to what claim(s) each refers, and then cites a string of provisions in its concluding paragraphs; the Panel has sought some clarification in this regard but has obtained only very limited clarification.[38]

7.15. To Turkey's arguments, the European Union responds that it adopted a single definitive safeguard on certain steel products comprising 26 product categories, and that it ascertained the existence of the circumstances and conditions necessary for imposing a safeguard on the product as thus defined.[39] As regards the allegation of internal inconsistency, the European Union responds that it did, as required, conduct an objective and unbiased evaluation and set out its findings and reasoned conclusions, and that the Agreement on Safeguards does not contain, in addition, the "internal consistency" requirement invoked by Turkey.[40]

7.16. Among the third parties, Canada, the Republic of Korea, the United Kingdom, and the United States argue that the authority has discretion to define the product under investigation but must then verify whether the circumstances and conditions for applying a safeguard to that product are met.[41] Argentina and Switzerland question how the authority could demonstrate the existence

[36] See e.g. Turkey's first written submission, para. 67. See, more broadly, Turkey's first written submission, paras. 50-67; and second written submission, paras. 17-46.

[37] See e.g. Turkey's first written submission, para. 76; response to Panel question No. 17, para. 3. See, more broadly, Turkey's first written submission, paras. 68-76; and second written submission, paras. 48-54.

[38] The second set of arguments is presented in support of the same claims as the first set of arguments, plus Articles 3.1 and 4.2(c) of the Agreement on Safeguards. (Turkey's response to Panel question No. 17, para. 3).

[39] European Union's first written submission, paras. 27-46; second written submission, paras. 1, 3-5, 7-16, and 24-29.

[40] European Union's first written submission, paras. 25-58; second written submission, paras. 1, 6, 17-23, and 28-29.

[41] Canada's third-party submission, paras. 12-13 and 15; Korea's third-party submission, paras. 7-9; United Kingdom's third-party submission, paras. 4-11; Canada's third-party statement, para. 9; United Kingdom's third-party statement, paras. 4-6; United States' third-party responses to Panel question Nos. 1 and 2, paras. 1-7.

of the conditions for imposing a safeguard for the product under investigation if it modified the product groupings depending on the condition it was examining.[42] Switzerland adds that the authority must use a method that is unbiased and objective and that allows for a reasoned and adequate explanation of how the facts support the determination that the imports covered by a safeguard measure satisfy the conditions for applying the measure.[43] Switzerland also takes the view that there are contradictions both in the record of the domestic proceedings and in the EU arguments.[44] Japan recalls that if a safeguard is applied to specific products, it is not enough to demonstrate the existence of the conditions for imposing a safeguard for a broad category of products that includes the product under investigation.[45] Argentina considers that the question before the Panel is primarily a factual one, i.e. whether the European Commission applied a single safeguard on a single product, or a number of safeguards. Argentina notes that this question is central because the European Commission was required to verify the existence of the necessary conditions for the product on which it applied a safeguard. Further, Argentina notes that the European Commission was required to conduct the investigation in an objective and unbiased manner, and that if an authority relies on different product groupings at different steps of its analysis, that might cast doubt on whether the investigation was objective and unbiased.[46] For its part, Ukraine cautions that "including a wide list of products may result in artificial and incorrect findings in the framework of such categories' injury examination and, as a result, may lead to distorted findings of an investigation".[47]

7.17. Canada considers that the Panel must assess whether the European Commission demonstrated that it was appropriate to exclude certain product categories from the analysis.[48] The United Kingdom takes the view that we must examine whether the exclusion of certain product categories affected the analysis, and cautions against finding that a Member errs by adopting a narrower safeguard than it is entitled to apply.[49] Argentina indicates that a Member may exclude a subset of the product concerned from the application of a safeguard and, in that case, the imports of the excluded subset are a factor for which the authority must perform a non-attribution analysis pursuant to Article 4.2(b) of the Agreement on Safeguards.[50] Brazil and Switzerland take the view that a Member may exclude a subset of the product concerned from the application of a safeguard and, if it does so, it must exclude the corresponding imports from the analysis of increased imports.[51]

7.18. We recall that Turkey sets out its arguments on product scope mostly without specifying to what claim or claims each argument refers, and then cites a string of provisions in its concluding paragraphs.[52] Therefore, in this section, we first examine the requirements of all of the provisions with which Turkey claims an inconsistency, and we then examine, in turn, each of Turkey's two sets of arguments.

7.2.1 The applicable requirements of Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards

7.19. As noted, Turkey brings a number of claims related to the product scope of the EU investigation and of the ensuing safeguard. That is, Turkey claims that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994, and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards. We consider each of these provisions below.

7.20. Article XIX:1(a) of the GATT 1994 provides:

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[42] Argentina's third-party statement, para. 7; Switzerland's third-party submission, para. 11.
[43] Switzerland's third-party submission, para. 7.
[44] Switzerland's third-party submission, para. 10.
[45] Japan's third-party submission, paras. 9 and 17 (referring to the Panel Reports and Appellate Body Report in *US – Steel Safeguards*).
[46] Argentina's third-party statement, paras. 5-7.
[47] Ukraine's third-party statement, paras. 11-12.
[48] Canada's third-party submission, para. 16; third-party statement, paras. 5-6.
[49] United Kingdom's third-party statement, paras. 9-10. See also United Kingdom's third-party response to Panel question No. 2, paras. 6-8.
[50] Argentina's third-party response to Panel question No. 2.
[51] Brazil's third-party response to Panel question No. 2; Switzerland's third-party response to Panel question No. 2.
[52] See para. 7.14 above.

> *If*, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, *any product* is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, *in respect of such product*, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[53]

7.21. Article XIX:1(a) states that "if" the circumstances and conditions specified therein are met for "any product", a Member is free to apply a safeguard "in respect of such product". Thus, under Article XIX:1(a), a safeguard may be applied on a product only if the circumstances and conditions necessary to apply the safeguard have been verified for that same product.

7.22. Our understanding accords with the findings in *US – Steel Safeguards* and *India – Iron and Steel Products* that if a required circumstance or condition is not found to exist specifically *for the product(s) under investigation*, the application of a safeguard on that product is inconsistent with Article XIX:1(a). In those two proceedings, the panels found that the authority had not explained how the unforeseen developments, which related to steel in general, had resulted in an increase in imports of the specific products under investigation, and that therefore the safeguards applied on those products were inconsistent with Article XIX:1(a).[54]

7.23. Similarly, Article 2.1 of the Agreement on Safeguards provides that a Member may apply a safeguard "to a product" "only if" that Member has determined that certain conditions are met in respect of "such product". That is, the product on which a safeguard is applied must be the same as the product for which the Member has determined that the conditions for applying a safeguard are met. If a Member applies a safeguard on a product for which it has not determined that the conditions are met, it acts inconsistently with Article 2.1.

7.24. The last sentence of Article 3.1 of the Agreement on Safeguards provides:

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

7.25. Article 3.1 thus requires authorities to set forth their findings and "reasoned" conclusions on "all pertinent issues of fact and law" in their published reports.

7.26. The ordinary meaning of "finding" includes an instance of "coming across or discovering something … as the result of searching or enquiry", "something which is found", and "the result of a[n] … enquiry".[55] The ordinary meaning of "conclusion" includes a "final result, outcome" and "a judgement or statement arrived at by any reasoning process".[56] And the ordinary meaning of "reasoned" includes "characterized by or based on reasoning; carefully studied".[57] The last sentence of Article 3.1 therefore requires authorities to set forth in their published reports what they have found, as the result of searching or enquiry, and the conclusions (outcome, final result) they have reached from their findings. These conclusions must be "based on reasoning", "carefully studied".

7.27. As to the scope of the necessary findings and reasoned conclusions, the last sentence of Article 3.1 specifies that these must cover "all pertinent issues of fact and law". The ordinary

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[53] Emphasis added.

[54] Panel Reports, *US – Steel Safeguards*, paras. 10.126, 10.147, and 10.150; *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], paras. 7.111-7.112 and 7.122; and Appellate Body Report, *US – Steel Safeguards*, paras. 314-319.

[55] Oxford Dictionaries online, definition of "finding", n., meanings 2(a), 2(b), and 6(a), https://www.oed.com/view/Entry/70356?rskey=Qnw27c&result=2&isAdvanced=false#eid (accessed 20 September 2021).

[56] Oxford Dictionaries online, definition of "conclusion", n., meanings 2 and 5(a), https://www.oed.com/view/Entry/38312?redirectedFrom=conclusion#eid (accessed 20 September 2021).

[57] Oxford Dictionaries online, definition of "reasoned", adj.2, https://www.oed.com/view/Entry/159078?rskey=0Idv1P&result=3&isAdvanced=false#eid (accessed 20 September 2021).

meaning of "pertinent" includes "referring or relating to; relevant; to the point; apposite".[58] Article 3 is a provision on the "investigation" that is required for a Member to be able to apply a safeguard measure, and Article 3.1 specifies certain procedural requirements relating to such an investigation. This suggests that the "pertinent", i.e. relevant, issues of fact and law are those that must be established through the investigation, and specifically those that must be established for a Member to be able to apply a safeguard measure. We therefore agree with previous findings to the effect that the pertinent issues of fact and law within the meaning of Article 3.1 include the circumstances and conditions that must be demonstrated in order to apply a safeguard and that are set forth in Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[59]

7.28. Article 4.1(c) of the Agreement on Safeguards defines the domestic industry. One of the conditions that must be determined to exist to apply a safeguard is serious injury or threat of serious injury "to the domestic industry that produces like or directly competitive products".[60] Article 4.1(c) defines the domestic industry as "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". Thus, given a product under investigation, the authority must ascertain injury or threat of injury to the domestic industry producing the products that are "like or directly competitive" with that product.

7.29. We note that the panel in *Argentina – Footwear (EC)* was called upon to assess whether the authority had erred by not examining each injury factor for each segment of the market for the like or directly competitive products. In that dispute, Argentina had defined the like or directly competitive products as all footwear except ski boots. In collecting data from the domestic industry, Argentina had requested a breakdown into five product segments, but it had not then examined each injury factor for each of the five product segments separately, and the European Union argued that, by not doing so, Argentina had acted inconsistently with Articles 2 and 4 of the Agreement on Safeguards. The panel rejected that argument of the European Union. The panel reasoned that, given that the definition of like or directly competitive products (all footwear except ski boots) was not disputed, that definition was decisive. Therefore Argentina was "required at a minimum to consider each injury factor with respect to all footwear" and was not required to consider each injury factor for each segment of the like or competitive products on a disaggregated basis, although it could do so.[61] We agree with the assessment of that panel, because a Member is required to verify the existence of the necessary circumstances and conditions for the product under investigation as a whole (in the injury determination, for the corresponding like or directly competitive products as a whole), and not necessarily on a disaggregated basis.

7.30. Article 4.2(a) of the Agreement on Safeguards provides that in determining whether increased imports have caused or threatened serious injury to the domestic industry, the authorities "shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry", and it also lists certain relevant factors.

7.31. Article 4.2(b) of the Agreement on Safeguards provides that to determine causation, the authorities must "demonstrate[], on the basis of objective evidence, the existence of a causal link between the increased imports of the product concerned and serious injury or threat thereof", and must not attribute to the increased imports injury that is due to other factors. Thus, it must be increased imports "of the product" under investigation that cause injury or threat of injury to the industry producing the like or directly competitive products.

7.32. Finally, 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.

[58] Oxford Dictionaries online, definition of "pertinent", adj., meaning 3, https://www.oed.com/view/Entry/141602?redirectedFrom=pertinent#eid (accessed 20 September 2021).
[59] See e.g. Appellate Body Report, *US – Lamb*, para. 72.
[60] Agreement on Safeguards, Article 2.1.
[61] Panel Report, *Argentina – Footwear (EC)*, paras. 8.112-8.116 and 8.135-8.137.

7.33. Article 4.2(c) thus reiterates, with reference to the analysis of injury and causation addressed in Article 4.2, the obligation set out in the last sentence of Article 3.1, and requires in particular "a detailed analysis of the case" and a demonstration of the relevance of the factors examined.

7.34. It is also worth noting what the provisions considered in this section do *not* discipline, namely the choice of the product under investigation, in itself. These provisions do not set out rules for selecting the product under investigation, and for example they do not prevent a Member from including a range of products in a single investigation. We thus agree with the panel in *Dominican Republic – Safeguard Measures* that while the Agreement on Safeguards requires the authority to define the product under investigation, it does not set out requirements such as restricting the product under investigation "solely to those products that are like or directly competitive with each other".[62] In that instance, the product under investigation comprised polypropylene bags (the end product) and polypropylene tubular fabric (the input product for polypropylene bags). The panel in that dispute explained that the authority could include "two separate products" in the product under investigation, and was not under an "obligation to provide an explanation of why two separate products were treated as the product under investigation in the same proceeding". It therefore found that no inconsistency had been established on that basis.[63]

7.2.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards with regard to product scope

7.35. We now assess whether Turkey has established that the definitive safeguard is inconsistent with the provisions outlined in the previous section.

7.36. We recall that Turkey has grouped its arguments into two sets, i.e. (a) that the European Commission applied 26 distinct definitive safeguards, on 26 products, but did not examine whether the circumstances and conditions for imposing a safeguard existed for each of those products individually (the mismatch argument); and (b) that the European Commission's approach to product scope in the investigation and application of the safeguards was internally inconsistent (the internal inconsistency argument). We address these two sets of arguments in turn.

7.37. Before discussing the parties' specific arguments and setting out our findings, we note a point of terminology. In the underlying investigation, the European Commission used the terms "products" and "product categories" somewhat interchangeably to refer to the range of products/product categories covered by its investigation. In their arguments before us, the European Union mostly refers to "product categories" and Turkey mostly refers to "products". As we explain below, we do not consider that the use of either of these phrases decides the outcome of Turkey's claims.[64] For consistency of style, we will use the phrase "product categories" to refer to the range of products/product categories covered by the EU investigation, except in certain instances when referring to arguments of a party or citing record documents that use the term "products" instead.

7.2.2.1 The alleged mismatch between the products on which the European Commission applied a safeguard and the products for which the European Commission investigated the existence of the necessary circumstances and conditions

7.38. Turkey argues that the European Commission applied 26 distinct definitive safeguards, on 26 products, without examining whether the circumstances and conditions for imposing a safeguard existed for each of those products individually.[65] Specifically, Turkey argues that: the European Commission has applied distinct safeguards on 26 products[66]; the European Commission did not examine unforeseen developments and their connection with the increase in imports for each of the 26 products individually[67]; although the European Commission examined the data on increase

[62] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.177 and 7.181.
[63] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.176-7.182.
[64] See para. 7.53 below.
[65] Turkey's first written submission, paras. 37-38, 42-48, and 50-67; second written submission, paras. 17-46.
[66] Turkey's first written submission, paras. 42-48 and 54-58; second written submission, paras. 32-46; and opening statement at the first meeting of the Panel, para. 6.
[67] Turkey's first written submission, paras. 61 and 141-142.

in imports for each of the 26 products individually, it did not base its determination of an increase in imports on such data[68]; and the European Commission did not examine threat of injury[69] and causation[70] for each of the 26 products individually. Therefore, according to Turkey, there is a mismatch between the products to which the European Commission has applied the safeguard, on the one hand, and the products for which it has investigated the existence of the circumstances and conditions required to apply the safeguard, on the other.

7.39. The European Union disputes Turkey's characterization of the facts underpinning this line of argument, namely that it has applied a number of distinct safeguards on distinct products. The European Union asserts that it investigated "certain steel products" globally as the product under investigation, and applied provisional and definitive safeguards on that product. The European Union asserts that its examinations at the level of individual product categories and then at the level of three "product families" merely supplemented its examination of the circumstances and conditions at the level of the product as a whole; that it carried out such additional examinations out of diligence; and that where it did carry out these additional examinations, they confirmed the findings reached for the product concerned globally.[71]

7.40. Turkey responds to the European Union's argument that the European Commission adopted a single safeguard by asserting that if the European Commission had really applied a single safeguard on a single product under investigation, that product should have stayed the same throughout the investigation. Turkey asserts that this was not the case here, given that the European Commission began with 28 products, applied a provisional safeguard on 23 products, and applied definitive measures on 26 products.[72] The European Union responds that it chose not to apply measures to those product categories for which it had not observed an increase in imports, and that therefore when verifying the existence of the circumstances and conditions necessary to apply a safeguard, it excluded those product categories.[73]

7.41. Turkey brings a single set of arguments on product scope in support of its series of claims under Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards, without specifying which argument supports which of these individual claims. We consider, first, the claims of inconsistency under Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards (section 7.2.2.1.1) and, second, the claims of inconsistency under Articles 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards (section 7.2.2.1.2).

7.2.2.1.1 Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards

7.42. We recall that under Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards, a Member may apply a safeguard to a product only if it has verified the existence of the required circumstances and conditions for that same product. In other words, the product(s) to which the Member applies a safeguard must be the same as the product(s) for which the Member has verified the existence of the circumstances and conditions for adopting the safeguard.

7.43. With this in mind, we turn to the facts to assess the merits of the parties' respective arguments.

7.44. In its notice of initiation, the European Commission described the "products subject to th[e] investigation" as "certain steel products (the 'products concerned') … listed in Annex I to th[e] Notice". That annex listed 26 "products concerned". The notice used interchangeably the phrases "products" and "product categories". The notice specified that there was sufficient evidence to initiate

[68] Turkey's first written submission, paras. 62 and 170-173. In other words, Turkey's argument is that the determination was based on the data for the 26 product categories taken together, and on the data for the three product families. (Turkey's first written submission, para. 62 (referring to Definitive determination, (Exhibit TUR-5), recitals 32-36 and 47)).

[69] Turkey's first written submission, paras. 63, 226-229, and 254-257.

[70] Turkey's first written submission, para. 64.

[71] European Union's first written submission, paras. 21-23; second written submission, paras. 11-15.

[72] Turkey's opening statement at the first meeting of the Panel, para. 12.

[73] European Union's responses to Panel question No. 6, paras. 18-19; and No. 7, paras. 21-22; opening statement at the first meeting of the Panel, paras. 22-23. See also European Union's second written submission, para. 46.

the investigation both for the product concerned as a whole and for some or all product categories, and that the investigation would "examine the situation of the products concerned, including the situation of each of the product categories individually".[74] The European Commission later amended the notice of initiation, to add two more "steel product categories" to the scope of the investigation, and in so doing it updated among others the figures on total volume of imports, to include the additional product categories.[75]

7.45. In its questionnaires both for exporting producers and for domestic producers, the European Commission described the product under investigation as "certain steel products", and asked respondents to provide certain data "separately for each of the products concerned".[76, 77, 78]

7.46. In the provisional determination, the European Commission explained that it found:

> [A]n important interrelation and strong competition between products classified in different product categories and also between products at different production stages within certain categories as some of the categories contain the main raw or input material to produce other products in other product categories.[79]

7.47. The European Commission observed that, "as a consequence, given this level of interrelation, competitive pressure can easily be shifted from one product to the other"[80], and further explained that:

> Because of these interrelations and interconnections, and given the fact that – as will be explained below – the potential trade diversion resulting from the US Section 232 measures applies to all product categories … the analysis for the purpose of the provisional determination has been carried out both globally for all 28 product categories

[74] Notice of initiation, (Exhibit TUR-1), p. 29 and annex.

[75] Amendment to the notice of initiation, (Exhibit TUR-2), p. 54.
In notes to the file following the original notice of initiation and its amendment, which were made available to interested parties, the European Commission referred to "products concerned" or "product categories", and provided data for the various product categories concerned taken together. In addition to the data for all product categories together, in some instances, the European Commission also provided or referred to data for individual product categories. (Note to the file (11 April 2018), (Exhibit TUR-18); Updated note to the file (2 July 2018), (Exhibit TUR-19). See also European Union's response to Panel question No. 3; second written submission, para. 14; and request for interim review, p. 1).

[76] Questionnaire for exporting producers, (Exhibit TUR-14), cover page and section D, heading D.1; Questionnaire for domestic producers, (Exhibit TUR-15), cover page and section E, heading E.1. The questionnaire for exporting producers requested information by product category on production, capacity, captive use, stock variation, sales volume, value and price by destination market (the respondent's domestic market, the European Union, the United States, and other markets), consumption in the respondent's domestic market, current and foreseen production and capacity on the respondent's domestic market (in the European Union and worldwide), future plans for production, capacity, and sales in the event that the European Union did, or did not, adopt a safeguard, and information on factors other than trends in imports that might have caused or threatened serious injury to the EU industry. (Questionnaire for exporting producers, (Exhibit TUR-14), section D). The questionnaire for exporting producers also requested information for all product categories taken together on sales volume and value by destination markets, and on the comparability of the imported and domestic products. (Questionnaire for exporting producers, (Exhibit TUR-14), sections C.7, C.9, and C.10). The questionnaire for domestic producers requested information by product category on the comparability of the imported and domestic products, on production, capacity, sales, stocks, profitability, return on capital employed, cash flow, employment, "any information" on the exporters' behaviour in the EU market and their current or likely future export capacity, and on the expected consequences of the US Section 232 measures. (Questionnaire for domestic producers, (Exhibit TUR-15), section E). The questionnaire for domestic producers also requested information for all product categories taken together on turnover by destination and on whether safeguard measures would be in the Union interest. (Questionnaire for domestic producers, (Exhibit TUR-15), sections D.1 and F).

[77] Turkey submitted a questionnaire response showing that a responding domestic producer provided data on injury factors at the level of product categories. (Questionnaire response of ThyssenKrupp Steel Europe GmbH, (Exhibit TUR-40); Turkey's second written submission, para. 26; and request for interim review, para. 8).

[78] The cover letter for the questionnaire for domestic producers indicated that the information requested therein was meant to "assist the Commission in establishing global data relating to the Union steel industry". (Cover letter (11 April 2018), (Exhibit EU-10), p. 1; European Union's request for interim review, p. 1).

[79] Provisional determination, (Exhibit TUR-3), recital 13.

[80] Provisional determination, (Exhibit TUR-3), recital 16.

as the product concerned (i.e. steel in various shapes and forms) and also at individual level for each product category.[81]

7.48. In its provisional determination, having reviewed import trends for all 28 product categories, the European Commission found that imports of five product categories had not increased between 2013 and 2017. On that basis, it decided to exclude them from the scope of the provisional safeguard, without prejudice to the possibility of imposing a definitive safeguard on them. The European Commission then performed every step in its analysis underlying the provisional safeguard for the remaining 23 product categories only, taken together and, for some steps, also individually.[82]

7.49. In its definitive determination, the European Commission reiterated its approach to the product under investigation as comprising a group of product categories, taken together.[83] In response to certain objections from interested parties regarding the product scope of the investigation, it also divided the product categories concerned into three "product families", and examined both the import trends and injury also at the level of those product families.[84] Further, having found that imports of two of the 28 product categories had not increased between 2013 and the first half of 2018, it excluded those two product categories both from the scope of the definitive safeguard and from the scope of its analysis of the circumstances and conditions required to apply the safeguard.[85]

7.50. Specifically, as a basis for adopting the definitive safeguard, the European Commission examined the existence of the required circumstances and conditions as follows:

a. Increase in imports. The European Commission reviewed data on increase in imports for each of the 28 product categories; having found that there had been no increase in imports between 2013 and the first part of 2018 for two product categories, it excluded those from the rest of the analysis, and only included in the rest of its analysis the product categories for which it found an increase in imports; relying on the data for the remaining 26 product categories globally, it found that there had been an increase in imports; in addition, it also considered the evolution of imports for those 26 product categories grouped into three product "families", "to supplement the global … analysis"[86];

b. Unforeseen developments. The European Commission examined unforeseen developments for all product categories "globally", and found that there were such unforeseen developments resulting in increased imports[87, 88];

c. Threat of injury. The European Commission reviewed data for the 26 product categories globally, and on that basis found that the domestic industry was threatened with material injury; it also "supplemented" its conclusions by reviewing the data for the three families into which it grouped the 26 product categories[89];

[81] Provisional determination, (Exhibit TUR-3), recital 17. (fn omitted)
[82] Provisional determination, (Exhibit TUR-3), recitals 24 and 26 ff.
[83] Definitive determination, (Exhibit TUR-5), section 2.
[84] Definitive determination, (Exhibit TUR-5), recitals 19-22.
[85] Definitive determination, (Exhibit TUR-5), recital 31; see also para. 7.50 below.
[86] Definitive determination, (Exhibit TUR-5), recitals 27-47 and annex II.
[87] Definitive determination, (Exhibit TUR-5), recitals 50 and 48-62; Provisional determination, (Exhibit TUR-3), section V.
[88] We consider that the question whether the European Union only examined unforeseen developments for steel in general and, if so, whether that suffices to establish unforeseen developments resulting in an increase in imports of the product under investigation under Article XIX:1(a), is a separate one. However, since we find that the European Commission has otherwise not established that the unforeseen developments resulted in the observed increase in imports, we do not reach this question. (See section 7.3.2.3.2 below).
[89] Definitive determination, (Exhibit TUR-5), recitals 63-110. In the provisional determination, the European Union had also relied on data for product categories individually, but those did not include four of the product categories on which the European Union applied the definitive safeguard. The European Union did not rely on this analysis by product categories in the definitive determination. (Provisional determination, (Exhibit TUR-3), recitals 38, 47-69, and annex III; Definitive determination, (Exhibit TUR-5), recitals 63-110).

d. Causation. The European Commission examined causation for all product categories globally.[90]

7.51. The definitive safeguard consists of the following elements:

a. the introduction of tariff-rate quotas (TRQs) for each of the 26 product categories subject to measures[91], with the following characteristics:

i. for each product category, the European Commission based the initial level of the TRQ on the average imports in the period 2015-2017 plus 5%[92];

ii. the European Commission further split two of the 26 product categories into two subcategories, adopting a TRQ for each subcategory[93]; and

iii. for most product categories, the European Commission allocated part of the TRQ on a country-specific basis.[94]

b. an out-of-quota duty rate of 25% for all product categories[95]; and

c. for each of the 26 product categories separately, the exclusion of developing country Members with *de minimis* exports.[96]

7.52. Having set out the facts, we now assess whether Turkey has established that the definitive safeguard is inconsistent with Article XIX:1(a) and Article 2.1 on the basis of a mismatch between the products to which the European Commission has applied the safeguard, on the one hand, and the products for which it has investigated the existence of the circumstances and conditions required to apply the safeguard, on the other.

7.53. We recall, first, that Article XIX:1(a) and the Agreement on Safeguards do not constrain the choice of product(s) under investigation.[97] They did not therefore bar the European Commission from choosing to investigate a number of steel products taken together, and indeed Turkey does not argue that the European Commission's selection of the product under investigation, in itself, gave rise to an inconsistency. We note in this respect that Turkey's reliance on the fact that the European Commission has at times used the term "products", in the plural, instead of referring to a "product" (comprising a number of product categories) is not decisive, because an investigating authority can investigate and apply a safeguard on a range of products taken together, provided that the safeguard meets the other requirements of Article XIX:1(a) and the Agreement on Safeguards.[98]

7.54. Next, we recall that Article XIX:1(a) and Article 2.1 of the Agreement on Safeguards require a Member to have ascertained the existence of the necessary *circumstances and conditions* for

[90] Definitive determination, (Exhibit TUR-5), recitals 111-127; Provisional determination, (Exhibit TUR-3), recitals 70-81 (confirmed in Definitive determination, (Exhibit TUR-5), recital 127).
[91] Definitive determination, (Exhibit TUR-5), article 1.
[92] Definitive determination, (Exhibit TUR-5), recital 144.
[93] Definitive determination, (Exhibit TUR-5), recital 160 and annex IV.
[94] Definitive determination, (Exhibit TUR-5), article 1(2) and annex IV.
[95] Definitive determination, (Exhibit TUR-5), article 6.
[96] Definitive determination, (Exhibit TUR-5), article 5 and annex III.2.
[97] See para. 7.53 above.
[98] Separately, we note that Turkey has also argued that the use of the plural in "measures" (e.g. "definitive safeguard measures") establishes that the European Union in fact applied 26 distinct safeguards on 26 products. (Turkey's first written submission, para. 58; request for interim review, para. 9). We note that it is not uncommon to describe a safeguard as "safeguard measures", and that the European Commission's references to "safeguard measures" appeared in a context that made it abundantly clear that the European Commission considered that it had investigated and was applying measures on a "single product" collectively rather than distinct safeguards on a number of distinct products. (See e.g. Definitive determination, (Exhibit TUR-5), section 2.1). Therefore, the use of the plural "safeguard measures" by the European Commission in this context does not assist us in answering the question before us.

applying a safeguard for the *same product* on which that Member *applies a safeguard*.[99] We therefore consider whether Turkey has established that the European Commission did not do so.

7.55. We begin by assessing whether Turkey has established that the European Commission has applied 26 distinct safeguards on 26 products, rather than a single safeguard as the European Union asserts.

7.56. The facts reviewed above indicate that the European Commission began an investigation into "certain steel products", together, and indicated that it would "examine [their] situation" both globally and at the level of "the product categories individually"[100]; it accordingly collected certain data globally and other data for each product category individually.[101] At the end of its investigation, the European Commission applied, through the definitive determination (Regulation (EU) 2019/159), a safeguard consisting of a combination of a zero-rate TRQ and an out-of-quota duty rate of 25% on 26 categories of steel products. The size of the TRQ was calculated at the level of each product category or, for two product categories, at the level of further subsets of those product categories, and according to the definitive determination it was set, among other things, to "ensur[e] that traditional trade flows are maintained".[102] Whenever a product category (or subcategory) subject to the safeguard is imported in excess of the respective TRQ, it is subject to the out-of-quota duty of 25%.[103]

7.57. These facts support the European Union's assertion that it applied a single safeguard on 26 steel product categories, together.

7.58. Turkey argues that the fact that the European Commission examined import trends also at the level of individual product categories, and excluded from the application of the safeguard those product categories for which, separately, it found no increase in imports, and the fact that, as a result, the total number of product categories concerned shifted, establish that the European Union imposed a number of distinct safeguards, each on one product category.[104] However, a Member is not barred from not applying a safeguard on a subset of the product or products[105] on which it initiates a safeguard investigation. What a Member applying a safeguard must ensure is that it verifies the existence of the conditions for imposing a safeguard for the same product on which it applies the safeguard, which is a question we address further below.[106] We therefore do not consider that the decision to refrain from imposing the safeguard on certain product categories establishes that the European Commission imposed distinct safeguards on each of the remaining product categories.

7.59. Turkey also argues that that the fact that TRQs were established at the level of the product categories shows that the European Union applied distinct safeguards on each product category.[107]

[99] See paras. 7.20-7.23 above.

[100] See para. 7.44 above.

[101] For example, the European Commission collected data on imports both globally and by product category; information on unforeseen developments globally; data on volume and value of sales both globally and by product category; information on Union interest globally; data on injury factors, and data on the exporters' current and expected capacity and production, by product category. (See e.g. Definitive determination, (Exhibit TUR-5), table 2 and section 4; and para. 7.45 above).

[102] Definitive determination, (Exhibit TUR-5), recital 144. See also European Union's opening statement at the first meeting of the Panel, para. 20.

[103] See para. 7.51 above.

[104] Turkey's first written submission, para. 57; second written submission, paras. 32 and 44-45; and opening statement at the first meeting of the Panel, para. 12. The European Union argues that it adopted "a conservative approach" by choosing not to include in the safeguard those product categories for which, taken separately, it did not observe an import surge, even though it had found an import surge for all the product categories initially considered, taken together. The European Union observes that, having made this choice, it then verified the existence of the conditions for imposing a safeguard for the same product on which it applied the safeguard. (European Union's responses to Panel question No. 6, paras. 18-19; and No. 7, paras. 21-22; second written submission, para. 46; and opening statement at the first meeting of the Panel, paras. 22-23).

[105] See para. 7.53 above.

[106] See paras. 7.60-7.67 below.

[107] Turkey's first written submission, paras. 54-56; second written submission, paras. 32 and 34-38. The European Union explains that its safeguard "is calibrated so as to affect in the minimum way possible steel trade into the EU, reflecting historical trade flows in volumes and origins, making a more effective administration of the TRQs". (European Union's opening statement at the first meeting of the Panel, paras. 19-20).

However, we do not consider that the choice of calculating the size of the TRQ at the level of individual product categories (or further subdivisions[108]), to better match traditional trade flows, establishes the existence of 26 distinct different safeguards, rather than a single safeguard covering 26 product categories. Turkey also refers to the fact that the European Commission excluded developing country Members with *de minimis* exports on a category-by-category basis, rather than for the 26 product categories as a whole[109], and points out that "the product" referred to in Articles 2.1 and 9.1 of the Agreement on Safeguards must be the same.[110] According to the European Union, it applied Article 9.1 at the level of product categories to ensure "calibration", and that choice is not evidence of the existence of distinct safeguards for each product category.[111] We note that Turkey does not ask us to assess whether the European Commission's approach is consistent with Article 9.1 of the Agreement on Safeguards, and we therefore do not do so. Whether or not the exclusion of developing country Members at the level of subsets of the product concerned is consistent with Article 9.1, we do not view this approach as establishing that the European Commission in effect adopted 26 distinct safeguards. We therefore do not consider that Turkey has demonstrated that the European Commission adopted 26 distinct safeguards. On this factual question, we therefore conclude that the European Commission has applied a single definitive safeguard to 26 steel product categories, taken together.[112]

7.60. The next question under Article XIX:1(a) and Article 2.1, therefore, is whether the European Commission has investigated the existence of the circumstances and conditions required to apply a safeguard for that *same* product, namely the 26 steel product categories on which it has applied the challenged definitive safeguard, taken together.

7.61. The facts reviewed above[113] indicate that, without prejudice to the substantive adequacy of the European Commission's examination on other grounds (which we consider in subsequent sections), the European Commission has examined, for the 26 steel product categories taken together, whether there had been an increase in imports; whether there existed unforeseen developments resulting in that increase in imports[114]; whether there existed injury or threat of injury; and whether the injury or threat of injury were caused by the increase in imports; and it found in each respect that this was the case.[115]

7.62. In assessing whether there had been an increase in imports, the European Commission also examined the trends in imports at the level of the product categories. First, the European Commission examined import trends for all 28 product categories under investigation. By so doing, it found that imports of 2 of the 28 product categories had not increased between 2013 and the first half of 2018; as a consequence, it chose both to remove those two product categories from its examination of the circumstances and conditions necessary to apply a safeguard, and not to apply a safeguard to them.[116] Because the European Commission did not apply a safeguard to those two product categories, and because it excluded them from every step in its examination of the necessary circumstances and conditions for imposing a safeguard, we do not consider that

[108] See para.7.56 above.
[109] Turkey's second written submission, paras. 32 and 39-43.
[110] Turkey's comments on the European Union's response to Panel question No. 19, para. 5; second written submission, para. 42.
[111] European Union's response to Panel question No. 19, paras. 5-6; opening statement at the first meeting of the Panel, paras. 20-21. Among the third parties, the United States argues that: "[w]hen the products under investigation encompass different types of imported articles, it may be appropriate for a Member to impose a safeguard measure consisting of tariffs, quotas, or [TRQs] specific to each type of imported article or to different groupings of imported articles. The suitability of such a safeguard measure will depend upon the relevant facts". (United States' third-party response to Panel question No. 3, para. 11). The United Kingdom "does not consider that evidence relating to the manner in which a safeguard measure is applied, including developing country exceptions, is relevant to the factual determination of the product concerned adopted by the authority". (United Kingdom's third-party response to Panel question No. 3, para. 11).
[112] As noted above, in this context, the wording "product categories" or "products" is not decisive, because a Member may adopt a safeguard on multiple product categories, provided that it complies with all the requirements of Article XIX:1(a) of the GATT 1994 and of the Agreement on Safeguards. (See para. 7.53 above).
[113] See para. 7.50 above.
[114] See fn 88 above.
[115] See para. 7.50 above.
[116] Definitive determination, (Exhibit TUR-5), recital 31 and annex II.

Turkey has established that the removal of these two categories, in this case, gave rise to an inconsistency with Article XIX:1(a) and Article 2.1.[117]

7.63. The European Commission also examined the evolution of imports at the level of the three product families into which it grouped the 26 product categories to which it applied the safeguard, "to supplement the global import analysis".[118]

7.64. We do not consider that the fact that the European Commission also examined the evolution of imports at the level of product categories and product families detracts from the fact that the European Commission assessed the existence of the increase in imports for the 26 product categories taken together. An authority is not barred from examining the existence of the necessary conditions, including increase in imports, for segments of the product under investigation, provided that it does ascertain that the conditions exist for the product as a whole.[119]

7.65. Similarly, in assessing whether there was a threat of serious injury, the European Commission also performed its assessment at the level of the three product families into which it grouped the 26 product categories. Again, this does not detract from the fact that the European Commission assessed the existence of threat of injury for the 26 product categories taken together.

7.66. That is, the European Commission has verified the existence of each of the circumstances and conditions necessary for applying a safeguard, at least, for the 26 product categories taken together, i.e. the same product to which it has applied the definitive safeguard.

7.67. We therefore find that Turkey has not established that the European Union applied 26 distinct safeguards on 26 products without examining the existence of the required circumstances and conditions for each of those products, inconsistently with Article XIX:1(a) and Article 2.1.

7.2.2.1.2 Articles 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards

7.68. We recall that Turkey argues that by imposing 26 distinct safeguards on 26 products without examining the existence of the required circumstances and conditions for each of those products, the European Union also violated Articles 4.1(c), 4.2(a), and 4.2(b). Thus, the factual premise of these additional claims is the same as reviewed in the previous section (section 7.2.2.1.1). Because we have found that Turkey has not established that factual premise, we also find that Turkey has not established that the European Union applied 26 distinct safeguards on 26 products without examining the existence of the required circumstances and conditions for each of those products, inconsistently with Articles 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.

7.2.2.2 The alleged internal inconsistency in the approach to product scope

7.69. Turkey argues that the European Commission took an inconsistent approach to the products under investigation because it first gave notice of an investigation into 28 different products, and sought information by product[120], but then examined sometimes all products together, sometimes each product individually or by family, and sometimes took a combination of these approaches.[121] Turkey adds that the European Commission also acted in a biased manner, because it first reviewed the import trends for each product and excluded the products whose imports had not increased, and then continued the analysis only including those products whose imports had increased.[122] According

[117] As noted in para. 7.73 below, we do not exclude that modifying the scope of a safeguard investigation to remove product categories that do not, individually, meet certain conditions, could lead to a biased outcome in certain cases. However, we do not consider that Turkey has established that, in this case, the EU approach gave rise to a mismatch between the product to which the European Union applied the safeguard and the product for which it verified the existence of the necessary circumstances and conditions.

[118] Definitive determination, (Exhibit TUR-5), recitals 33-47.

[119] We also note in this regard that the panel in *Argentina – Footwear (EC)* addressed a similar question, noting that an authority could examine the existence of injury for segments of the domestic industry, although it was not required to. (See para. 7.29 above).

[120] Turkey's first written submission, paras. 42-46 and 70; second written submission, paras. 19-31; and opening statement at the first meeting of the Panel, paras. 8-11.

[121] Turkey's first written submission, paras. 47-48 and 71-74; second written submission, para. 52; and opening statement at the first meeting of the Panel, paras. 14-15.

[122] Turkey's first written submission, para. 75; second written submission, para. 53.

to Turkey, for these reasons, the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards. Turkey specifies that the "consistency requirement" it relies upon "is supported by Article 4.2(a)", which according to Turkey establishes an "obligation of objectivity"[123], and by the requirements in Articles 3.1 and 4.2(c) to publish "reasoned conclusions" and "a detailed analysis", respectively.[124] As for the claims under Article XIX:1(a) and Articles 2.1, 4.1(c), and 4.2(b), Turkey has not explained in which way its arguments on "consistency" differ from its arguments on the alleged mismatch between the products subject to measures and the investigated products. We have examined and rejected the latter in the previous section, and therefore, in this section, we do not further consider the claims under Article XIX:1(a) and Articles 2.1, 4.1(c), and 4.2(b).

7.70. The European Union responds that under Articles 3.1 and 4.2(a), the authority's "evaluation … must be objective and unbiased", and that Article 3.1(a) requires the authority to set forth "reasoned conclusions" in its report, and that this is what the European Commission has done. According to the European Union, Articles 3.1 and 4.2(a) do not prevent an authority from examining individual product categories or product families in addition to examining a product globally, as argued by Turkey.[125] Regarding the exclusion of product categories whose imports, individually, had not increased, the European Union responds that: the very purpose of a safeguard investigation is to investigate on what products a measure should be applied; even when a Member has a right to apply a safeguard, it does not have an obligation to do so[126]; the two categories that were excluded at the definitive stage represented only 0.36% of total imports, and "a very small amount of the total EU production", and therefore their "impact … would not have changed the findings with regard to the injury"[127]; and what matters is that the European Commission verified the existence of the necessary circumstances and conditions on the product comprising the 26 product categories to which it applied the definitive safeguard.[128]

7.71. In essence, insofar as this second set of Turkey's arguments differs from the first set, discussed in the previous section, Turkey's contentions are that: (a) the European Commission examined the investigated products sometimes together, sometimes individually, and sometimes took a mixed approach; and (b) the European Commission's analysis was biased because it removed from the analysis those products whose imports had not increased.

7.72. As regards the first of these two contentions, we have found, above[129], that the European Commission examined the existence of each of the requisite circumstances and conditions for the 26 product categories to which it applied the challenged definitive safeguard, taken together, and that for some conditions it supplemented that analysis with an analysis at the level of product categories and/or product families. Given that it applied the definitive safeguard on a product comprising 26 product categories, taken together, the European Commission was required, at a minimum, to investigate the existence of the necessary circumstances and conditions for that product. At the same time, this did not preclude the European Commission from examining that product, additionally, at a more disaggregated level.[130] This being the case, Turkey has not demonstrated that merely by conducting both a global analysis and, in some instances, conducting in addition a more disaggregated analysis, the European Union acted inconsistently with the requirements to publish "findings and reasoned conclusions" (Article 3.1), to "evaluate all relevant factors of an objective and quantifiable nature" (Article 4.2(a)), or to publish "a detailed analysis" (Article 4.2(c)).

7.73. Turkey also argues that the decision to exclude (from the safeguard and from the underlying analysis) the two product categories whose imports had not increased between 2013 and June 2018 was biased, because, according to Turkey, it made it more likely to find an increase in imports and

[123] Turkey's first written submission, para. 40.
[124] Turkey's first written submission, para. 41.
[125] European Union's first written submission, paras. 47-57.
[126] European Union's second written submission, para. 6 (referring to Appellate Body Report, *US – Line Pipe*, paras. 83-84 ("[t]he Appellate Body confirmed in *US – Line Pipe* that the taking of a safeguard measure, when all the conditions are satisfied, is a right of WTO Members, not an obligation")).
[127] European Union's response to Panel question No. 7, para. 23; first written submission, para. 19.
[128] European Union's response to Panel question No. 18, paras. 1-4. See also Brazil's third-party response to Panel question No. 2(b), para. 10.
[129] See paras. 7.37-7.45 and 7.50-7.51 above.
[130] See para. 7.29 above.

threat of injury.[131] We note that once the European Commission decided to exclude these product categories, it performed every step of its analysis without including them, and it did not include these product categories within the scope of the safeguard, either. Despite alleging bias, Turkey has not shown how the exclusion of certain product categories *both* from the scope of the measure and from the analytical steps of the investigation supporting the measure led to bias in the present case.[132] Therefore, while we do not discount the possibility that modifying the scope of a safeguard investigation to remove product categories that do not, individually, meet certain conditions, could lead to a biased outcome in certain cases, we find that Turkey has not established that this was so in this instance.

7.74. We also observe that the European Commission explained its approach in the provisional and definitive determinations. In particular, the European Commission explained why it considered it appropriate to examine the product categories concerned taken together[133]; it explained that it carried out certain additional analyses at the level of individual product categories or of product families to supplement the global analysis[134]; and when it excluded certain product categories from the safeguard and consequently from the analysis of the required circumstances and conditions, it explained this choice.[135]

7.75. Turkey argues that the European Commission failed to reach a reasoned and objective determination because its approach to the product under investigation lacked internal consistency and carried bias; however, we have found above that Turkey has not established that the European Commission was not entitled to complement the analysis for the product as a whole with a disaggregated analysis, or to exclude from both the analysis and from the scope of its safeguard those product categories for which there was no increase in imports, which are the grounds on which Turkey argues that the EU approach lacked consistency. Given that we have found that the European Commission's approach to the product under investigation was permissible, and noting that the European Commission has also explained that approach in some detail, we find that Turkey has not established that the definitive safeguard was inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards because of the alleged internal inconsistencies and bias in the European Commission's approach to the product under investigation.

7.3 Unforeseen developments

7.76. Turkey argues that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 because: (a) the European Commission did not identify unforeseen developments; (b) if it did identify developments, they were not unforeseen; and (c) it did not demonstrate that the injurious increase in imports occurred "as a result of" the unforeseen developments.[136] The European Union disagrees on all counts.

7.77. Below, we first consider the applicable requirements of Article XIX:1(a) (section 7.3.1). We then examine whether Turkey has established that the European Union acted inconsistently with this

[131] See e.g. Turkey's first written submission, para. 75.

[132] Turkey has suggested a parallel between the facts in this instance and zeroing in anti-dumping investigations. However, in this instance the product categories excluded from the investigation of the circumstances and conditions necessary for imposing a safeguard are also excluded from the application of the safeguard, and there is no calculation of the equivalent of a dumping margin. (Turkey's comments on the European Union's response to Panel question No. 50, para. 62; European Union's opening statement at the second meeting of the Panel, paras. 53-55).

[133] See paras. 7.46-7.47 above. See also Provisional determination, (Exhibit TUR-3), recitals 11-17; and Definitive determination, (Exhibit TUR-5), recitals 12-18. In response to a question from us, Turkey indicated that this explanation was "irrelevant in the context of Turkey's claims", although "in any event" Turkey did not agree with the European Commission's explanation that there were an important interrelation and strong competition between product categories. (Turkey's response to Panel question No. 8, paras. 27-28; request for interim review, para. 13).

[134] Provisional determination, (Exhibit TUR-3), recital 47; Definitive determination, (Exhibit TUR-5), recitals 19-22, 28, and 34.

[135] See paras. 7.48-7.49 above. See also Provisional determination, (Exhibit TUR-3), recital 24, article 1.1, and annex II; and Definitive determination, (Exhibit TUR-5), recital 31, article 1.1, and annex II.

[136] Turkey's first written submission, paras. 87-112 and 123-150; second written submission, paras. 59-76 and 80-95. Turkey also argues that the European Commission "should have made its analysis of the unforeseen developments for each product category". (Turkey's first written submission, para. 141). We have addressed this argument in section 7.2 above.

provision because the European Commission did not identify unforeseen developments (section 7.3.2.1), because the developments were not unforeseen (section 7.3.2.2), or because the European Commission did not establish that the injurious increase in imports was "as a result of" the unforeseen developments (section 7.3.2.3).

7.3.1 The applicable requirements of Article XIX:1(a) of the GATT 1994

7.78. Article XIX:1(a) of the GATT 1994 provides:

> *If, as a result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, *any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury* to domestic producers in that territory of like or directly competitive products, *the contracting party shall be free*, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, *to suspend the obligation* in whole or in part or to withdraw or modify the concession.[137]

7.79. Article XIX:1(a) is a two-part conditional sentence, and each part contains several clauses. The first part of Article XIX:1(a) begins with the conjunction "[i]f" and recites certain circumstances or conditions. The second part of Article XIX:1(a), which begins with the phrase "the contracting party shall be free", describes what happens in the event that the circumstances and conditions contained in the first part of the sentence are satisfied. That is, the Member concerned may ("shall be free … to") suspend the relevant obligation(s) of the GATT 1994, thus imposing a safeguard.

7.80. Part of the circumstances and conditions that permit a Member to apply a safeguard is that "*as a result of unforeseen developments* … [a] 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". We first consider the meaning of the phrase "unforeseen developments", and then the meaning of the phrase "as a result of".

7.81. The ordinary meaning of "development" includes "an event constituting a new stage in a changing or evolving situation; a fact or circumstance emerging or coming to light".[138] The ordinary meaning of "unforeseen" includes "not anticipated or expected: … unexpected"[139], and not "seen beforehand".[140] Thus, an unforeseen development is an event, fact, or circumstance that emerges or comes to light, including a new stage in an evolving situation, that was not anticipated or expected. This interpretation accords with findings in previous disputes that "unforeseen developments" are developments that were "unexpected".[141] Because the ordinary meaning of the word "development" includes a "new stage in a changing or evolving situation", a known event may develop into an unforeseen development.[142]

7.82. Regarding the point in time at which the development must be "unforeseen", we note that Article XIX:1(a) requires that the injurious increase in imports result from two elements, i.e. unforeseen developments and "the effect of the obligations incurred" under the GATT 1994. We further note that the remedy allowed by Article XIX:1(a) is the suspension of the relevant obligations. To us, this means that the point in time at which a development must have been "unforeseen" is when the relevant obligations were incurred, because the Member concerned would not have undertaken the obligation had it foreseen a development that would result in an injurious increase in imports. This understanding also accords with findings reached in previous proceedings,

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[137] Emphasis added.

[138] Oxford Dictionaries online, definition of "development", n., meaning II.11 https://www.oed.com/view/Entry/51434?redirectedFrom=development#eid (accessed 22 September 2021).

[139] Merriam Webster, online edition, definition of "unforeseen", adj., https://www.merriam-webster.com/dictionary/unforeseen (accessed 22 September 2021).

[140] Oxford Dictionaries online, definition of "foreseen", adj., https://www.oed.com/view/Entry/73150?rskey=ykyd38&result=2&isAdvanced=false#eid (accessed 22 September 2021).

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

[142] See also Panel Reports, *US – Steel Safeguards*, para. 10.84 ("there may be instances where an event which is already known will develop into a situation initially unforeseen").

namely that the point in time at which a development must be unforeseen is when the relevant obligations were incurred.[143]

7.83. Whether a given development was unforeseen at the time the obligations were incurred will of course depend on the facts. We note that, in the past, panels have found that certain market developments, in the circumstances of the cases before them, could constitute unforeseen developments. In *US – Steel Safeguards*, for example, the panel found that the Russian financial crisis, the Asian financial crisis, the continued strength of the US market, and the persistent appreciation of the dollar, taken together, could constitute unforeseen developments.[144] As regards specifically the Russian financial crisis, the panel considered arguments to the effect that the crisis could not be unforeseen during the Uruguay Round, because the Union of Soviet Socialist Republics (USSR) had dissolved prior to the conclusion of the Uruguay Round and Russia's then-current financial circumstances could be traced to that dissolution. In considering this argument, the panel observed that the United States had distinguished between the anticipated financial difficulties flowing from the dissolution of the USSR and the additional financial disruption that was unforeseen, and stated that "an unforeseen development may evolve from well-known prior facts".[145] In *India – Iron and Steel Products*, the panel reviewed India's conclusion that a significant increase in steel excess capacity, decreased demand for steel in important markets, currency depreciation in Russia and Ukraine, and increased demand and prices in India, were unforeseen developments. In doing so, the panel reasoned that while "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". The panel found that having explained the extent of the developments and having noted that they were occurring at the same time, India had reasonably concluded that they constituted unforeseen developments.[146]

7.84. Turning to the phrase "as a result of" we note that the ordinary meaning of the word "result" includes "[t]he effect, consequence, or outcome of some action, process, or design".[147] In Article XIX:1(a) the phrase "as a result of" connects the unforeseen developments and the injurious increase in imports, i.e. it envisages that the injurious increase in imports occurs "as a result of" – i.e. is the effect, consequence or outcome of – the unforeseen developments. We note that previous reports have described this as a "logical connection" between the unforeseen developments and the injurious increase in imports.[148] The phrase "logical connection" does not appear in the text of Article XIX:1(a). However, our understanding of this provision accords with this concept.[149] We also note that in describing the relationship required between the increased imports and the injury suffered by the domestic industry, Article XIX:1(a) uses the word "cause" in the phrase "cause or threaten serious injury". In contrast, the word "cause" is not used in the first part of Article XIX:1(a), which uses instead the phrase "as a result of". The different choice of terms indicates that the

[143] See e.g. Appellate Body Report, *Korea – Dairy*, para. 86; Panel Reports, *US – Steel Safeguards*, paras. 10.79, 10.80, and 10.85; and Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, adopted 22 October 1951, para. 12.

[144] Panel Reports, *US – Steel Safeguards*, paras. 10.78-10.100.

[145] Panel Reports, *US – Steel Safeguards*, para. 10.84. The panel in that case therefore accepted for the sake of argument that the Russian financial crisis could constitute an unforeseen development. (Ibid. para. 10.85 ("the Panel will accept, *arguendo*")).

[146] Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], paras. 7.90-7.99.

[147] Oxford Dictionaries online, definition of "result", n., meaning II.4.a https://www.oed.com/view/Entry/164061?rskey=Ft4Kjb&result=1&isAdvanced=false#eid (accessed 22 September 2021).

[148] Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92; *US – Lamb*, para. 72; and *US – Steel Safeguards*, paras. 317-318 and 322; and Panel Reports, *US – Steel Safeguards*, para. 10.104; and *Argentina – Preserved Peaches*, paras. 7.17 and 7.24. See also, with different wording, Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], paras. 7.105-7.106, 7.110, and 7.114. The report of the GATT Working Party in *US – Fur Felt Hats* described the requirement as being that "the increased imports must be the result of unforeseen developments". (Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, para. 4(a)(ii); see also ibid. paras. 7 and 11-12).

[149] Appellate Body Reports, *Korea – Dairy*, para. 85; *US – Steel Safeguards*, paras. 317-318. See also Panel Reports, *US – Steel Safeguards*, para. 10.104; and *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], para. 7.86.

relationship required between unforeseen developments and the increase in imports is not the same as causation, which is instead required between the increase in imports and serious injury.

7.85. In *US – Steel Safeguards*, the panel reasoned that 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".[150] We agree that what is required to establish the connection between the unforeseen developments and the increase in imports will depend on the specific facts of each case. As the panel observed in *US – Steel Safeguards*, "[i]n some cases, the explanation may be as simple as bringing two sets of facts together", whereas "in other situations, it may require much more detailed analysis".[151]

7.86. We now assess whether Turkey has demonstrated that the European Commission did not establish the existence of unforeseen developments that resulted in the injurious increase in imports.

7.3.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 with regard to unforeseen developments

7.87. To recall, Turkey claims that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 because the European Commission adopted that measure without establishing the existence of unforeseen developments that resulted in the injurious increase in imports. Turkey advances three sets of arguments in support of this claim: first, that the European Commission did not even nominally identify unforeseen developments; second, that if the European Commission did identify certain developments, these developments were not "unforeseen"; and third, that the European Commission did not establish that the unforeseen developments resulted in the increase in imports of the product under investigation into the European Union. We examine each of these three sets of arguments in turn, below.

7.3.2.1 Whether the European Commission did not identify any unforeseen developments

7.88. Turkey notes that the European Commission's provisional and definitive determinations stated that the increase in imports "had been the result of unforeseen developments that found *their source* in a number of factors", and then went on to describe the factors in question.[152] Turkey argues that the fact that the European Commission described the factors that were allegedly *the source of* unforeseen developments, means that the European Commission did not identify the unforeseen developments themselves, which must be different from their "source".[153] Turkey adds that the "failure to clearly identify the events … is compounded by the failure to clearly state when … the factors identified would have occurred", with the European Commission making imprecise references to different time periods, one of which spanned 16 years.[154]

7.89. The European Union asserts that Turkey's arguments are mere "semantic efforts", and explains that the developments that the European Commission described as the "source" are indeed the unforeseen developments.[155] Regarding timing, the European Union responds that the provisional and definitive determinations do identify the timeframe of each development, and that not all events that form a confluence of developments must take place simultaneously.[156]

7.90. Among the third parties, the United States argues that an authority is not required to demonstrate in its published report the existence of unforeseen developments before it applies a safeguard; the developments need only exist as a matter of fact.[157] Japan, Switzerland, and Ukraine argue that an authority must identify the unforeseen developments in its published report before

[150] Panel Reports, *US – Steel Safeguards*, para. 10.115.
[151] Panel Reports, *US – Steel Safeguards*, para. 10.115.
[152] Definitive determination, (Exhibit TUR-5), recital 48 (emphasis added). See also Provisional determination, (Exhibit TUR-3), recital 30.
[153] Turkey's first written submission, paras. 88-89; second written submission, para. 59.
[154] Turkey's first written submission, para. 90; second written submission, paras. 60-61.
[155] European Union's first written submission, paras. 72-74.
[156] European Union's first written submission, paras. 75-79 (referring to Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], para. 7.114).
[157] United States' third-party submission, paras. 8-14; third-party statement, paras. 7-10.

applying a safeguard.[158] Concerning Turkey's reliance on the fact that the European Commission referred to "factors", Switzerland argues that the particular label used by the authority to describe the developments does not matter.[159]

7.91. We turn for our assessment to the provisional and definitive determinations.

7.92. The provisional[160] and definitive determinations each contain a section entitled "Unforeseen Developments".[161] In those sections, both determinations identify three cumulative developments, namely: (a) "unprecedented" overcapacity in the steel sector, which persisted despite measures taken to narrow it[162], and which was fuelled by government support[163]; (b) greater use of trade-restrictive measures in third-country markets, including applied tariff increases, minimum import prices, mandatory national standards, and local content requirements, and a steady increase in trade defence measures on steel, a significant portion of which was by the United States, one of the world's largest steel importers[164]; and (c) the United States' Section 232 measures.[165]

7.93. Turkey grounds its claim that the European Commission did not identify any unforeseen development on the fact that both determinations refer to unforeseen developments that "found their source in a number of factors"[166], and then list the developments set out above. Turkey points to this statement to reason that if these developments are "factors" that were the "source" of the unforeseen developments, they could not be the unforeseen developments themselves, and therefore that the European Commission cannot be considered to have even nominally identified any unforeseen developments. We disagree. The developments in question are listed and discussed in a section clearly entitled "unforeseen developments"[167]; they are referred to interchangeably not only as "factors" but also as "unforeseen developments"[168]; the European Commission addressed arguments of the interested parties tending to establish that the developments were not unforeseen, explaining why, in its view, they were indeed unforeseen[169]; and the European Commission indicated that these developments led to an increase in imports.[170] It is thus clear from the European Commission's published determinations that it considered these to be the relevant unforeseen developments. In this context, that the European Commission referred at times to the unforeseen developments as "factors" that were a "source" of unforeseen developments does not negate the fact that it identified the developments at issue as unforeseen developments. A Member is not necessarily required to use the exact wording of the World Trade Organization (WTO) Agreement in its domestic determinations.

7.94. On Turkey's argument that the European Commission did not "clearly state when … the factors identified … occurred"[171], we observe that the provisional and definitive determinations indicated that: (a) global steelmaking capacity had more than doubled from 2000 to 2017 and global

[158] Japan's third-party submission, para. 6; Switzerland's third-party submission, para. 13; and Ukraine's third-party submission, para. 11.
[159] Switzerland's third-party submission, para. 17.
[160] The definitive determination incorporates by reference the findings on unforeseen developments of recitals 30 to 36 of the provisional determination, which thus also form part of the basis for the definitive safeguard. (Definitive determination, (Exhibit TUR-5), recital 48; see also para. 7.10 above).
[161] Provisional determination, (Exhibit TUR-3), section V; Definitive determination, (Exhibit TUR-5), section 4.
[162] Provisional determination, (Exhibit TUR-3), recital 31; Definitive determination, (Exhibit TUR-5), recitals 48-49 and 62.
[163] Provisional determination, (Exhibit TUR-3), recital 32; Definitive determination, (Exhibit TUR-5), recitals 48-49 and 62.
[164] Provisional determination, (Exhibit TUR-3), recitals 33-34; Definitive determination, (Exhibit TUR-5), recitals 48-49 and 62.
[165] Provisional determination, (Exhibit TUR-3), recital 35; Definitive determination, (Exhibit TUR-5), recitals 48-49 and 62.
[166] Definitive determination, (Exhibit TUR-5), recital 48; Provisional determination, (Exhibit TUR-3), recital 30 ("that finds its source in").
[167] Provisional determination, (Exhibit TUR-3), section V, heading; Definitive determination, (Exhibit TUR-5), section 4, heading.
[168] See e.g. Provisional determination, (Exhibit TUR-3), recital 36 ("the abovementioned unforeseen developments").
[169] Definitive determination, (Exhibit TUR-5), recitals 51-52.
[170] Provisional determination, (Exhibit TUR-3), recital 36; Definitive determination, (Exhibit TUR-5), recital 62.
[171] See para. 7.88 above.

steel production in 2016 was 100 million tonnes higher than global steel demand[172]; (b) several countries had made greater use of trade restrictive measures on steel products since 2014/2015 and throughout 2017[173]; (c) there had been significantly more initiations of steel-related trade defence investigations in 2015-2016 than in 2011-2013, and in 2018 the United States had 169 anti-dumping and countervailing (AD/CV) duty orders in place on steel and 25 ongoing investigations[174]; and (d) the US Section 232 measures on steel had been adopted in March 2018, following an investigation initiated in April 2017 and a report published in January 2018.[175] Thus, the European Commission described the timing of each development either by reference to a timeframe over which it had manifested itself (e.g. the doubling of capacity since 2000), or by reference to the specific time at which it was introduced (e.g. the initiation of a US Section 232 investigation in April 2017 and introduction of measures in March 2018). Therefore, we do not see that Turkey has substantiated its allegation that the European Commission failed to identify unforeseen developments because it did not sufficiently identify their timing.

7.95. Given this, we reject Turkey's arguments that the European Commission did not *identify* the unforeseen developments on which the definitive safeguard is based.

7.3.2.2 Whether the developments were not unforeseen

7.96. Turkey argues that even if the European Commission had identified developments, none of them was unforeseen. We consider whether Turkey has so established for each of the three sets of developments identified by the European Commission (the increase in steel overcapacity, the increase in trade restrictive and trade defence measures on steel, and the US Section 232 measures on steel), in turn.

7.97. First, Turkey submits that steel overcapacity existed for decades and predated the Uruguay Round, and therefore was not unforeseen.[176]

7.98. The European Union responds that the European Commission explained why the overcapacity in question was unforeseen: according to the European Commission's explanations, this was because steel production capacity continued to increase after 2011 (following a dip between 2009 and 2011) despite being already excessive then and despite the fact that it was economically expected to decline, and because this overcapacity persisted "despite the important number of measures taken to reduce it".[177] The European Union also observes that the panel in *India – Iron and Steel Products* considered that the increase in production capacity for steel in 2015 was, together with other factors, an unforeseen development.[178]

7.99. Turkey responds to the European Union that if an authority relies on developments in the market such as changes in capacity as an unforeseen development, it must provide "a reasonable and detailed explanation regarding exactly how … [they] are unforeseen". According to Turkey, "[t]he European Commission's findings and explanations that '[post-2011] it was expected that total crude steel capacity would decrease or at least remain stable', do not constitute such a reasonable and detailed explanation, as this statement is provided without evidence." Turkey also asserts that the dip in overcapacity between 2009 and 2011 was due to the financial crisis, and therefore that it

[172] Provisional determination, (Exhibit TUR-3), recital 31. In addition, in the definitive determination the European Commission discussed intervening trends (comparing 2009-2011 with 2011-2016) to address arguments to the effect that excess steelmaking capacity was not unexpected. (Definitive determination, (Exhibit TUR-5), recital 52).

[173] Provisional determination, (Exhibit TUR-3), recital 33.

[174] Provisional determination, (Exhibit TUR-3), recital 34; Definitive determination, (Exhibit TUR-5), recital 56.

[175] Definitive determination, (Exhibit TUR-5), recitals 49 and 58-59.

[176] Turkey's first written submission, paras. 93-96; see also response to Panel question No. 9, on the issue of the treatment of one piece of evidence. Turkey argues in particular that because overcapacity has existed for decades and predated the Uruguay Round, "[p]eriods of overcapacity in commodities … cannot be characterized as an unexpected development that was unforeseen by the European Union during the Uruguay Round." (Turkey's first written submission, para. 94; request for interim review, para. 15).

[177] European Union's first written submission, paras. 82-87; Definitive determination, (Exhibit TUR-5), recitals 49 and 52. See also European Union's response to Panel question No. 9, para. 30.

[178] European Union's first written submission, para. 85.

was to be expected that capacity would then have resumed its upward trend observed in the previous years.[179]

7.100. Among the third parties, Canada submits that overcapacity may be an unforeseen development but that an authority must provide a reasoned and adequate explanation of why this is so.[180] Brazil submits that if a Member invokes market dynamics, such as overcapacity, as an unforeseen development, it must provide a careful explanation of why they were unforeseen.[181] The Republic of Korea and Ukraine submit that overcapacity has existed in the steel sector for a long time, and the Republic of Korea therefore considers it "[i]n principle … doubtful" that it could constitute an unforeseen development.[182] More generally, on the interpretation of "unforeseen", Japan submits that an authority must have, "at a minimum, some discussion as to why the alleged 'unforeseen developments' were 'unexpected'", and the United States argues that unforeseen means not actually foreseen.[183]

7.101. We turn again for our assessment to the published determinations. With respect to overcapacity, we understand the explanation in the published determinations to be that what was unexpected was that overcapacity would continue to increase, reaching "unprecedented" levels, contrary to economic logic and efforts to contain the increase.[184] Turkey relies on the fact that overcapacity in the steel sector has existed for a long time and argues that therefore periods of overcapacity were not unforeseen when concluding the Uruguay Round.[185] However, Turkey has not directly contested the European Commission's assertions that overcapacity had continued to increase and reached unprecedented levels, with capacity having more than doubled since 2000, despite measures to contain overcapacity. Turkey has contested the relevance of the 2009-2011 dip in overcapacity in the assessment conducted by the European Commission, and has noted that the European Commission's statement that capacity would have been expected to decrease or remain stable after 2011 did not contain a reference to supporting material on the record.[186] This however does not contradict the proposition relied on by the European Commission that it was contrary to economic logic for capacity to continue to increase when there was already considerable overcapacity. The European Commission drew a distinction between an underlying situation – i.e. overcapacity *per se*, which was known at the time of the Uruguay Round – and its development into a new situation, i.e. the fact that overcapacity greatly increased, contrary to economic expectations and measures taken to address it. We do not consider that more was required in this case to identify the unprecedented overcapacity as a development that was unforeseen in this instance. A development that was unforeseen at the time of contracting an obligation can evolve from a situation that was known at that time. We therefore do not consider that Turkey has established that the European Commission erred in concluding that increased overcapacity constituted a development that was unforeseen at the conclusion of the Uruguay Round.

7.102. Second, Turkey argues that the increase in trade defence measures on steel products could not be unforeseen, because: "the adoption of trade defence measures is contemplated by WTO rules"[187]; periodic increases in the use of anti-dumping measures had taken place before the Uruguay Round[188]; data on the use of anti-dumping measures since 1995 also show that there are periodic peaks in the number of anti-dumping investigations, both generally and for "base metals and articles"[189]; and the European Union itself contributed to the alleged increase both by adopting

[179] Turkey's first written submission, paras. 94-96; second written submission, paras. 65-67.
[180] Canada's third-party submission, para. 23.
[181] Brazil's third-party submission, paras. 5-6.
[182] Korea's third-party submission, para. 17; Ukraine's third-party submission, para. 15; and third-party statement, para. 7.
[183] Japan's third-party submission, para. 7; United States' third-party submission, para. 5; and third-party statement, paras. 4-6.
[184] Provisional determination, (Exhibit TUR-3), recital 31; Definitive determination, (Exhibit TUR-5), recitals 49 and 52.
[185] See para. 7.97 and fn 176 above.
[186] See para. 7.99 above.
[187] Turkey's first written submission, para. 100.
[188] In this regard, Turkey relies on data concerning all anti-dumping investigations, regardless of the product concerned. (Turkey's first written submission, paras. 101-102 and 106, and figure 2).
[189] Turkey's first written submission, paras. 102-104 and (for iron and steel products in the United States) 108, and figures 2-4.

trade defence measures and because its steel exports were also the target of trade defence measures.[190]

7.103. The European Union responds that increases in trade restrictive and trade defence measures are not necessarily unforeseen developments, but can be. According to the European Union, the extent, timing, and degree of impact of such increases can make them an unforeseen development, and did in this case.[191] The European Union likewise contests the relevance of some of Turkey's factual allegations. According to the European Union, of three datasets that Turkey has submitted showing the evolution of anti-dumping measures, two are not relevant because they are not specific to steel, and one is not relevant because it postdates the Uruguay Round and therefore cannot serve as an indicator of what was unforeseen when the European Communities incurred the relevant obligation of the GATT 1994.[192] The European Union also observes that the trade defence measures either initiated by the European Union or against EU steel exports account for a small proportion of the "worldwide use of trade defence measures in the steel sector".[193]

7.104. To the European Union's objection that the data submitted by Turkey on the use of anti-dumping measures after the Uruguay Round does not help assess whether a particular development was unforeseen when the European Communities incurred the relevant obligation of the GATT 1994, Turkey responds that the data it has provided are intended to show that the use of trade defence measures, in general and for the "steel-related" sector, "follows cycles of varying intensity" and has done so both before and after the Uruguay Round.[194]

7.105. In the context of its discussion of post-Uruguay Round data, Turkey also notes that the number of anti-dumping initiations had decreased in 2014 compared to 2013, and in 2017-2018 compared to 2015-2016, and that as a result the number of initiations in 2017-2018 was only slightly higher than in 2011-2013. According to Turkey, these facts contradict the European Commission's statement that there had been a steady increase in the recourse to trade defence measures and that the situation constituted an unforeseen development.[195] The European Union responds that the slight decrease in the number of anti-dumping initiations in 2014 was compensated by an increase in countervailing duty initiations the same year[196], that the number of initiations increased again in 2015[197], and that the decrease in the number of initiations in 2017-2018 compared to 2015-2016 did not call into question the unforeseen nature "of the overall significant increase of the use of trade defence measures".[198]

7.106. Finally, Turkey argues that the fact that the United States had in place a large number of trade defence measures on steel in 2018 could not be unforeseen because the United States was one of the largest steel importers, and had had a similarly high number of trade defence measures on steel in place in 2002-2006.[199] The European Union responds that this does not preclude a significant increase in trade defence measures by the United States, "as part of a global increase in the use of such instruments", from constituting an unforeseen development. In response to Turkey's argument, the European Union also provides an overview of the evolution of the number

[190] Turkey's first written submission, para. 107.

[191] European Union's first written submission, paras. 89-90.

[192] European Union's first written submission, para. 91 (referring to Turkey's first written submission, figures 2 and 3) and para. 92 (referring to Turkey's first written submission, figure 4). The data in figure 3 also postdates the Uruguay Round.

[193] European Union's first written submission, paras. 88-106.

[194] Turkey's second written submission, paras. 68-75; request for interim review, para. 19. Turkey also reiterates its earlier arguments and notes that reliance by the European Union on an OECD presentation is an *ex post* explanation. (Turkey's second written submission, para. 75).

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

[196] European Union's first written submission, paras. 92 and 95 (referring to WTO statistics on antidumping initiations by sector, (Exhibit EU-2); and WTO statistics on countervailing initiations by sector, (Exhibit EU-3)). The data on initiations per year in the provisional determination, recital 34, refer to anti-dumping initiations. (WTO statistics on antidumping initiations by sector, (Exhibit EU-2)).

[197] European Union's first written submission, para. 95.

[198] European Union's first written submission, para. 96. The European Union also notes that the WTO statistics on base metals and articles "show a significant increase [in the number of initiations] during 2014-2018 compared to the period 2011-2013", and also show that 498 antidumping and 61 countervailing measures were adopted worldwide in the (six-year) period 2013-2018 compared to 163 and 25, respectively, in the (seven-year) period 2006-2012. (European Union's first written submission, para. 93).

[199] Turkey's first written submission, para. 108.

of anti-dumping and countervailing duty investigations and orders by the United States over several years.[200]

7.107. Among the third parties, Brazil argues that accepting that trade defence measures, which are "an integral part of the WTO system"[201], may constitute an unforeseen development risks leading to an escalation in trade barriers; and that to establish that they do constitute unforeseen developments, there must at least be solid supporting data and an "adequate threshold".[202] Switzerland shares the concern of an escalation of trade restrictions, and adds that an exercise of rights under the covered agreements cannot be an unforeseen development.[203] The Republic of Korea notes that the use of trade defence measures is presumably "lawful".[204]

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

7.109. Regarding the European Union's contribution to the increase, the European Union asserts that any such increase was marginal, and Turkey has not provided us with information rebutting this assertion.[205]

7.110. We turn to consider Turkey's argument that there are cycles in the use of trade defence measures[206], and that for this reason increases in their use are not unexpected. We note that the published determinations place the increase in trade defence measures in the broader context of increased overcapacity and the US Section 232 measures, and cite an increase in the average number of steel-related anti-dumping investigations initiated per year from 77 in 2011-2013 to 117 in 2015-2016 and the fact that the United States had, in February 2018, 169 AD/CV orders in place on steel and 25 ongoing investigations.[207] In response to objections that the adoption of trade defence measures could not be unforeseen, the European Commission further explained in the definitive determination that the "issue" was "the unprecedented and increased number of such measures taken by third countries, which ha[d] created trade diversion resulting in increase of imports into the [European Union]".[208] Thus, the European Commission did not assert that any uptick in trade defence measures would constitute an unforeseen development, but instead based its finding that these developments were unforeseen on the concrete circumstances before it. The fact that the use of trade defence measures may "follow cycles", or fluctuate, does not mean that an increased use of such measures cannot ever constitute an unforeseen development. The European Commission found that in the particular circumstances before it, the increase in trade defence measures together with the other developments was unforeseen within the meaning of Article XIX:1(a), and we consider that the fact that the use of trade defence measures may fluctuate does not call into question that assessment.

7.111. We next turn to Turkey's arguments regarding the number of worldwide initiations of anti-dumping investigations into base metals and articles in 2014 and 2017-2018, and regarding trade defence investigations and orders by the United States.[209] We recall that the European Commission relied on the significant increase in the number of anti-dumping initiations

[200] European Union's first written submission, paras. 100-106.
[201] Brazil's third-party submission, para. 7.
[202] Brazil's third-party submission, paras. 7-10.
[203] Switzerland's third-party submission, paras. 18-21.
[204] Korea's third-party submission, para. 17.
[205] Turkey notes that the European Union had initiated 29 trade defence investigations for iron and steel between 2013 and 2019, and compares the trade defence measures on steel targeting the European Union with the *total* trade defence measures *targeting the European Union*. The European Union responds that 72 of 723 "trade defence measures of all types" in force in 2020 targeted the European Union, and notes that it initiated 29 trade defence investigations for iron and steel between 2013-2018 out of a total of 582 anti-dumping and 118 countervailing initiations in the "Base metals and articles" sector in the same period 2013-2018. (Turkey's first written submission, para. 107; European Union's first written submission, para. 98).
[206] We note in this regard the European Union's observation that much of the data provided by Turkey on the fluctuations in the use of trade defence measures postdate the Uruguay Round or do not concern the steel sector. (See para. 7.103 above).
[207] Provisional determination, (Exhibit TUR-3), recital 34.
[208] Definitive determination, (Exhibit TUR-5), recital 56.
[209] See paras. 7.105 and 7.106 above.

worldwide in the steel sector in the period 2015-2016 as compared to the period 2011-2013, and on the number of steel-related trade defence investigations and orders in place in the United States in February 2018, as evidence that there had been a significant increase in recourse to trade defence measures on steel, in a broader context of overcapacity, trade restrictive measures on steel, and the US Section 232 measures on steel. That the number of worldwide initiations was not as high in 2014 or 2017-2018 does not upset those observations and the conclusions drawn from them by the European Commission that the developments in question were unforeseen. Similarly, it is not merely because the United States is a large market, or because it had already had a high number of measures in place in 2002-2006, that its high number of orders and investigations in 2018 did not contribute to the overall situation that the European Commission found to be "unforeseen".

7.112. We therefore do not consider that Turkey has shown that the European Commission acted inconsistently with Article XIX:1(a) in concluding that the increase in trade defence measures it identified, together with the other developments it identified, was unforeseen.

7.113. Turning to the increase in trade restrictive measures on steel products, Turkey asserts that the European Commission did not clearly identify the measures and did not explain how an increase in a most-favoured-nation tariff or a tariff increase adopted as a trade defence measure would be unforeseen.[210] In response, the European Union recalls that the provisional determination listed the types of measures taken (tariff increases, standards, local content requirements) and countries adopting such measures (India, Indonesia, Mexico, South Africa, Turkey, and the United States).[211] The European Union also states that more detail is provided in an OECD presentation made at the 83rd session of the OECD Steel Committee, and notes that the provisional determination refers to the reports from the 83rd and 84th sessions of the OECD Steel Committee. However, as that reference is not made in the context of increases in trade restrictive measures, we do not rely on the OECD presentation in this context.[212] Among the third parties, the Republic of Korea submits that the adoption of government restrictions is also part of the reality in the steel sector, and it is therefore "doubtful" that it may constitute an unforeseen development.[213]

7.114. Regarding the identification of the trade-restrictive measures, we note that the published determinations identify both the types of measures at issue and a number of countries having adopted them. While Turkey submits that "it is difficult to understand how"[214] the increase in these measures could be unforeseen, it has not articulated why this is the case. Similar to the increase in trade defence measures, the European Commission cited the increase in trade-restrictive measures in a context that included unprecedented overcapacity and the US Section 232 measures, which constrained the universe of outlets for steel products around the world, thereby "establishing and aggravating imbalances in the international trade of the products concerned".[215] We do not consider that Turkey has established that the European Commission erred in finding that these events, including the increased recourse to trade-restrictive measures, in this context, by a number of countries, were unforeseen.

7.115. Third, Turkey also submits that the Section 232 measures that the United States adopted on steel could not constitute an unforeseen development because Section 232 of the Trade Expansion Act, the US legislation that allows the adoption of such measures in the United States, long predated the Uruguay Round.[216] The European Union responds that indeed measures adopted under Section 232 will not always be unforeseen developments, but they might be, and that the European Commission explained why they were in these circumstances.[217] Among the third parties, Canada takes the view that there could be instances in which Section 232 measures could be unforeseen developments, but that the Panel must assess whether the

[210] Turkey's first written submission, para. 110.
[211] Provisional determination, (Exhibit TUR-3), recital 33.
[212] European Union's first written submission, para. 108 (referring to Presentation at the 83rd session of the OECD Steel Committee, (Exhibit EU-7)). In the context of overcapacity and government support measures, fns 1-2 to recitals 31-32 of the provisional determination refer to "reports from the 83rd and 84th OECD Steel Committee" and provide the following link: http//:www.oecd.org/stid/ind/steel.htm. (Provisional determination, (Exhibit TUR-3), fns 1-2).
[213] Korea's third-party submission, para. 17.
[214] Turkey's first written submission, para. 110.
[215] Provisional determination, (Exhibit TUR-3), recital 30.
[216] Turkey's first written submission, para. 111; second written submission, para. 76.
[217] European Union's first written submission, para. 110 (referring to Provisional determination, (Exhibit TUR-3), recital 35).

European Commission gave a reasoned and adequate explanation of why this was so in the case before it.[218]

7.116. The fact that existing legislation of a Member may authorize that Member to adopt a particular measure does not in itself establish that all measures that may be applied by virtue of that legislation are foreseen. By way of illustration, a Member's legislation may establish certain rules regarding military conflict, but that does not mean that any military conflict engaged in by that Member cannot be "unforeseen" within the meaning of Article XIX:1(a). Turning to the published determinations in the present case, we note that the European Commission referred to the "level and scope" of the US Section 232 measures on steel, noting that it consisted of "a single across-product tariff … with almost no country exclusion", and that the measure was expected to reduce imports of steel products into the United States by 13 million tonnes. The European Commission also took the view that the measure was "illegal", and observed that it was being introduced "in the context of the prevailing persistent … overcapacity".[219] The European Commission thus articulated several reasons why it regarded these specific Section 232 measures, and the events that included these measures, as unforeseen. The fact that the Section 232 measures were adopted in accordance with longstanding US legislation does not establish that the European Commission erred in considering those specific Section 232 measures to be an unforeseen development.

7.117. We therefore find that Turkey has not established that the European Commission erred in finding that the developments it relied upon were unforeseen.

7.3.2.3 Whether the European Commission did not establish that the increase in imports was "as a result of" the unforeseen developments

7.118. Turkey's third set of arguments is that the European Commission did not establish the requisite "logical connection" between the unforeseen developments and the increase in imports. Specifically, Turkey argues that: (a) the European Commission did not do enough to establish how the unforeseen developments resulted in the increase in imports into the European Union[220]; (b) the unforeseen developments related to steel in general, and the European Commission did not demonstrate that they resulted in the increase in imports of the specific steel products under investigation[221]; and (c) the US Section 232 measures, introduced in March 2018, could not have resulted in the increase in imports observed during 2013-2017.[222] We consider these arguments in turn.

7.3.2.3.1 Whether the European Commission did not do enough to establish how the unforeseen developments had resulted in the increase in imports into the European Union

7.119. We begin by considering Turkey's argument that the European Commission did not do enough to establish how the unforeseen developments (i.e. overcapacity, the increase in trade restrictive and trade defence measures, and the Section 232 measures) resulted in the increase in imports at issue, and instead made assertions unsupported by evidence.

7.120. In considering these arguments, we note that the parties disagree on how much was required in this case to establish that the unforeseen developments resulted in the injurious increase in imports into the European Union. On the one hand, Turkey argues that as the European Commission relied on a complex set of facts to establish the "logical connection" between the unforeseen developments and the resulting increase in imports, the European Commission was required to provide a "detailed explanation … of how the alleged unforeseen developments resulted in increases

[218] Canada's third-party submission, para. 25.
[219] Provisional determination, (Exhibit TUR-3), recital 35.
[220] Turkey's first written submission, paras. 124-135; second written submission, paras. 80-92; response to Panel question No. 22(a); and comments on the European Union's response to Panel question No. 22(a)-(b).
[221] Turkey's first written submission, paras. 136-143; second written submission, paras. 93-95; opening statement at the first meeting of the Panel, para. 22; response to Panel question No. 22(a), paras. 4-8; and comments on European Union's response to Panel question No. 21, paras. 8-10. Turkey also argues that the European Union failed to carry out an analysis at the level of each specific product category: we have addressed this argument in section 7.2 above.
[222] Turkey's first written submission, paras. 132 and 144-149; second written submission, paras. 87-88.

in imports".[223] The European Union, on the other hand, considers that the facts of this case were such that it was sufficient to just "put together" the unforeseen developments and the increase in imports to show their logical connection, including because they took place during the same period.[224] Among the third parties, Canada submits that we must determine whether it was sufficient to "bring [the] two sets of facts together" as the European Union argues, given Turkey's arguments on the complexity of the facts.[225] Canada asserts that although "a competent authority enjoys a certain latitude in choosing the appropriate method" to examine the relationship between the unforeseen developments and the increase in imports, "it must provide a reasoned and adequate explanation of its findings".[226] Japan argues *inter alia* that the authority must demonstrate how the unforeseen developments resulted in the increase in imports, and that for this to be the case, the unforeseen developments must modify the conditions of competition in favour of the imported products.[227] The Republic of Korea submits that we must focus on whether the explanation in the published reports is sufficiently reasoned and adequate, and that we must consider "whether complex phenomena can be reduced to a simple matter of 'putting facts together'".[228] Switzerland argues that merely putting together the unforeseen developments and the increase in imports is not enough.[229]

7.121. With this in mind, we consider the parties' specific arguments on each of the unforeseen developments relied upon by the European Commission.

7.122. We begin with the increase in overcapacity. Turkey argues that the European Commission only offered general and vague statements, unsupported by evidence, regarding the connection between overcapacity and the increase in imports.[230] Among other things, Turkey argues that although the European Commission asserted that "many steel producers, notably in countries where the State distorts the normal play of market forces, kept capacity utilisation at high rates and flooded third country markets with their products at low prices", and that "[t]his ha[d] resulted in increasing imports in the EU and overall price depression", the European Commission did not support these assertions with evidence.[231] Turkey also argues that the European Commission did not provide evidence to support the assertion that where there is spare capacity, exporting producers will seek opportunities on export markets.[232] Turkey notes that, insofar as it refers to China, this statement also "fails to take into account the existence of numerous trade remedies in place".[233] Turkey also recalls that the panel in *US – Steel Safeguards* found that even if large volumes of foreign steel production were displaced from foreign consumption, this would not suffice to establish that imports into the Member concerned increased as a result.[234] To support its position that overcapacity does not necessarily lead to increased imports, Turkey notes that a report on the record of the underlying proceeding indicated that the trade effects of overcapacity were "systemically unimportant".[235]

7.123. The European Union responds that when one considers side by side the increase in overcapacity and the increase in imports into the European Union, their logical connection is apparent.[236] The European Union adds that the increase in overcapacity (and the other developments) occurred during the same period as the increase in imports: overcapacity had been increasing since 2000 and reached high levels in 2014-2016, and the increase in imports had been observed between 2013 and June 2018.[237] The European Union also submits that the

[223] Turkey's second written submission, paras. 80-81. See also Turkey's first written submission, para. 125.
[224] European Union's first written submission, paras. 115-117.
[225] Canada's third-party submission, para. 30.
[226] Canada's third-party submission, para. 31.
[227] Japan's third-party submission, paras. 9-10; third-party statement, paras. 2-4. See also Ukraine's third-party statement, para. 9.
[228] Korea's third-party submission, para. 19.
[229] Switzerland's third-party submission, paras. 23-24.
[230] Turkey's first written submission, paras. 126-127.
[231] Turkey's first written submission, para. 126 (referring to Provisional determination, (Exhibit TUR-3), recital 32).
[232] Turkey's first written submission, para. 127 (referring to Definitive determination, (Exhibit TUR-5), recital 54).
[233] Turkey's first written submission, para. 127.
[234] Turkey's first written submission, para. 128.
[235] Turkey's first written submission, para. 129 (referring to Global Trade Alert Report, "Going Spare", (Exhibit TUR-21), p. 6). On the latter, see European Union's response to Panel question No. 9, paras. 29-35.
[236] European Union's first written submission, para. 116.
[237] European Union's first written submission, para. 117.

European Commission's findings on overcapacity were "justified by evidence". The European Union refers "for example" to the European Commission's communication "Steel: Preserving Sustainable Jobs and Growth", and to the Chair's statements at the 83rd and 84th sessions of the OECD Steel Committee.[238] Turkey submits that these materials were not cited in the determinations to support the European Commission's findings on the logical connection between the unforeseen developments and the increase in imports, and that in any event they do not establish that logical connection.[239] Turkey also argues that the European Union's choice of record evidence is biased, because the European Union is omitting to refer to a report according to which the trade effects of overcapacity were unimportant.[240] The European Union notes that the passage of the report that Turkey is referring to does not refer specifically to the steel sector.[241]

7.124. To evaluate these arguments, we again turn to the published determinations. These determinations indicate that the European Commission found that global steelmaking capacity had more than doubled since 2000 (and in particular increased unexpectedly between 2011 and 2016[242]), that actual steel production far exceeded demand[243], and that there had been a sudden, sharp, and significant increase in imports between 2013 and both 2017 and the first half of 2018.[244] Regarding the connection between overcapacity and the increase in imports, the provisional determination stated that "given the important fixed costs in the steel sector, many steel producers, notably in countries where the State distorts the normal play of market forces, kept capacity utilisation at high rates and flooded third country markets with their products at low prices when they could not be absorbed by domestic consumption", and that this "has resulted in increasing imports into the EU and overall price depression".[245] The provisional determination also stated that import prices "generally" undercut prices of EU producers in 2017. In the definitive determination, the European Commission observed that:

> As far as the link between the unforeseen development of steel overcapacity and the increase in imports is concerned, it is clear that exporting producers have an interest in maximizing their capacity utilization. In situations where spare capacity is available after supplying their domestic market, they will seek other business opportunities on export markets and thus generate an increase in import volumes on such markets.[246]

7.125. In the provisional determination, the European Commission referenced "reports from the 83rd and 84th Steel Committee" in support of its statements that overcapacity had more than doubled since 2000, and that distortive government support accentuated the imbalances in the steel sector.[247] In the definitive determination, the European Commission referred to its communication "Steel: Preserving Sustainable Jobs and Growth", and to the Global Trade Alert Report "Going Spare", as supporting its statements that overcapacity had "unexpectedly continued to increase", and that it had increased between 2011 and 2016 after decreasing from 2009 to 2011.[248]

7.126. In discussing overcapacity, the European Commission also stated that "overcapacity is inherently closely linked to dumped and subsidized imports".[249]

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[238] European Union's first written submission, paras. 118-121 (referring to the European Commission's Communication "Steel: Preserving Sustainable Jobs and Growth", (Exhibit EU-23); and to Chair's statements at the 83rd and 84th session of the OECD Steel Committee, respectively, (Exhibits EU-8 and EU-9)).

[239] Turkey's second written submission, paras. 83-84.

[240] Turkey's second written submission, para. 85; request for interim review, para. 21 (referring to Global Trade Alert Report, "Going Spare", (Exhibit TUR-21)).

[241] European Union's response to Panel question No. 9, para. 34. We agree with the European Union that the passage at issue refers to overcapacity in general and not specifically in the steel sector. (See also ibid. paras. 26-36).

[242] Definitive determination, (Exhibit TUR-5), recital 52.

[243] Provisional determination, (Exhibit TUR-3), recital 31.

[244] Provisional determination, (Exhibit TUR-3), recital 29; Definitive determination, (Exhibit TUR-5), recital 47.

[245] Provisional determination, (Exhibit TUR-3), recital 32.

[246] Definitive determination, (Exhibit TUR-5), recital 54.

[247] Provisional determination, (Exhibit TUR-3), recitals 31-32, fn 1 ("Cf. reports from the 83rd and 84th OECD Steel Committee, available at http://www.oecd.org/sti/ind/steel.htm"), and fn 2 ("Idem, 83rd report").

[248] Definitive determination, (Exhibit TUR-5), recital 52. The same communication was also cited in the context of the analysis of threat of injury, in Provisional determination, (Exhibit TUR-3), recitals 58-60.

[249] Definitive determination, (Exhibit TUR-5), recital 53.

7.127. We recall that Article XIX:1(a) provides that a Member may adopt a safeguard where, among other things, a product is being imported in increased quantities "as a result of" unforeseen developments and the effect of GATT obligations, and that the phrase "as a result of" does not establish a causation requirement.[250] This means that an investigating authority need not provide the same quantum of reasoning and evidence to substantiate the "logical connection" between unforeseen developments and the increase in imports as it would be if Article XIX:1(a) had contained a causation requirement. Further, we recall that what precisely is required to establish that the increase in imports is "as a result of" the unforeseen developments will depend on the "nature of the facts" in any given case.[251]

7.128. In this instance, we note that the European Commission established that global steel overcapacity greatly increased, reaching 2,29 billion tonnes in 2016 and remaining steady at 2,17 billion tonnes in 2017[252], and that Turkey does not dispute this fact. We also note that the European Commission established that imports into the European Union of the 26 product categories on which it imposed the definitive safeguard increased significantly between 2013 and June 2018[253], and although Turkey takes issue with this assessment, we do not find fault with this finding.[254] We further note that the European Commission established that for 16 of the steel product categories subject to the definitive safeguard, import prices undercut the prices of EU producers[255], and that the European Commission provided a reference to support its statement that distortive government support was accentuating the structural imbalances in the steel sector, and Turkey has not contested this reference.[256] The European Commission also explained the connection between the increase in overcapacity and the increase in imports, by stating that because of the high fixed costs in the steel sector, many steel producers kept capacity utilization rates high, especially in countries with distortive government support, and that as a result of this, they "flooded third country markets with their products at low prices when they could not be absorbed by domestic consumption"; in turn, this "resulted in increasing imports into the EU and overall price depression".[257]

7.129. The published determinations thus indicate that the European Commission provided evidentiary support for its statements regarding the increase in overcapacity, the unexpected nature of its continued increase, and its links to government support. However, the determinations do not point to evidence in support of the European Commission's statements regarding the connection between the overcapacity and the increase in imports. Instead, the European Commission's reasoning on the connection between overcapacity and the increase in imports into the European Union was limited to noting the magnitude of global overcapacity and excess production, asserting that "it is clear" that overcapacity leads steel producers to seek other export opportunities, observing that import prices were typically lower than prices of EU producers, and concluding that this has resulted in increased imports into the European Union.[258]

7.130. It may well be that overcapacity led to pressure to export, and that that pressure to export led to increased exports to the European Union, so that EU imports of the product under investigation increased as a result of overcapacity. Notwithstanding this, we note that, except for the description of the magnitude of the overcapacity and the increase in imports, the

[250] See para. 7.84 above.
[251] See para. 7.85 above.
[252] Provisional determination, (Exhibit TUR-3), recital 31 and fn 1; Definitive determination, (Exhibit TUR-5), recital 52 and fns 19-20.
[253] Definitive determination, (Exhibit TUR-5), section 3.
[254] See section 7.5 below.
[255] Provisional determination, (Exhibit TUR-3), recital 32 and annex III. The European Commission also found import prices undercut the prices of EU producers for product category 23, to which it did not apply the definitive safeguard. (Definitive determination, (Exhibit TUR-5), recital 31).
[256] Provisional determination, (Exhibit TUR-3), recital 32 and fn 2. Turkey contests the European Union's reliance on the OECD Chair's statement at the 83rd session of the OECD Steel Committee, (Exhibit EU-8) on the basis that the European Commission did not rely on it as evidence of the connection between the increase in overcapacity and the increase in imports. Turkey does not dispute the European Commission's reliance on it for the proposition that government support has accentuated the imbalances in the steel sector. (See para. 7.124 above).
[257] See paras. 7.124-7.125 above.
[258] As noted, the European Commission offered evidence for its statements about the evolution of overcapacity and about distortive government support, but not for its statements regarding the logical connection between overcapacity and the increase in imports. (See para. 7.125 above).

European Commission's determinations do not provide evidence that would otherwise support its reasoning on the connection between the two.

7.131. We do not consider this to be a circumstance in which a great deal of analysis was required to establish a logical connection between the unforeseen development (i.e. overcapacity) and the increase in imports.[259] The European Commission, however, did not satisfy this requirement, because it merely asserted that the connection existed, without referencing any evidence for its assertion.

7.132. In reaching this conclusion, we have considered a recent WTO dispute where no Article XIX:1(a) inconsistency was found to flow from an authority's determination that certain unforeseen developments resulted in an increase in imports based on their coincidence in time. In *US – Safeguard Measure on PV Products (China)*, one of the unforeseen developments that the US authorities cited was the rapid change in the global supply chains and manufacturing processes that followed the imposition of US AD/CV duties on photovoltaic (PV) products from China and Chinese Taipei. The panel found that the US authorities had shown that Chinese firms had made significant investments in PV production in several third countries, and that PV imports into the United States from those countries had significantly increased. China argued that it was inappropriate for the US authorities to infer that the increase in production capacity of Chinese-affiliated PV producers contributed to the increased imports into the United States, suggesting that the increase could have come from other producers. The panel rejected that argument, explaining:

> [E]ven if this were a hypothetical possibility, the circumstantial evidence relied upon by the [United States International Trade Commission] suggests otherwise. Indeed, in line with the United States' argument, the fact that Chinese-affiliated companies significantly increased their production capacity in third countries in the same years when imports from those countries into the US market significantly increased suggests to us that there was a meaningful connection between these developments.[260]

7.133. This analysis appears to support the view that in some instances demonstrating a coincidence in time between certain unforeseen developments and an increase in imports, and explaining their connection, is sufficient to establish their logical connection for purposes of Article XIX:1(a).[261] In that case there was, among other elements[262], an increase in production capacity of Chinese-affiliated producers in four countries that matched a simultaneous increase in imports from those same countries, all over a two-year period. Thus, there was a closer link in that case between the unforeseen development at issue and the increase in imports than there is in the present case between overcapacity in the global steel industry in general and an increase in imports in general.

7.134. We next consider the European Commission's examination of the connection between the increase in trade restrictive and trade defence measures and the increase in imports. Turkey submits that the European Commission "provided no detailed factual or statistical record" on how steel flows into the European Union were impacted by the trade restrictive and trade defence measures it referred to, and did not identify those measures.[263] The European Union responds that nothing more was required other than establishing the increase in trade defence measures and the increase in imports "during the same period".[264]

7.135. We turn again to the published determinations. In the provisional determination, the European Commission stated that the increasing imports into the European Union and overall price depression had "been exacerbated by trade-restrictive practices in third country markets". The European Commission gave the example of tariff increases on certain steel products that "were typically imported in increasing quantities over the period of investigation [(POI)]". The

[259] We recall that Article XIX:1(a) does not require a causation relationship between the unforeseen developments and the increase in imports. (See para. 7.84 above).

[260] Panel Report, *US – Safeguard Measure on PV Products (China)* [appealed by China 16 September 2021], para. 7.42.

[261] See also Panel Reports, *US – Steel Safeguards*, para. 10.115.

[262] See Panel Report, *US – Safeguard Measure on PV Products (China)* [appealed by China 16 September 2021], paras. 7.21 and 7.39-7.44.

[263] Turkey's first written submission, paras. 130-131; second written submission, para. 86.

[264] European Union's first written submission, paras. 117 and 123.

European Commission went on to list other trade restrictive practices; and then it noted that while in 2011/2013 there had been 77 trade defence initiations related to steel per year, that had increased to 117 per year in 2015/2016. It then referred to the large number of AD/CV duty orders and investigations in the United States, and stated that "as the U.S. is one of the world's largest steel-importing countries … the impact of such a large number of trade remedies has been strongly felt globally".[265] In the definitive determination, addressing arguments that it had not established the connection between the trade restrictive and trade defence measures and the increase in imports, the European Commission recalled that while in 2011/2013 there had been 77 trade defence initiations per year related to steel, that had increased to 117 per year in 2015/2016, and stated that "no party [had] questioned these figures which indicate an unforeseen development, leading to the increase of imports established above".[266]

7.136. Except for the trade defence measures adopted by the United States, the European Commission mainly described these unforeseen developments and asserted that they had led to the increase in imports into the European Union. As regard the trade defence measures adopted by the United States, the European Commission reasoned that because the United States is one of the largest steel importers, the effect of the large number of measures adopted by the United States had "been strongly felt globally".[267]

7.137. We note that each trade restrictive and trade defence measure typically concerns only certain steel products imported into and exported from certain countries. Therefore, recalling that the type of analysis required to establish the connection between the unforeseen developments and the increase in imports depends on the nature of the facts, we consider that this is a situation where a "more detailed analysis" is required.[268] The European Commission did not offer such an analysis. Other than for the US trade defence measures, the European Commission merely asserted that the trade restrictive and trade defence measures had led to the increase in imports into the European Union; for the US trade defence measures, the European Commission asserted that their impact had been felt globally, but offered no evidence and made no attempt to establish a link between the measures and the increase in imports into the European Union. For example, while it indicated the increased number of US trade actions, it gave no information on the volume of imports affected.

7.138. Therefore, we find that the European Commission did not establish that the increase in imports was "as a result of" the increase in trade-restrictive and trade defence measures.

7.139. We next consider the US Section 232 measures on steel. Turkey argues that the European Commission did not establish that those measures resulted in the increase in imports of the 26 product categories concerned into the European Union, because: (a) the Section 232 measures excluded several products but the European Commission did not carry out a product-specific analysis; (b) the European Commission did not conduct a country-specific analysis to show that there had been increases in imports into the European Union from the countries whose exports to the United States had decreased; (c) the European Commission offered no evidence for its assertion that the EU market was attractive, and in any event that would not have been sufficient to establish that the Section 232 measures resulted in the increase in imports into the European Union; and (d) the Section 232 measures entered into force after the POI over which the increase in imports was observed.[269]

7.140. The European Union responds that: (a) the exclusions of products from certain countries did not change the authority's conclusions[270]; (b) a country-specific analysis was not necessary here, given the global nature of the unforeseen developments[271]; (c) the EU market is attractive because it is the largest steel importing market, with high prices, and this is "public knowledge"[272]; (d) there

[265] Provisional determination, (Exhibit TUR-3), recitals 33-34.
[266] Definitive determination, (Exhibit TUR-5), recital 56.
[267] Provisional determination, (Exhibit TUR-3), recital 35.
[268] Panel Reports, *US – Steel Safeguards*, para. 10.115.
[269] Turkey's first written submission, paras. 132-135; second written submission, paras. 87-92; responses to Panel question Nos. 22 and 23; and comments on European Union's response to Panel question No. 22, para. 12.
[270] European Union's first written submission, para. 127.
[271] European Union's first written submission, para. 128.
[272] European Union's response to Panel question No. 22(a), para. 9.

is evidence of the attractiveness of the EU market[273]; and (e) the attractiveness of the EU market, when combined with the unforeseen developments and their overlap in time with the increase in imports, establishes the logical connection between the unforeseen developments and the increase in imports.[274] As regards the timing of the Section 232 measures, the European Union responds that: the POI for the increase in imports ended in June 2018, after the imposition of the Section 232 measures; the European Commission ascertained the existence of actual trade diversion based on data on monthly imports into the United States and the European Union from January to September 2017 and 2018; and the very initiation of the Section 232 investigation in April 2017 had already created uncertainty in the market.[275]

7.141. We turn once more to the published determinations to make our assessment. In the provisional determination, the European Commission stated that: the "U.S. Section 232 measures, given their level and scope, are likely to cause substantial trade diversion of steel products into the Union"; the United States had calculated that the Section 232 measures would decrease imports by an amount that corresponded to 7% of EU consumption; the EU market "is generally a very attractive market for steel products both in terms of demand and prices"; and "some of the main exporters to the US are also traditional steel suppliers to the Union and there is no doubt that these countries, as well as others whose exports and production will be affected by the U.S. measures and the foreseeable trade diversion cascade, will redirect their exports to the Union".[276] In the definitive determination, the European Commission noted that the Section 232 investigation had been initiated in April 2017 and the resulting report published in January 2018, and asserted that even the initiation of the investigation "did undoubtedly create uncertainty on the market and caused effects on steel trade flows".[277] Further, the European Commission examined monthly imports of steel into the United States and the European Union from January to September 2017 and 2018; it found that, in 2018, monthly imports into the United States had been "consistently lower" than in 2017, with the exception of April, and that correspondingly monthly imports into the European Union had been higher, each month, than in 2017; according to the European Commission, this established that trade diversion was already taking place, and more specifically that the Section 232 measures "sped up the increase in imports by adding further trade diversion".[278] Next, addressing arguments regarding "product exclusions", the European Commission stated that only Australia had obtained an unconditional exemption, and accounted for around 1% of total US imports, whereas other countries had been allocated tariff-free quotas, many of which had been exhausted upon allocation, and moreover those countries accounted for less than 20% of 2017 imports.[279]

7.142. Thus, the European Commission's finding that the US Section 232 measures resulted in the increase in imports (by "adding further trade diversion") rested on the following: the "level and scope" of US measures, which according to the US Department of Commerce were expected to cut out of imports into the United States a volume equivalent to 7% of EU consumption[280]; the assertions that the European Union is "generally a very attractive market for steel products both in terms of demand and prices", and that some of the suppliers of the US market were also "traditional suppliers" of the European Union[281]; and data showing that between the imposition of the Section 232 tariff on steel in March 2018 and September 2018, monthly imports of steel into the United States had decreased compared to the same month of 2017, except in April, and monthly imports into the European Union had correspondingly increased.[282]

7.143. Similar to the trade restrictive and trade defence measures that we have just considered, we take the view that establishing the connection between the Section 232 measures on steel and the increase in imports into the European Union "require[s] a much more detailed analysis" than "bringing two sets of facts together".[283] This is particularly in view of the fact that the Section 232 measures have been adopted by a single Member.

[273] European Union's response to Panel question No. 22(a), para. 10.
[274] European Union's response to Panel question No. 22(b), para. 11.
[275] European Union's first written submission, paras. 124-129 and 139-145.
[276] Provisional determination, (Exhibit TUR-3), recital 35.
[277] Definitive determination, (Exhibit TUR-5), recital 58.
[278] Definitive determination, (Exhibit TUR-5), recitals 58-59 and tables 12 and 14.
[279] Definitive determination, (Exhibit TUR-5), recitals 60-61.
[280] Provisional determination, (Exhibit TUR-3), recital 35 and fn 2.
[281] Provisional determination, (Exhibit TUR-3), recital 35.
[282] Definitive determination, (Exhibit TUR-5), recital 59 and tables 12 and 14.
[283] See para. 7.85 above, and Panel Reports, *US – Steel Safeguards*, para. 10.115.

7.144. The Section 232 analysis that the European Commission conducted with regard to the Section 232 measures does not satisfy this more detailed standard. In terms of evidence, we note that the European Commission relied on an estimate by the United States according to which the measures would have reduced steel imports into the United States by a total amount corresponding to 7% of EU steel consumption, and on six months of data following the imposition of the Section 232 steel tariffs that showed some negative correlations between trends in imports into the European Union and the United States. For the remainder of its analysis, the European Commission did not offer evidence or sufficiently detailed information.[284]

7.145. In particular, a key element of the European Commission's analysis was that the EU market was attractive for exporters forced out of the US market. While there appears to be evidence on the record that would support this proposition, this evidence is limited to a model presented to the European Commission by the EU industry[285], which the European Commission used in its fashioning of the safeguard it applied, but made no mention of in discussing the connection between the Section 232 measures and the increase in imports.[286] The other evidence pointed to by the European Union in this context was either not referred to by the European Commission as establishing the attractiveness of the EU market for exporters forced out of the US market, or is not on the record. First, the European Union now refers to the EU importing market shares reported in presentations made at the 83rd and 84th sessions of the OECD Steel Committee, showing that the European Union "was the main importing economy worldwide".[287] But although the provisional determination, in discussing overcapacity, referred to "reports from the 83rd and 84th sessions of the OECD Steel Committee"[288], the investigating authority did not refer to these "reports" as establishing the size of the EU market.[289] Second, the European Union refers to the European Commission's findings on undercutting, but this was described in the published determinations as an effect of the unforeseen developments, and not as evidence of the attractiveness of the EU market.[290] Third, the European Union refers to "publicly available data in the Global Trade Atlas database", but these data were not on the record of the investigation.[291] Fourth, the European Union asserts that the existence of trade defence measures establishes that the European Union was an attractive target for exports, but this assertion does not feature anywhere in the reasoning of the investigating authority.[292]

7.146. Thus, while it appears that evidence of the attractiveness of the EU market for exporters excluded from the US market might have been readily available to the European Commission, the European Commission in its published determinations did not rely on that evidence to establish that its own market was attractive to exporters excluded from the US market because of the Section 232

[284] See para. 7.142 above.

[285] Calculation deflection, (Exhibit EU-12); Estimate of imports to the US that will be deflected, (Exhibit EU-13).

[286] Before us, the European Union has referred to this model as evidence of the connection between the Section 232 measures and the increase in imports. (European Union's response to Panel question No. 11; comments on Turkey's response to Panel question No. 22).

However, the published determinations indicate that that analysis was used to determine the appropriate level of the measures, and not to establish the connection between the unforeseen developments and the increase in imports; therefore, we do not consider it in this context. (Provisional determination, (Exhibit TUR-3), recitals 101-111; Definitive determination, (Exhibit TUR-5), recitals 167-169, 174-176, and 178-180).

[287] European Union's opening statement at the first meeting of the Panel, para. 56; response to Panel question No. 22(a), para. 10 (referring to Presentation at the 83rd session of the OECD Steel Committee, (Exhibit EU-7); and Presentation at the 84th session of the OECD Steel Committee, (Exhibit EU-16)).

[288] Provisional determination, (Exhibit TUR-3), fn 1 ("Cf. reports from the 83rd and 84th OECD Steel Committee, available at http://www.oecd.org/sti/ind/steel.htm"). Turkey points out that the two OECD documents that the European Union is referring to as establishing the attractiveness of the EU market, submitted to us as Exhibits EU-7 and EU-16, were not on the record of the safeguard investigation. (Turkey's comments on the European Union's response to Panel question No. 22, para. 12).

[289] We also note that the OECD documents cited by the European Union in this context (Exhibits EU-7 and EU-16) are not the same OECD documents that the European Union has put forward as the relevant "reports" in the context of the discussion of overcapacity (Chair's statements at the 83rd and 84th session of the OECD Steel Committee, respectively, (Exhibits EU-8 and EU-9)).

[290] Provisional determination, (Exhibit TUR-3), recital 32.

[291] European Union's response to Panel question No. 22(a), para. 10; Turkey's comments on the European Union's response to Panel question No. 22, para. 12.

[292] European Union's opening statement at the first meeting of the Panel, para. 57; response to Panel question No. 22(a), para. 10. See also Provisional determination, (Exhibit TUR-3); and Definitive determination, (Exhibit TUR-5).

measures. Yet, this proposition was central to the European Commission's conclusion that the Section 232 measures resulted in the increase in imports into the European Union, by "speeding up" the pre-existing increase.

7.147. Similarly, we note that while the European Commission asserted that some of the suppliers to the United States were also suppliers of the EU market, and that there was "no doubt that these countries as well as others" would redirect their exports from the United States to the European Union[293], the European Commission did not reference evidence in its determination that supported this assertion.

7.148. We therefore consider that the European Commission did not establish that the Section 232 measures resulted in the increase in imports into the European Union.

7.3.2.3.2 Unforeseen developments relating to steel in general

7.149. Turkey argues that the unforeseen developments relied upon by European Commission pertained to steel in general, and not to the specific products under investigation, and that therefore the European Commission did not demonstrate that they resulted in the increase in imports of the specific products under investigation.[294]

7.150. Having already found that the European Commission has not established that those unforeseen developments resulted in the increase in imports, we do not examine this further argument advanced by Turkey.

7.3.2.3.3 The timing of the Section 232 measures

7.151. Turkey argues that the increase in imports could not have been "as a result of" the Section 232 measures, because these were introduced in March 2018, after the observed increase in imports.[295]

7.152. The European Union responds *inter alia* that the POI for the increase in imports ended in June 2018, thus after the imposition of the Section 232 measures; that nothing requires a Member to rely on evidence that predated *initiation* of a safeguard investigation; that the European Commission also ascertained the existence of trade diversion based on data on monthly imports into the United States and into the European Union in January to September 2017 and 2018; and also that the European Commission found that the very initiation of the investigation in April 2017 had created uncertainty and affected trade flows.[296]

7.153. Having found that the European Commission has not established that the Section 232 measures resulted in the increase in imports, we do not examine this further argument advanced by Turkey.

7.3.2.3.4 Overall conclusion on the connection between the unforeseen developments and the increase in imports

7.154. We therefore find that the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 by imposing the definitive safeguard without establishing that the increase in imports took place "as a result of" the unforeseen developments.

7.4 The effect of obligations

7.155. Turkey argues that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 because the European Commission did not identify the relevant "obligations incurred" under the GATT 1994, and because the European Commission did not explain how any

[293] Provisional determination, (Exhibit TUR-3), recital 35.

[294] Turkey's first written submission, paras. 136-140 and 142-143; second written submission, para. 94. We recall that Turkey makes a related but separate argument that the European Commission was required to carry out its examination at the level of the individual product categories. We have examined that argument in section 7.2 above.

[295] Turkey's first written submission, paras. 132 and 144-149; second written submission, paras. 87-88.

[296] European Union's first written submission, paras. 124-129 and 139-145.

such obligations had the effect of constraining the European Union's ability to prevent the threatened injury.[297]

7.156. In its first written submission, the European Union identified the relevant obligations as "the obligation under the GATT 1994 to not impose any tariffs above 0% (or quantitative restrictions)", and their "effect" as the inability to deviate from those same obligations to prevent the threat of serious injury from the increased imports.[298] According to the European Union, those obligations "are self-evident" and do not require additional explanation, and their effects do not require additional demonstration.[299] In answer to a question from the Panel, the European Union describes the relevant obligations as "the tariff binding of 0% for all imports included in the product concerned", which "is an obligation on the European Union under Article II:1(a) and II:1(b), in conjunction with Article II:7 of the GATT 1994 and the European Union's Schedule of Concessions and Commitments".[300] The European Union acknowledges that it did not identify these obligations in its published determinations.[301]

7.157. In response to the European Union's argument that the relevant obligations are self-evident, Turkey points to the finding of the panel in *Ukraine – Passenger Cars* to assert that the fact that an obligation is "known or knowable" does not relieve the authorities from the requirement to identify the obligation and its effects.[302] As to the effects of the obligations, Turkey refers to the finding of the panel in *India – Iron and Steel Products* according to which the authority must "explain how that obligation constrains [the Member's] ability to react to the import surge causing injury to its domestic industry".[303]

7.158. Among the third parties, Japan argues that the authority must both identify in its published report the relevant obligations and explain how they "prevented the Member concerned from taking WTO-consistent measures in order to prevent or remedy the change generated by the 'unforeseen developments' in the competitive relationship between imports and domestic like or directly competitive products".[304] The United States argues that the authority is not required to demonstrate "the effect of obligations incurred" in its published report, and that "a Member establishes that increased imports are the 'effect of obligations incurred' by identifying a commitment, such as a tariff concession, that prevents it from raising duties on imports".[305]

7.159. In this section, we first examine the applicable requirements of Article XIX:1(a), and we then assess whether Turkey has established the claimed inconsistency.

7.4.1 The applicable requirements of Article XIX:1(a) of the GATT 1994

7.160. We recall that Article XIX:1(a) of the GATT 1994 provides:

> If, *as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement*, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, *the contracting party shall be free*, in respect of such product, and to the extent and for such time as may be necessary

[297] Turkey's first written submission, paras. 151-158; second written submission, paras. 98-103.
[298] European Union's first written submission, para. 65. The European Union also submits that the relevant concessions need not have been negotiated during the Uruguay Round, but Turkey does not appear to have argued that they should. (European Union's first written submission, paras. 61-62).
[299] European Union's first written submission, para. 66.
[300] European Union's response to Panel question No. 24(a)-(b), paras. 12-13.
[301] European Union's response to Panel question No. 24(c), para. 15.
[302] Turkey's second written submission, para. 102 (referring to Panel Report, *Ukraine – Passenger Cars*, para. 7.96).
[303] Turkey's second written submission, para. 100 (referring to Panel Report, *India – Iron and Steel Products* [appealed by India on 14 December 2018, appealed by Japan on 21 December 2018], para. 7.89).
[304] Japan's third-party submission, paras. 20 and 22-24; third-party statement, paras. 5-6.
[305] United States' third-party submission, paras. 14 and 16. See also United States' third-party statement, paras. 13-14.

> to prevent or remedy such injury, *to suspend the obligation* in whole or in part or to withdraw or modify the concession.[306]

7.161. As we have already noted, Article XIX:1(a) is structured as a two-part conditional sentence, and both parts of this conditional sentence contain several clauses. The first part of Article XIX:1(a) is the dependent clause of the conditional sentence: it is introduced by the conjunction "if", and sets out certain circumstances or conditions. The second part of Article XIX:1(a), beginning with "the contracting party shall be free", describes the consequence of those circumstances and conditions. Specifically, that consequence is that the Member concerned "shall be free" to suspend the relevant obligation(s) of the GATT 1994, thus imposing a safeguard.

7.162. Under this conditional sentence, part of the circumstances that trigger a Member's ability to apply a safeguard are an injurious increase in imports "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement".[307] That is, under Article XIX:1(a) the circumstances that lead to the imposition of a safeguard measure include a combination of unforeseen developments and "the effect of the obligations" under the GATT 1994, both of which together result in the increase in imports. The term "obligation" reappears in the last clause of Article XIX:1(a), because the remedy provided for in Article XIX:1(a) is the suspension of "the obligation" "as a result of" which the increase in imports has occurred.

7.163. As we have already noted[308], the phrase "as a result of" connects the effect of the obligations incurred under the GATT 1994, on the one hand, and the injurious increase in imports, on the other, by providing that the latter occurs "as a result of" – i.e. is the effect, consequence or outcome of – the former. As we have also already noted[309], the phrase "as a result of" is different from "cause".

7.164. We also note that Article 3.1 of the Agreement on Safeguards requires Members to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". The existence of the circumstances and conditions that are necessary for a Member to be allowed to adopt a safeguard is "pertinent" to the decision to adopt a safeguard, and the existence of obligations of the GATT 1994 whose effect resulted in the injurious increase in imports is one such circumstance. It is therefore in a published report that Members must identify those obligations.[310]

7.4.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 with regard to the "effect of the obligations"

7.165. The parties agree that the European Commission did not identify the relevant obligations of the GATT 1994 in its published determinations.[311]

7.166. The European Union asserts that those obligations "are self-evident and do not require any additional explanation".[312] The European Union also notes that the definitive determination "refers in several instances to a 'free of duty quota' thus identifying the products included in the product concerned as products with a tariff binding of 0%", because "[p]roducts that are free of duty under the safeguards measure were necessarily free of duty before the imposition of this measure".[313]

7.167. We note, first, that the existence of obligations of the GATT 1994 whose effect results in the injurious increase in imports is one of the cumulative circumstances that must exist for a Member

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[306] Emphasis added.

[307] We thus agree with the finding of the Appellate Body in *Korea – Dairy* that the clause "as a result of unforeseen developments and of the effects of obligations" "describes … *circumstances* which must be demonstrated as a matter of fact … for a safeguard measure to be applied consistently with the provisions of Article XIX". (Appellate Body Report, *Korea – Dairy*, para. 85 (emphasis original); see also Appellate Body Report, *Argentina – Footwear (EC)*, para. 85; and Panel Report, *Ukraine – Passenger Cars*, para. 7.52).

[308] See para. 7.84 above.

[309] See para. 7.84 above.

[310] We also note that the panel in *Ukraine – Passenger Cars* found that referring to the relevant obligations in the published determinations but in a different context (in that case, when discussing causation) was not sufficient. (Panel Report, *Ukraine – Passenger Cars*, paras. 7.96-7.99).

[311] See paras. 7.155-7.156 above.

[312] European Union's first written submission, para. 66.

[313] European Union's response to Panel question No. 24(c), para. 14 (referring to Definitive determination, (Exhibit TUR-5), recitals 152, 156, and 188). (fn omitted)

to be able to apply a safeguard measure, and those obligations must therefore be identified in the Member's published report as part of the "pertinent issues of fact and law".[314]

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

7.169. Given this, we reject the European Union's suggestion that the European Commission's references to a "free of duty quota" (to which the out-of-quota duty does not apply) in the sections of the definitive determination discussing the form, level, and duration of the measures[315] was sufficient to identify the relevant obligations of the GATT 1994.

7.170. We therefore find that the definitive safeguard is inconsistent with Article XIX:1(a) because the European Commission did not identify in its published reports the obligations whose effect resulted in the injurious increase in imports. Having so found, we do not proceed to examine Turkey's further argument that the European Commission did not explain how the obligations in question resulted in the injurious increase in imports.

7.5 Increase in imports

7.171. Turkey claims that the European Commission acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it failed to make reasoned and adequate findings with respect to its determinations regarding an increase in imports, including with respect to alleged increases in certain product categories and product families.[316] The European Union responds that: (a) the European Commission was not required to examine increases by reference to individual product categories and product families, but rather the examination of the product as a whole was the "relevant determination"[317]; and (b) the examination of the product as a whole showed a sharp increase in imports of 59% between 2013 and 2016 followed by a continued increase after this timeframe, which reached 71% overall at the end of the most recent period (MRP), namely mid-2017 to mid-2018.[318]

7.172. We begin by setting out the applicable provisions forming the basis of Turkey's claims (section 7.5.1). We then evaluate Turkey's arguments that the European Commission did not provide a reasoned and adequate explanation for this determination due to decreases in import levels for some individual product categories and product families (section 7.5.2.1), and that the European Commission did not show that the increase was sufficiently significant, sudden, sharp, and recent (section 7.5.2.2).

[314] Agreement on Safeguards, Article 3.1; see also para. 7.164 above and Appellate Body Report, *US – Lamb*, paras. 72 and 76.

[315] See fn 313 above.

[316] Turkey's first written submission, para. 159. Turkey also argues that the definitive determination is inconsistent with Articles 2.1 and 4.2(a) and Article XIX:1(a) because the European Commission did not determine that there had been the requisite increase in imports for each product category, and took an inconsistent approach to the product concerned at different steps of its analysis. (Turkey's first written submission, paras. 170-173). We have already examined and rejected these arguments in section 7.2 above, and therefore we do not discuss them again in this section.

[317] European Union's first written submission, para. 161.

[318] European Union's first written submission, paras. 154, 157, 159, 161, 171, 180, and 194.

7.5.1 The applicable requirements of Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards

7.173. Turkey claims that the European Commission's determination of an increase in imports fails to satisfy the requirements of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Article XIX:1(a) of the GATT 1994 provides, in relevant part:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product *is being imported* into the territory of that contracting party *in such increased quantities* and under such conditions as to cause or threaten serious injury to domestic producers … [.][319]

7.174. Article 2.1 of the Agreement on Safeguards provides, in relevant part:

> 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 … [.][320]

7.175. Article 4.2(a) of the Agreement on Safeguards provides, in relevant part:

> 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* … [.][321]

7.176. We proceed now to examine Turkey's claims in relation to these provisions.

7.5.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards

7.5.2.1 Whether the European Commission did not adequately account for decreases in imports in the most recent past

7.177. Turkey argues that the European Commission failed to provide a reasoned and adequate explanation for its finding of an increase in imports in two main ways. First, with respect to product categories, Turkey argues that the European Commission only compared imports at the beginning and end of the POI.[322] Second, Turkey argues that the European Commission did not properly account for the fact that imports of certain individual product categories and product families decreased during the most recent part of the POI.[323] The European Union responds that Turkey's contention incorrectly focuses on a limited number of individual product categories and product families, whereas the "relevant determination" analysed the product under investigation as a whole.[324] For the European Union, the European Commission's analysis of the product categories and product families was merely "additional" to this "relevant determination".[325] The European Union also asserts that nothing in the GATT 1994 or in the Agreement on Safeguards requires the "increase" to manifest as a continuous acceleration of imports.[326] Brazil, as a third party, argues that "investigating authorities must analyse trends over the entire POI with a particular focus on the

[319] Emphasis added.
[320] Emphasis added; fn omitted.
[321] Emphasis added.
[322] Turkey's first written submission, paras. 174-181.
[323] Turkey's first written submission, para. 182.
[324] European Union's first written submission, paras. 157-161.
[325] European Union's first written submission, para. 161.
[326] European Union's first written submission, paras. 167-170 and 178-179.

most recent data in order to comply with the requirement expressed by the phrase 'is being imported' present in Article 2.1 of the Agreement on Safeguards".[327]

7.178. In light of our findings in section 7.2.2 above, we consider it significant that this argument by Turkey pertains only to the European Commission's examination of increases in imports based on certain individual product categories and product families. Turkey has not presented an equivalent challenge in respect of the European Commission's examination of increases in imports based on the product under consideration as a whole. In its examination of the product as a whole, the European Commission found that "[i]mports increased in absolute terms by 71% during the period of analysis, and in relative terms with market shares increasing from 12,7% to 18,8%" and that "[t]he most significant increase took place in the period 2013-2016" whereupon "[s]ubsequently, imports continued to increase at a slower pace before picking up again in the MRP".[328] Thus, for the product as a whole, the European Commission examined these trends and found that import volumes continuously increased at varying rates.

7.179. Accordingly, the European Commission's determination sets out a basis for its finding of an increase in imports that has not been challenged by Turkey, namely its finding on the basis of the product as a whole, comprising all the product categories on which the European Commission applied the safeguard. The European Commission characterized its examination by reference to the individual product categories and product families as "confirm[atory]", "complement[ary]", and "supplementa[l]" *vis-à-vis* its examination of the product as a whole.[329] This is also reflected in the general structure and order of the European Commission's analysis.

7.180. In this context, we note that Turkey's argument is based on the fact that for certain product categories and product families imports peaked either in 2016 or 2017, after which they decreased somewhat, although remaining at a higher level than at the beginning of the POI.[330] The European Commission considered that the overall increase for the included product categories and product families confirmed the findings relating to the product as a whole.[331] The European Commission also observed that although for some product families the greatest increase took place between 2013 and 2016, with imports peaking and then decreasing to an extent, those imports still remained "at a much higher level" than at the beginning of the POI.[332]

7.181. Taking into account that, as set out above, the central analysis conducted by the European Commission related to the product as a whole, the analysis of product categories and product families was supplemental, and this granular analysis still disclosed trends that were similar to those observed for the product as a whole, we do not consider that Turkey has established that the European Commission did not provide a reasoned and adequate explanation of its finding of increase in imports in light of the fluctuations in import levels observed for certain individual product categories and product families.

7.5.2.2 Whether the European Commission did not demonstrate that the increase in imports was sufficiently sharp, significant, sudden, and recent

7.182. Turkey contends that the European Commission "failed to demonstrate an increase in imports that is sharp enough, significant enough, sudden enough and recent enough" as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[333] The European Union responds that there are no "absolute standards" governing the requisite rate of increase and, accordingly, the sufficiency of an increase cannot be examined "in the abstract" without considering the situation of the domestic industry.[334] Brazil, as a third party, argues that the "standard for the determination of the increase of imports 'in such quantities'" has been "elucidated by previous case law", namely that the increase of imports must have been recent enough, sudden

[327] Brazil's third-party submission, para. 14.
[328] Definitive determination, (Exhibit TUR-5), recital 33.
[329] Definitive determination, (Exhibit TUR-5), recitals 19, 22, 28, and 34.
[330] Turkey's first written submission, tables 3-11. See also ibid. table 14.
[331] Provisional determination, (Exhibit TUR-3), recitals 23 and 28; Definitive determination, (Exhibit TUR-5), recitals 35-36 and 39.
[332] Definitive determination, (Exhibit TUR-5), recital 36.
[333] Turkey's first written submission, paras. 169 and 197.
[334] European Union's first written submission, paras. 173-174; second written submission para. 48.

enough, sharp enough, and significant enough, both quantitatively and qualitatively to cause or threaten to cause serious injury.[335]

7.183. In our view, if a complainant in WTO dispute settlement alleges that the increase in imports found by an authority is not sudden, significant, sharp, or recent *enough*[336], it bears the onus of adducing the reference point or benchmark against which to ascertain what may or may not be "enough". This is because the concept of "enough" is relational. Something is "enough" in relation to something else. What qualifies as "enough" cannot exist in the abstract untethered from some reference point or benchmark for ascertaining what is "enough".

7.184. We note that our understanding in this regard accords with that of the panel in *US – Steel Safeguards*, which observed that the question of whether, in that instance, an increase in imports was "sudden, sharp and significant *enough* as to cause serious injury is a question that is appropriately to be addressed in the context of causation of serious injury, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made".[337]

7.185. Thus, the question of whether an increase is sudden, significant, sharp, and recent enough may be determined by evaluating whether the increase is sufficient to cause or threaten to cause serious injury to the domestic industry. This question may also conceivably be determined by reference to some other benchmark proposed by the complainant, such as whether the increase is merely reflective of a reversion to normal market conditions after a disruption.[338]

7.186. In the present case, having structured its claim around whether the increase was sudden, significant, sharp, or recent enough, we do not consider that Turkey has adduced a viable benchmark or reference point to ascertain what was "enough". In its first written submission, Turkey refers to another panel's finding that a 37.9% relative increase in imports was not "enough", but that reference point has no relevance to the present case involving a different product, market, and set of facts.[339] Turkey also refers to the imports increasing by only 7% in the present case between 2017 and the MRP, and to the most recent data in the POI evincing only a 3% or 4% year-on-year increase[340], but Turkey does not explain *why* these rates of increase were not "enough".

7.187. We asked Turkey the following question on this point:

> The European Union contends that the sufficiency of increased imports cannot be assessed "*in the abstract*" but [the assessment] must instead be made in relation to "*other conditions necessary for imposition of a safeguard*" (European Union's first written submission, para. 174). Is it Turkey's view that the Panel should consider Turkey's claims regarding increased imports in isolation, and if so, what would be the benchmark for determining whether the increase was sufficient?[341]

7.188. Turkey responded that "the condition of 'increase in imports' should not be seen in isolation but relating to the other conditions necessary for the imposition of safeguard measures".[342] Despite this, Turkey's submissions in relation to the present claim do not address *why* the increase in imports identified by the European Commission was not sudden, significant, sharp, or recent enough to

[335] Brazil's third-party submission, para. 12.

[336] We note that these terms are not found in the text of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, but are rather derived from prior DSB reports. In view of our ultimate conclusion in this section, we need not express a view on the extent to which these terms correspond to the textual requirements of those provisions.

[337] Panel Reports, *US – Steel Safeguards*, paras. 10.217, 10.226, 10.236, and 10.255 (original emphasis omitted; emphasis added); see also Appellate Body Report*, US – Steel Safeguards*, paras. 351, 358, and 360 (noting that "[t]he question whether 'such increased quantities' of imports will suffice as 'increased imports' to justify the application of a safeguard measure is a question that can be answered only in the light of 'such conditions' under which those imports occur" and cannot be determined by reference to "absolute standards" nor "in the abstract").

[338] Panel Report, *Argentina – Preserved Peaches*, para. 7.60.

[339] Turkey's first written submission, para. 198 (referring to Panel Report, *Ukraine – Passenger Cars*, para. 7.147).

[340] Turkey's first written submission, paras. 204-205.

[341] Panel question No. 10. (emphasis original)

[342] Turkey's response to Panel question No. 10, para. 34.

threaten to cause serious injury.[343] Turkey points to characteristics exhibited by the increase itself. For instance, Turkey refers to the 3% year-on-year rate of increase at the end of the POI. Turkey also considers it significant that the bulk of the increase in imports found by the European Commission took place earlier in the POI and subsequently decelerated.[344] However, Turkey does not link these characteristics to the situation of the domestic industry to show that the increase was not sudden, significant, sharp, or recent enough to threaten to cause serious injury.

7.189. We therefore find that Turkey has not established that the European Commission did not demonstrate a sufficient increase in imports under Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. We note, however, that Turkey has presented other claims in these proceedings that encompass the impact of increased import volumes on the situation of the domestic industry, which we address elsewhere.

7.5.2.3 Overall conclusion on the European Commission's determination of an increase in imports

7.190. Based on the above, we find that Turkey has not established that the European Commission acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards in its assessment of an increase in imports.

7.6 Threat of serious injury

7.191. Turkey claims that the definitive safeguard is inconsistent with Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards because the European Commission improperly determined that increased imports were threatening to cause serious injury to the domestic industry.[345] Turkey argues that the European Commission neither demonstrated the existence of a significant overall impairment to the domestic industry that was clearly imminent, nor the existence of a high degree of likelihood of serious injury in the very near future.[346]

7.192. Turkey also argues that purely as a consequence of these inconsistencies with Articles 4.1(a), 4.1(b), and 4.2(a), the definitive safeguard is also inconsistent with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[347]

7.193. The European Union responds that the European Commission's finding of a threat of serious injury to the domestic industry was based on facts and Turkey has not demonstrated an inconsistency with the provisions it invokes.[348]

7.194. We begin by setting out the applicable requirements of Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards (section 7.6.1). We then evaluate whether Turkey has demonstrated that the European Commission acted inconsistently with these provisions by not demonstrating that

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[343] Turkey's response to Panel question No. 10, paras. 34-40; first written submission, paras. 197-213; and second written submission, paras. 132 and 136.

[344] Turkey's second written submission, paras. 131-134; response to Panel question No. 10, paras. 35-40.

[345] Turkey's first written submission, para. 215. When presenting its arguments on this point, Turkey did not clearly distinguish its arguments under Articles 4.1(a), 4.1(b), and 4.2(a), respectively, but rather mostly advanced a single set of arguments in respect of those provisions collectively.

[346] Turkey's first written submission, paras. 231 and 245.

[347] Further, Turkey argues that the definitive safeguard is inconsistent with Articles 2.1, 4.1(a), 4.1(b), and 4.2(a) and Article XIX:1(a) for the reasons already discussed in section 7.2 above, i.e. that, according to Turkey, the European Commission was required to determine that each of the conditions and circumstances to impose a safeguard was met for each product category individually. (Turkey's first written submission, paras. 226-229 and 254-257). Having already addressed these arguments in section 7.2, we do not discuss them again in this section.

We note that at paras. 226-229 and 254-257 of its first written submission, Turkey also relies on these arguments in support of a claim under Article 4.1(b). We have not addressed Article 4.1(b) directly in section 7.2, but these arguments rely on the same basic proposition that we have rejected in section 7.2, namely that the European Commission was required to determine that each of the conditions and circumstances to impose a safeguard was met for each product category individually. We therefore reject these arguments under Article 4.1(b). We note that we find that the definitive safeguard is otherwise inconsistent with Article 4.1(b).

[348] European Union's first written submission, paras. 222 and 225; opening statement at the first meeting of the Panel, para. 79.

a significant overall impairment was clearly imminent (section 7.6.2.1), and that serious injury would be highly likely to materialize in the very near future (section 7.6.2.2). Last, we address Turkey's consequential arguments (section 7.6.2.3).

7.6.1 The applicable requirements of Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards

7.195. Turkey contends that the European Commission's determination of a threat of serious injury is inconsistent with the requirements set out in Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards.[349]

7.196. Article 4.1(a) defines "serious injury" as follows:

> "[S]erious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry[.]

7.197. Article 4.1(b), which defines "threat of serious injury" and sets out certain requirements for a determination of such threat, reads:

> "[T]hreat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of [Article 4.2]. 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[.]

7.198. Thus a competent authority making a determination of a threat of serious injury must establish (i) the clear imminence of (ii) a significant overall impairment in the position of a domestic industry.

7.199. Article 4.2(a) of the Agreement on Safeguards provides 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.

7.200. We proceed now to examine Turkey's claims under these provisions.

7.6.2 Whether Turkey has established that the definitive safeguard is inconsistent with Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards

7.6.2.1 Whether the European Commission did not provide a reasoned and adequate explanation of its determination of threat of serious injury

7.201. Turkey claims that the European Commission failed to provide a reasoned and adequate explanation for its finding that the domestic industry was "in a fragile and vulnerable position", given that the data indicate that the industry's performance had improved towards the end of the POI.[350] Turkey argues that the very fact of this improved performance precludes a "threat of serious injury" determination.[351] Turkey also argues that the European Commission failed to adequately explain how this improved performance came about and why it would be short-lived in the face of further imports.[352] Because the finding of the domestic industry as "fragile and vulnerable" despite its improved performance was at the heart of the European Commission's determination of a threat of

[349] Turkey's first written submission, para. 225.
[350] Turkey's first written submission, paras. 231-232, 239, and 241-243.
[351] Turkey's response to Panel question No. 26, para. 13. See also Turkey's opening statement at the second meeting of the Panel, para. 12; and first written submission, para. 244.
[352] Turkey's response to Panel question No. 12, paras. 41, 44-45, and 50; comments on the European Union's response to Panel question No. 27, paras. 18-24.

serious injury, Turkey argues that the European Commission failed to properly reach this determination under Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards.[353]

7.202. The European Union responds that the European Commission acknowledged the domestic industry's improved performance but found it to be partial, temporary, and readily reversible, such that the domestic industry remained vulnerable to a continued increase in imports.[354] For the European Union, the domestic industry's position was fragile in view of the continued downward trends in the domestic industry's market share, employment, and stocks, despite improvements in other factors.[355] The European Union contends that the domestic industry's deterioration in 2013-2016 illustrates its vulnerability to increased imports, and that the post-2017 data indicate that import levels were accelerating due to, *inter alia*, the Section 232 measures, and that prices were also starting to decline.[356]

7.203. Brazil, as a third party, argues that while not every injury factor needs to be declining at the end of the POI, positive trends must be explained, particularly given that the most recent data will provide the most reliable indication of the situation of the domestic industry in the near future.[357]

7.204. Our evaluation of Turkey's claims and the European Union's rebuttal proceeds as follows. We first address Turkey's contention that the very fact that the domestic industry performance improved precludes a "threat of serious injury" determination (section 7.6.2.1.1). We then assess whether the European Commission properly examined the basis for the domestic industry's improved performance, which in turn sheds light on whether the European Commission provided a sufficient basis for inferring that these improvements would be temporary and readily reversible in the face of increasing imports (section 7.6.2.1.2). We next assess Turkey's contention that, even assuming the European Commission did indeed properly attribute the domestic industry's improved performance to the AD/CV measures, it nonetheless erred in inferring that these improvements would be temporary and readily reversible (section 7.6.2.1.3). Finally, we assess the role of the other factors that allegedly explained the domestic industry's improved performance (section 7.6.2.1.4).

7.6.2.1.1 Whether any improvement in the domestic industry's situation necessarily negates a finding of threat of serious injury

7.205. Turkey argues that the fact that the domestic industry improved towards the end of the POI demonstrates that serious injury was not "clearly imminent", irrespective of the reasons underlying the improvement.[358] The European Union responds that the fact that the domestic industry improved during this period did not preclude a determination of a threat of serious injury in view of the European Commission's finding that the domestic industry nonetheless remained "fragile" and "vulnerable".[359]

7.206. We are of the view that the Agreement on Safeguards does not establish a categorical rule that precludes authorities from finding a threat of serious injury whenever the data show positive trends in the domestic industry's performance at a given point of the POI. Rather, Article 4.1(b) provides that "'threat of serious injury' shall be understood to mean serious injury that is clearly imminent". In our view, such assessments are necessarily fact-specific and to be made on a case-by-case basis. If the evidence in a proceeding shows that a domestic industry's performance is on a durable upward trajectory, it may be difficult to establish that serious injury is "clearly imminent". However, if the evidence indicates that serious injury is "clearly imminent" despite certain improvements in the domestic industry's performance, an authority may find a threat of serious injury. For instance, the evidence may show that the improvement is fleeting or illusory and that the domestic industry will continue to be at a competitive disadvantage *vis-à-vis* imports once the short-lived improvement recedes. Accordingly, the question of whether a determination of a

[353] Turkey's first written submission, paras. 225, 231, and 244.
[354] European Union's first written submission, para. 202.
[355] European Union's first written submission, paras. 204-205.
[356] European Union's first written submission, paras. 203, 205, and 213-215; opening statement at the first meeting of the Panel, paras. 80 and 83; and opening statement at the second meeting of the Panel, paras. 17 and 31.
[357] Brazil's third-party submission, paras. 23-25.
[358] Turkey's response to Panel question No. 26, para. 13. See also Turkey's opening statement at the second meeting of the Panel, para. 12; and first written submission, para. 244.
[359] European Union's comments on Turkey's response to Panel question No. 26, paras. 12-14.

threat of serious injury complies with the Agreement on Safeguards when the domestic industry's performance improves at some point during the POI will depend on the facts and the quality of the authority's explanation as to the nature and implications of those improvements.

7.6.2.1.2 Whether the European Commission adequately explained the basis for the domestic industry's improved performance

7.207. We turn now to whether the European Commission adequately explained the basis for the domestic industry's improved performance, such that it could infer that this improvement was partial and transitory in the face of increasing imports and thus did not negate a finding of a threat of serious injury. We address two main points of contention in this section. The first point of contention concerns the parties' differing understandings of the European Commission's findings on why the domestic industry's performance improved. The second point of contention concerns whether the European Commission properly identified and substantiated that the AD/CV measures[360] that were adopted during the POI were a factor that contributed to the domestic industry's improved performance.

7.208. The improvement in the domestic industry's performance towards the end of the POI is a matter of fact that is uncontested between the parties. Rather, the parties dispute whether the European Commission could reasonably infer that this improvement was "partial", "temporary", and readily "revers[ible]"[361], and whether, on that basis, the European Commission reasonably determined that the situation of the domestic industry was "fragile and vulnerable".[362] Given that the parties offer differing understandings of the European Union's findings on why the domestic industry's performance improved, we begin our evaluation by examining the relevant sections of the European Commission's determination on this point.

7.209. The European Commission found that the situation of the domestic industry had "deteriorated significantly" in the period 2013-2016, before "recover[ing] partially" in 2017.[363] In particular, the European Commission observed both positive trends for the domestic industry from 2016 to 2017 in relation to domestic sales, consumption, production, production capacity, capacity utilization, prices, profitability, and cash flow, as well as negative trends in market share, stocks, and employment.[364] The determination also sets out data indicating that the domestic industry improved its position relative to imports from 2016 to 2017 in terms of the respective rates at which it captured new demand and stemmed the loss of market share to imports.[365] Although the European Commission indicated that the data for the first semester of 2018 could not be verified, the European Commission noted that these data confirmed that the "partial recovery" of the domestic industry was ongoing.[366]

7.210. The parties diverge as to what factors informed the European Commission's analysis of the domestic industry's improved performance from 2016 to 2017. The European Union contends that the European Commission identified five factors that explained this improvement, namely increased domestic consumption from 2013 to 2017, increased sales by the domestic industry, the cost of raw material remaining lower in 2017 than 2013, the recovery in prices to 2013 levels, and the imposition

[360] Our reference to AD/CV measures in this section means those measures adopted by the European Union during the POI of the safeguard investigation that are mentioned in the provisional and definitive determinations. (See e.g. Provisional determination, (Exhibit TUR-3), recitals 52-53, 55-57, 59, 61, and 69; and Definitive determination, (Exhibit TUR-5), recitals 95 and 116).

[361] Definitive determination, (Exhibit TUR-5), recitals 87, 89, 90, 95, 97, and 114; European Union's opening statement at the first meeting of the Panel, paras. 82-83; and Turkey's response to Panel question No. 26, paras. 16 and 20.

[362] European Union's opening statement at the second meeting of the Panel, paras. 17-19; Turkey's second written submission, paras. 157, 161, and 175.

[363] Definitive determination, (Exhibit TUR-5), recital 90.

[364] Provisional determination, (Exhibit TUR-3), recitals 39-46; Definitive determination, (Exhibit TUR-5), recitals 67-73. These data pertain to the "global" level of analysis. Similar trends were observed by reference to the product families and product categories. (Definitive determination, (Exhibit TUR-5), recitals 73-86. See also Turkey's first written submission, para. 234; and European Union's first written submission, para. 211).

[365] Definitive determination, (Exhibit TUR-5), recital 33 and table 4. See also Turkey's response to Panel question No. 26, para. 19; and European Union's second written submission, para. 75.

[366] Definitive determination, (Exhibit TUR-5), recital 89; European Union's opening statement at the first meeting of the Panel, para. 83.

of AD/CV measures against several of the products at issue.[367] The European Union also cites "efficiency gains by [the domestic] producers" in this regard.[368] Turkey responds that three of these factors – prices, sales volume, and consumption – are descriptive rather than explanatory in nature, and in any event, neither consumption nor sales volume are mentioned in the European Commission's determination as factors explaining the domestic industry's improved performance.[369]

7.211. Based on our review of the European Commission's determination, we agree that consumption and sales volume do not appear to have been explicitly cited as factors contributing to the domestic industry's improved performance. At the provisional stage, the European Commission stated that "[p]rices recovered in 2017, given a general recovery of the steel market but also as a consequence of the various trade defence measures"; "some [product categories] have improved, most likely as a result of the recent imposition of anti-dumping and anti-subsidy measures"; and "the [domestic] steel industry has partially recovered for some product categories in 2017, notably due to trade defence measures".[370] At the definitive stage, the European Commission affirmed its finding that "[t]his recovery was attributed, *inter alia*, to the effectiveness of the different trade defence measures that have been adopted, in particular since 2016".[371] Given this, the European Commission appears to have accorded particular weight to the AD/CV measures in stimulating the domestic industry's recovery, with "a general recovery of the steel market" also mentioned as a factor contributing to price increases. Additionally, the European Commission appears to have considered raw material costs to be a factor contributing to the domestic industry's improved profit levels. Specifically, the European Commission noted that "[t]he [domestic] industry achieved a level of profit of 6,2 % [in 2017] since cost of production (raw material), even if increasing, remained lower than in 2013".[372]

7.212. In summary, we understand the European Commission to have found that the domestic industry's recovery in 2017 arose principally from the application of AD/CV measures, in particular since 2016, and that lower raw material costs and a "general recovery of the steel market" also contributed to this recovery through improved profitability and increased prices. Increased prices were not themselves cited as a contributing factor. Rather, the European Commission treated increased prices as indicative of the improvements arising from the AD/CV measures and the general recovery of the market. Increased consumption and sales volumes were likewise not cited as contributing factors, but rather as indicative of the situation of the domestic industry in 2017.[373]

7.213. With this understanding in mind, we turn now to the parties' disagreement as to the proper inferences and conclusions to be drawn from the domestic industry's improved performance. The European Commission found that, in light of the nature of this improvement, the improvement was "partial", "temporary", and readily "revers[ible]"[374], and it was on this basis that the European Commission justified its conclusion that the domestic industry was still "fragile" and "vulnerable" to a continued increase in imports despite the improvement.[375] Turkey, by contrast, contends that the domestic industry was "performing outstandingly in 2017".[376]

7.214. Given the prominence of the AD/CV measures in the European Commission's explanation for the domestic industry's improved performance, we focus in this section on the parties' disagreement as to the proper inferences to be drawn from that factor in relation to the improved situation of the

[367] European Union's second written submission, para. 55.
[368] European Union's response to Panel question No. 26, para. 17.
[369] Turkey's opening statement at the first meeting of the Panel, paras. 30-31; response to Panel question No. 26, para. 14.
[370] Provisional determination, (Exhibit TUR-3), recitals 52, 55, and 69.
[371] Definitive determination, (Exhibit TUR-5), recital 95.
[372] Provisional determination, (Exhibit TUR-3), recital 45. See also Definitive determination, (Exhibit TUR-5), recital 72.
[373] Provisional determination, (Exhibit TUR-3), recitals 39-40. We note that the European Union argues that consumption and sales volume comprise part of the "*general recovery* of the [steel] market" (European Union's comments on Turkey's response to Panel question No. 26, para. 16 (emphasis original)). We address the role of the "general recovery of the steel market" as a contributing factor in section 7.6.2.1.4 below.
[374] Provisional determination, (Exhibit TUR-3), recitals 55 and 69; Definitive determination, (Exhibit TUR-5), recitals 87, 89, 90, 95, 97, and 114.
[375] Definitive determination, (Exhibit TUR-5), recitals 87, 90, 95, and 114.
[376] Turkey's first written submission, paras. 239 and 243-244.

domestic industry in 2017.[377] The parties agree that this was the only factor identified by the European Commission to explain why the domestic industry improved its competitive relationship *vis-à-vis* imports after 2016.[378] However, the parties disagree as to whether the European Commission's analysis provided a sufficient basis for finding that the AD/CV measures contributed to the domestic industry's improved performance in the first place.[379]

7.215. The European Commission explained the role of the AD/CV measures in improving the situation of the domestic industry, particularly by increasing profits to a "sustainable" level for certain product categories, as follows:

> As far as profit is concerned, all product categories were sold at a loss or at a much reduced profit until 2016. Only 7 products could recover to a level of profit above 6 % in 2017. These products are significant in terms of EU production volume and six of them are currently subject to (recent) anti-dumping or countervailing duty measures. Note that these measures concern only some countries of origin. All other products remained either loss making (3 products) or only close to break-even (13 products).
>
> …
>
> For product categories 1, 2 and 4, the financial situation was negative in 2016, but became positive in 2017 following the imposition of anti-dumping and anti-subsidy measures against a number of countries like, amongst others, China and Russia.
>
> …
>
> In parallel, in order to remedy the injury caused by unfair trade imports, the Union has imposed a number of anti-dumping and anti-subsidy measures against imports of steel products. In total, there are currently no less than 19 anti-dumping or anti-subsidy measures against the unfairly traded imports of 14 product categories under investigation from various countries. During the period under investigation, i.e. 2013-2017, 13 new investigations determined that the EU steel industry suffered (or in one case was threatened to suffer) from material injury caused by unfair trade practices.[380]

7.216. Turkey contends that this analysis is deficient in a number of respects. First, Turkey argues that the European Commission failed to properly articulate its rationale for finding that the AD/CV measures contributed to the domestic industry's improved performance, because it did not identify the relevant measures and product categories concerned, nor did it explain how those measures impacted trends in injury factors.[381] Second, given this "lack of systematic analysis", Turkey contends that the European Commission drew incorrect conclusions.[382] In particular, Turkey asserts that the European Commission's focus on improvements in profitability for product categories subject to these measures ignored the improvements in profitability for product categories not subject to these measures.[383] For Turkey, the improvements across product categories irrespective of the application of AD/CV measures show that those measures could not themselves explain the domestic industry's improved performance.[384] The European Union responds that the domestic industry's improved performance "was due only in part" to the AD/CV measures, and that the improvement for products not subject to those measures "is explained by the general

[377] We address other factors contributing to the domestic industry's improved performance in section 7.6.2.1.4 below.

[378] European Union's response to Panel question No. 26, para. 16; Turkey's response to Panel question No. 26, paras. 16-20.

[379] Turkey's responses to Panel question No. 26, para. 17; and No. 28(b), para. 24; European Union's comments on Turkey's response to Panel question No. 28, paras. 26-29.

[380] Provisional determination, (Exhibit TUR-3), recitals 53, 56, and 59.

[381] Turkey's comments on the European Union's response to Panel question No. 27, para. 23.

[382] Turkey's comments on the European Union's response to Panel question No. 27, para. 24.

[383] Turkey's response to Panel question No. 26, para. 17.

[384] Turkey's response to Panel question No. 26, para. 17; comments on the European Union's response to Panel question No. 27, para. 24.

recovery of the steel market".[385] Moreover, the European Union emphasizes that product categories subject to AD/CV measures tended to return to sustainable levels of profitability, whereas those not subject to these measures tended to remain at unsustainable levels, despite improvements.[386]

7.217. We agree with Turkey that the European Commission's analysis of the role played by the AD/CV measures in the domestic industry's improved performance did not provide a sufficient basis to infer that the improvement was "temporary" and "revers[ible]".[387] The European Commission's analysis contains insufficient detail to explain how imposing an AD/CV measure on a particular product at a particular point in time led to a subsequent improvement in the trends for the category encompassing that product. For instance, as evidenced in the portions extracted above (see paragraph 7.215), the analysis does not provide any information about the product coverage of a given AD/CV measure, the proportion of a given category that was impacted by that measure, the point in time at which that measure was imposed, and the subsequent improvements in trends for that category. We do not suggest that all such information is necessarily required in all instances. Rather, such information is illustrative of the kind of details that could permit an understanding of how the AD/CV measures contributed to the domestic industry's improved performance. As it stands, the information underpinning the European Commission's analysis on this point is sparse and incomplete and thus, standing alone, is insufficient to support the European Commission's inference that the improvement was temporary and reversible. This aspect of the European Commission's explanation falls short of the Article 4.1(b) requirement that "threat of serious injury" determinations be "based on facts".

7.218. We also consider it significant that increases in profitability were observed in 2017 irrespective of the adoption of AD/CV measures. According to the European Commission, significant price depression from imports had precluded the domestic industry from achieving sustainable profit levels in 2013-2016 despite falling raw material costs.[388] Based on this, the European Commission reasoned that the subsequent improvement in profit levels for some product categories in 2017 was "most likely as a result of the recent imposition of anti-dumping and anti-subsidy measures".[389] According to this reasoning, the adoption of AD/CV measures alleviated the downward price pressure from certain imports, which in turn enabled the domestic industry to benefit from the lower (albeit increasing) raw material costs and to fetch prices that were commensurate to sustainable profit levels whilst passing increased costs on to customers.[390]

7.219. However, as Turkey has noted, increases in profitability were also observed in 2017 for product categories for which AD/CV measures had *not* been recently adopted.[391] For instance, profit levels increased in 2016-2017 from 4.9% to 9.2% for category 8, from 2.3% to 5.8% for category 14, and from -3.1% to 3.9% for category 15.[392] These increases can be juxtaposed against those explicitly referenced by the European Commission as exhibiting improvements in 2017 following the imposition of AD/CV measures, namely categories 1, 2, and 4.[393] The profit levels for these categories improved from 2016 to 2017 as follows: from -1.0% to 7.8% for category 1, from 0.6% to 9.8% for category 2, and from 7.9% to 11.7% for category 4.[394] Meanwhile, profit levels for category 6 decreased in 2016-2017 from 4.6% to 3.1% despite the recent adoption of

[385] European Union's comments on Turkey's response to Panel question No. 28(b), paras. 25 and 29. As we explained in para. 7.214, we focus on the role of the AD/CV measures in the present section given the prominence of this factor in the European Commission's determination and given that this was the only factor identified by the European Commission that could explain the domestic industry's improved performance *vis-à-vis* imports. We address other factors contributing to the domestic industry's improved performance in section 7.6.2.1.4 below.

[386] European Union's comments on Turkey's response to Panel question No. 26, para. 22.

[387] Turkey's comments on the European Union's response to Panel question No. 27, para. 21.

[388] Provisional determination, (Exhibit TUR-3), recital 55.

[389] Provisional determination, (Exhibit TUR-3), recital 55.

[390] European Union's second written submission, para. 62.

[391] Turkey's response to Panel question No. 26, para. 17.

[392] Provisional determination, (Exhibit TUR-3), annex III. The European Commission's determination does not enumerate those product categories affected by the imposition of AD/CV measures prior to 2017 or generally. Turkey has provided a table in this regard in Exhibit TUR-49. In the absence of any objections by the European Union as to its accuracy, we are guided by the contents of that table in understanding which product categories were affected by these measures, and when.

[393] Provisional determination, (Exhibit TUR-3), recital 56.

[394] Provisional determination, (Exhibit TUR-3), annex III.

anti-dumping measures in 2016. These data do not support the proposition that the fact and degree of improvement in profit levels in 2017 depended on the imposition of recent AD/CV measures.[395]

7.220. Accordingly, the domestic industry's ability to mitigate downward price pressure from imports and realize increased profit levels through higher prices in 2017 was not limited to the product categories recently subject to AD/CV measures. Rather, the domestic industry's improved competitiveness *vis-à-vis* imports was observable across other product categories too.[396] Indeed, as Turkey points out, the domestic industry's improved competitiveness *vis-à-vis* imports in 2017 was also reflected in other data.[397] In particular, domestic consumption grew 12% from 2013 to 2016.[398] Imports outperformed the domestic industry in capturing this growth insofar as imports increased by 59%, compared to domestic sales which increased by just 5% during that period.[399] By contrast, in 2016-2017 the domestic industry managed to substantially reduce the rate at which it was being outperformed by imports in capturing new demand.[400] This provides a further indication that the domestic industry had improved its competitiveness *vis-à-vis* imports in 2017 following the prior "significant deterioration"[401] in 2013-2016.

7.221. As we have noted, the European Union acknowledged that the imposition of the AD/CV measures was the only factor identified by the European Commission to explain the domestic industry's improved competitiveness *vis-à-vis* imports.[402] This factor, however, cannot explain the domestic industry's improved competitiveness in relation to product categories for which no AD/CV measures had been recently adopted. The absence of an explanation in this regard is noteworthy. First, the fact that the domestic industry could mitigate the price pressure from imports and improve profitability across a range of product categories in 2016-2017 irrespective of the application of AD/CV measures raises the possibility that something other than those measures was driving the improved competitiveness.[403] Nothing before us suggests that such a possibility was explored by the European Commission.[404] Second, even accepting that the AD/CV measures were

[395] The European Union seeks to differentiate between those product categories whose profits improved to a "healthy" or "sustainable" profit level and that were subject to recent AD/CV measures, and those whose profits levels improved but failed to reach "healthy" or "sustainable" levels and that were not subject to such measures. We find this unconvincing. The European Union oscillates between 6% (European Union's response to Panel question No. 28(b), para. 27) and 8% (response to Panel question No. 27, para. 21; comments on Turkey's response to Panel question No. 26, para. 22) as the benchmark for the requisite level of profit without any explanation. We note that the European Commission stated that "[i]t is considered that the level profit below 6 % is insufficient to cover the investments needed to sustain the activity, as, in the majority of the recent investigations, the Commission has used a level of around 8 % profit as a sufficient profit level in this sector in order to cover investments". (Provisional determination, (Exhibit TUR-3), recital 53). We would expect to see additional explanation if this was indeed a pivotal aspect of the determination. We agree with Turkey in this regard that the European Commission did not adequately explain its use of these benchmarks as indicative of a "sustainable" profit level. (Turkey's comments on the European Union's response to Panel question 28(b), para. 27). Indeed, several interested parties argued during the investigation that the European Commission had found profit levels of between 3-7% to be adequate in a number of AD/CV investigations concerning the steel sector, but the European Commission did not respond directly to this claim. (Definitive determination, (Exhibit TUR-5), recitals 96-97). In any case, contrary to the European Union's argument, at least one category not subject to AD/CV measures exceeded the 8% threshold (category 8), whereas some categories that were subject to those measures fell below the 6% threshold (categories 5, 7, and 12). These data-points call into question the premise of the European Union's alleged distinction between products subject to AD/CV measures reaching healthy profit levels on the one hand, and those not subject to such measures exhibiting unsustainable profit levels, on the other hand.

[396] We also note that *downward* trends in profitability from 2016-2017 were not limited to product categories not subject to AD/CV measures. For instance, profit levels for category 6 decreased in 2016-2017 from 4.6% to 3.1% despite the recent adoption of anti-dumping measures in 2016.

[397] Turkey's response to Panel question No. 26, paras. 19-20. See also European Union's second written submission, para. 75.

[398] Definitive determination, (Exhibit TUR-5), table 4.

[399] Definitive determination, (Exhibit TUR-5), tables 2 and 4.

[400] Definitive determination, (Exhibit TUR-5), recital 33, and tables 2 and 4.

[401] Definitive determination, (Exhibit TUR-5), recitals 90 and 95.

[402] European Union's response to Panel question No. 26, para. 16. According to the European Union, the other factors, namely the "general recovery of the steel market" and the lower raw material costs, benefitted both the domestic industry and imports.

[403] Turkey's responses to Panel question No. 12, para. 44; No. 26, paras. 17 and 20; and No. 28(b), para. 24.

[404] European Union's response to Panel question No. 12, paras. 45-48. The European Commission's reference to a "general recovery of the steel market" and lower raw material costs

responsible for the domestic industry's improved competitiveness *vis-à-vis* imports in certain product categories, the European Commission does not appear to have addressed the industry's improved competitiveness in other categories.[405] Its determination therefore leaves unexplained why the domestic industry began to gain ground on imports from 2016 to 2017 with respect to the imports of product categories not subject to the AD/CV measures. In the absence of any understanding as to why the domestic industry's performance improved *vis-à-vis* imports of those particular product categories, it was not reasonable for the European Commission to surmise that the industry nonetheless continued to be "vulnerable" to those imports. Moreover, the European Commission did not explain how its finding that the domestic industry was "vulnerable" was compatible with seemingly contradictory data cited in its determination. In particular, the domestic industry's performance improved after 2016 even as imports that were not subject to AD/CV measures continued to increase. The domestic industry's improvement in the face of increased volumes of imports not subject to AD/CV measures calls into question the European Commission's finding that the domestic industry was "vulnerable" to increases of those imports, and thus warranted further explanation.

7.222. We recall, in this regard, that Article 4.1(b) of the Agreement on Safeguards requires a determination of a threat of serious injury to "be based on facts and not merely on allegation, conjecture or remote possibility". In our view, the aforementioned deficiencies in the European Commission's assessment regarding how the domestic industry improved its competitive position in relation to imports from 2016 to 2017 indicate that the European Commission's subsequent conclusion as to the "vulnerab[ility]" of the domestic industry to further competition from imports was not "based on facts" as required by Article 4.1(b).

7.6.2.1.3 Whether the European Commission improperly inferred that improvements owing to the AD/CV measures would be temporary and reversible

7.223. We recall that Turkey presents a further contention on the assumption, *arguendo*, that the European Commission correctly identified the AD/CV measures as a main factor contributing to the domestic industry's improved performance. In particular, Turkey argues that the European Commission erred by inferring that the positive effects of those measures would be temporary and reversible.[406] We have already found that the European Commission's analysis of the role played by the AD/CV measures in the domestic industry's improved performance was deficient. We nonetheless consider it useful for the effective resolution of the dispute to examine Turkey's contention regarding the effects of the AD/CV measures.

7.224. According to Turkey, if AD/CV measures adopted during a safeguard investigation led to improvements in the domestic industry's performance, it stands to reason that those improvements will persist into the future.[407] For Turkey, by adopting AD/CV measures, an authority seeks to ameliorate certain sources of injury, an approach that is subsequently borne out if the domestic industry's performance improves.[408] Moreover, given that those measures can last for five years and potentially be renewed, Turkey contends that the resulting amelioration of certain sources of injury should be considered durable.[409] The European Union responds that the European Commission found that imports subject to AD/CV measures were being replaced by imports from other sources and, moreover, the improvements in domestic consumption and prices together with the Section 232 measures attracted yet further imports to the EU market.[410]

7.225. We recall that the European Commission found that there was a "significant deterioration" in the situation of the domestic industry in 2013-2016, followed by improvements in 2017 as a result

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may explain aspects of the domestic industry's overall improvement, but it does not explain why the domestic industry improved its competitive position *vis-à-vis* imports, since those factors benefitted both the domestic industry and imports in similar ways. (European Union's response to Panel question No. 26, para. 16). See also section 7.6.2.1.4 below.

[405] Turkey's responses to Panel question No. 12, para. 44; and No. 26, para. 20.

[406] Turkey's response to Panel question No. 26, paras. 16 and 20; second written submission, paras. 155-158.

[407] Turkey's response to Panel question No. 26, paras. 16 and 20. See also Turkey's second written submission para. 158; and response to Panel question No. 12, para. 45.

[408] Turkey's response to Panel question No. 12, para. 45.

[409] Turkey's response to Panel question No. 26, para. 16.

[410] European Union's comments on Turkey's response to Panel question No. 26, paras. 17-19.

of, *inter alia*, the AD/CV measures.[411] According to the European Union, the period 2013-2016 is illustrative of the domestic industry's vulnerability to imports.[412] However, according to the European Commission's own explanation, the AD/CV measures imposed on some imports had contributed to the subsequent improvement in 2017. To that extent, these measures had mitigated certain sources of injury – or "vulnerability" – in relation to imports. It follows from the European Commission's reasoning that, absent some explanation to the contrary, a reversion to the kind of negative conditions experienced by the domestic industry in 2013-2016 could arise only through sources of injury that had not been mitigated by the AD/CV measures.

7.226. In this regard, the European Union contends that the European Commission found that imports subject to the AD/CV measures were being replaced by imports from other sources, and that import levels continued to increase despite the measures.[413] The European Union presented data in these proceedings indicating that the proportion of the total import volume that was subject to AD/CV measures was 33% in 2015, before declining to 21% and 10% in 2016 and 2017 respectively.[414] Turkey responds that these data were not referenced in the European Commission's determination and should be disregarded.[415] Even if these data had been referenced explicitly by the European Commission, we do not consider that they support the European Union's case. Rather, when considered in light of other trends, they show that the replacement of imports subject to AD/CV measures with imports from other sources did not preclude the improvement in the domestic industry's performance in 2016-2017. Indeed, the domestic industry was able to achieve this improved performance *despite* import volumes (notably, those not subject to AD/CV measures) continuing to increase in 2016-2017.[416] This raises the possibility that the domestic industry had surmounted its vulnerability to increased imports[417], for instance through the alleviation of the price depression from 2013-2016 by the imposition of AD/CV measures.

7.227. The European Union points to declines in prices in the third quarter of 2018, whilst imports continued to increase, as evidence that the domestic industry was vulnerable to imports despite the imposition of AD/CV measures.[418] However, we agree with Turkey that the European Commission's findings of an acceleration in import volumes and a decline in prices after 2017 were not accompanied by evidence of downward trends in injury factors for the domestic industry.[419] Given that the domestic industry had improved its performance in 2016-2017 despite increased imports from sources not subject to AD/CV measures, we see no basis for inferring – in the absence of evidence to the contrary – that this dynamic would change after 2017.[420] Indeed, the data available to the European Commission for the first semester of 2018 appeared to show that the "partial recovery" of the domestic industry was ongoing despite continued increases in import volumes.[421] The mere prospect of further increases in imports was thus insufficient to

[411] Provisional determination, (Exhibit TUR-3), recital 55; Definitive determination, (Exhibit TUR-5), recitals 90 and 95.

[412] European Union's first written submission, paras. 205 and 207.

[413] European Union's opening statement at the second meeting of the Panel, para. 35; comments on Turkey's response to Panel question No. 26, para. 18.

[414] European Union's response to Panel question No. 28(a), para. 25.

[415] Turkey's comments on the European Union's response to Panel question No. 28(a), para. 26.

[416] Turkey's response to Panel question No. 12, paras. 49-50.

[417] Turkey's opening statement at the second meeting of the Panel, para. 17; opening statement at the first meeting of the Panel, para. 34.

[418] European Union's response to Panel question No. 26, para. 17; opening statement at the second meeting of the panel, paras. 19 and 31; and opening statement at the first meeting of the Panel, para. 83.

[419] Turkey's second written submission, paras. 159-160. See also Definitive determination, (Exhibit TUR-5), recital 89.

[420] We note, in this regard, the European Commission's finding that "imports of the product categories concerned rose by 4 % from 2017 to the MRP without causing serious injury". (Definitive determination, (Exhibit TUR-5), recital 143). The European Commission mentioned no evidence indicating that the replacement of imports subject to AD/CV duties with other imports was accompanied by a replacement of sources of injury. On the contrary, the fact that the domestic industry's performance improved in 2016-2017 as the replacement of imports increased suggested that the domestic industry had improved its competitiveness *vis-à-vis* imports, thus enabling it to face further increased imports in the future (Turkey's opening statement at the first meeting of the Panel, para. 34), and yet the European Commission did not contend with these indications from the evidence that contradicted its conclusions.

[421] Definitive determination, (Exhibit TUR-5), recital 89; European Union's opening statement at the first meeting of the Panel, para. 83.

demonstrate that the situation of the domestic industry was "vulnerable and fragile".[422] Additionally, we do not consider that declining prices in the third quarter of 2018 were indicative of the "new price depression" from imports that the European Commission had forecast in its provisional determination.[423] These declines could arise from factors unrelated to imports. For instance, when assessing any harm caused by the domestic industry's allegedly poor export performance, the European Commission explained the drop in the domestic industry's export prices in 2017 to be a result of reductions in costs of raw materials.[424] Thus, the European Commission explicitly recognized that price declines could be driven by factors other than price pressure from competitors. Against that background, we consider it significant that the determination does not set out the data underlying its observation of a price decline in the third quarter of 2018, nor does it analyse these data to ascertain whether this price decline was being caused by increased volumes of imports.

7.228. In summary, according to the European Commission's findings, the domestic industry was not vulnerable to imports subject to AD/CV measures to the extent that those measures produced positive effects for the domestic industry and continued to be in effect. The European Commission, however, did not demonstrate how the replacement of imports subject to AD/CV measures with imports from other sources could erode the positive effects of those measures. On the contrary, the domestic industry's performance improved in 2016-2017 whilst imports increased, particularly those not subject to these measures. In our view, therefore, the European Commission's respective findings that the "further increase of imports in 2018 – in particular from those countries or exporters not subject to trade defence measures – is likely to prevent the industry from a full recovery and from benefiting from [the AD/CV] measures"[425], and that the domestic industry was "vulnerable to further increases of imports" not subject to those measures[426], lacked the factual basis that is required for "threat of serious injury" determinations under Article 4.1(b) of the Agreement on Safeguards.

7.6.2.1.4 Whether the European Commission identified other factors contributing to the domestic industry's improved performance that demonstrate its vulnerability to increased imports

7.229. Finally, we recall that the European Union contends that there were factors other than the AD/CV measures contributing to the domestic industry's improved performance in 2016-2017. In particular, the European Union contends that the European Commission identified increased domestic consumption from 2013 to 2017 and increased sales by the domestic industry[427], the cost of raw material remaining lower in 2017 than 2013, and the recovery in prices to 2013 levels, as factors in this regard.[428] The European Union seems to argue that these factors could recede and leave the domestic industry exposed to the negative effects of imports that were increasing after 2017 due to, *inter alia*, trade diversion from the Section 232 measures.[429] We recall, however, that the European Union explained that improvements in these other factors benefitted the domestic

[422] Turkey's second written submission, para. 159; comments on the European Union's response to Panel question No. 27, para. 25.

[423] In its provisional determination, the European Commission considered that increased imports being diverted from the US market would "unavoidably result in a new price depression and undercutting on the EU market". (Provisional determination, (Exhibit TUR-3), recital 35). In the definitive determination, the European Commission considered that "monthly imports into the Union started to increase mostly since June 2018" as a result of such trade diversion, and "[m]oreover, steel prices in the Union started to follow a declining trend since the third quarter of 2018". (Definitive determination, (Exhibit TUR-5), recital 89). In the present proceedings, the European Union argues that the decline in prices was caused by downward price pressure from the increased import levels attributable to trade diversion from the US market. (European Union's response to Panel question No. 26, para. 17). In essence, we understand the European Union to argue that the price decline in the third quarter of 2018 represented the materialization of the anticipated "new price depression" due to increased imports being diverted from the US market that the European Commission had forecast in its provisional determination.

[424] See, e.g. Definitive determination, (Exhibit TUR-5), recital 123.

[425] Provisional determination, (Exhibit TUR-3), recital 61. See also ibid. recital 57.

[426] Provisional determination, (Exhibit TUR-3), recitals 35 and 61.

[427] The European Union contends that these factors were part of the "general recovery of the steel market" that was identified European Commission at Provisional determination, (Exhibit TUR-3), recital 52.

[428] European Union's second written submission, para. 55. See para. 7.212 for our understanding of the European Commission's determination on this point.

[429] European Union's response to Panel question No. 12, para. 47; second written submission, paras. 55, 60, 64, and 75; and comments on Turkey's response to Panel question No. 28, para. 29.

industry and imports in similar ways.[430] Yet, the European Union has provided no reason why declines in those factors would not likewise affect the domestic industry and imports in similar ways, leaving their competitive relationship unaltered. The European Union has thus not shown how the domestic industry would be any more exposed to imports as a result of declines in those factors than had been the case in 2016-2017, when the domestic industry improved its performance and competitive position *vis-à-vis* imports despite imports continuing to increase. Accordingly, the role of these other factors does not obviate the deficiencies in the European Commission's explanation, identified above in paragraphs 7.226-7.227 as to the allegedly partial, temporary, and readily reversible nature of the domestic industry's improvement. There is no reasoning in the European Commission's determination along the lines that downward trends in demand and increased raw material costs would leave the domestic industry more vulnerable to competition from increased imports.

7.6.2.1.5 Conclusion on the explanation for the determination of threat of serious injury

7.230. In conclusion, we have found that the European Commission's explanation of the AD/CV measures as a main contributor to the domestic industry's improved performance lacks basic information concerning the timing, scope, and effectiveness of those measures. Further, the European Commission's explanation in this regard did not account for improvements in product categories for which no AD/CV measures were imposed, thus leaving those improvements (and the assumption that they would be reversed in the face of increased import levels) unexplained and without a factual basis. As we consider the European Commission's explanation of the industry's improved performance to be deficient, this deficiency necessarily undermines the European Commission's inference that the improvement was partial, temporary, and readily reversible, and the European Commission's characterization of the domestic industry as "vulnerable" and "fragile" despite this improvement.

7.231. Additionally, to the extent that the AD/CV measures were responsible for the domestic industry's improved performance, the European Commission's explanation that the replacement imports from other sources would cause harm to the domestic industry was not "based on facts" as required by Article 4.1(b). Rather, the period during which these imports from other sources replaced those subject to AD/CV measures coincided with the domestic industry's recovery. Indeed, the domestic industry's performance improved during this period despite import volumes continuing to increase. The European Commission did not set out a factual basis for inferring that increased volumes of replacement imports from other sources would harm the domestic industry into the future.

7.232. For all of these reasons, we agree with Turkey that the European Commission's explanation that the domestic industry was "in a fragile and vulnerable position" despite its improved performance was flawed. Given the centrality of this flawed explanation to the European Commission's determination of a threat of serious injury[431], we find that the European Commission's determination of a threat of serious injury was not "based on facts" as required by Article 4.1(b) of the Agreement on Safeguards. In view of this finding, we consider it unnecessary for the effective resolution of the dispute to reach findings on substantively the same issue under Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards.

7.6.2.2 Whether the European Commission did not establish a high likelihood of serious injury in the very near future

7.233. Turkey claims that the European Commission acted inconsistently with Article 4.1(b) of the Agreement on Safeguards by failing to demonstrate, on the basis of facts, that there was a high degree of likelihood of serious injury to the domestic industry in the very near future.[432] In essence, Turkey argues that the European Commission conflated its finding of a threat of serious injury with a finding of a threat of increased imports.[433] For Turkey, this is because the European Commission's determination assumed that increased import levels in the future would bring about serious injury without demonstrating how those increased import levels would lead to a

[430] European Union's response to Panel question No. 26, para. 16.
[431] Provisional determination, (Exhibit TUR-3), recitals 55, 60-61, and 69; Definitive determination, (Exhibit TUR-5), recitals 90 and 111.
[432] Turkey's first written submission, para. 245.
[433] Turkey's second written submission, para. 182.

significant overall impairment in the position of the domestic industry.[434] Turkey thus contends that the European Commission's determination of threat of serious injury was based on "conjecture" rather than on "facts".[435]

7.234. The European Union responds that the European Commission based its determination of a threat of serious injury on a projection as to the overall state of the domestic industry that was informed by facts relating to the negative trends in certain injury factors, the increase in imports during the MRP, namely mid-2017 to mid-2018, declining prices in the third quarter of 2018, and the likely further increase in imports due among others to the Section 232 measures.[436] The European Union emphasizes that the expected further increase in imports should be understood in the context of the domestic industry's recovery from a period in which its position had deteriorated significantly due to increased imports.[437] For the European Union, the expected further increase in imports would reverse the recovery and "necessarily" cause a deterioration in injury factors such as price and profitability.[438]

7.235. Brazil, as a third party, argues that the future likelihood of increased imports cannot be a trigger for safeguard measures. Rather, the "threat" must relate to "the actual trend of imports that have experienced a recent, sharp, sudden, and significative increase".[439] Switzerland contends that "[b]ecause a threat determination requires an analysis of the likelihood that the serious injury will occur in the near-term, the expected volume of imports as well as their likely effect on the domestic industry could be relevant to the competent authority's analysis".[440] For the United Kingdom, a threat of serious injury determination entails an assessment of both historical and existing facts from the reference period accompanied by fact-based projections concerning future developments in the domestic industry's condition.[441]

7.236. The parties do not contest that the European Commission relied on the expectation of a further increase in import volumes as a "critical element"[442] in demonstrating that the domestic industry was currently threatened with serious injury. In our view, the main issue before us is whether the European Commission's determination of a threat of serious injury evinces a sufficient factual basis for projecting that this expected increase in imports would bring about a significant overall impairment in the position of the domestic industry.[443] We begin by setting out the European Commission's findings on the likely impact of this expected increase on the domestic industry. At the provisional stage, the European Commission examined the factors that would lead to a further increase in imports and stated that:

> In this context, a significant increase of supply on the Union market caused by an influx of imports will result in a general downward price pressure, resulting in price levels comparable to 2016 with significant negative consequences on the profitability of the Union steel industry.[444]

[434] Turkey's second written submission, paras. 182 and 185-186; response to Panel question No. 29, para. 30; and opening statement at the second meeting of the Panel, para. 19.
[435] Turkey's first written submission, para. 248; second written submission, para. 187.
[436] European Union's comments on Turkey's response to Panel question No. 30, para. 38.
[437] European Union's opening statement at the second meeting of the Panel, para. 38; closing statement at the second meeting of the Panel, para. 18.
[438] European Union's response to Panel question No. 30, para. 40; opening statement at the second meeting of the Panel, para. 38.
[439] Brazil's third-party submission, para. 22.
[440] Switzerland's third-party response to Panel question No. 6, para. 8.
[441] United Kingdom's third-party response to Panel question No. 6, para. 21.
[442] Definitive determination, (Exhibit TUR-5), recital 93.
[443] We note Turkey's clarification that, in its view, "the competent authorities are permitted to, and actually should, consider the expected rate and amount of the increase in import levels as part of the threat and/or causation analysis" and further that: "[a]s the Appellate Body emphasised, facts, by their very nature, pertain to the present and the past, and thus to the [POI]. Those facts then serve as a basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future. In this regard, this prospective analysis must not only assess whether imports will likely increase in the future, but also the expected evolution of all relevant injury factors in light of past trends". (Turkey's response to Panel question No. 39, para. 64 (fn omitted)).
[444] Provisional determination, (Exhibit TUR-3), recital 68. See also European Union's response to Panel question No. 30, para. 39(a).

7.237. At the definitive stage, the European Commission stated that:

> It should however be noted that – as indicated in table 12 below – monthly imports into the Union started to increase mostly since June 2018. Moreover, steel prices in the Union started to follow a declining trend since the third quarter of 2018. It is, therefore, not possible to observe the effects of these imports and price development on the situation of the Union industry during the first semester of 2018. Therefore, the recent data confirmed the delicate situation of the Union industry and the threat posed by the most recent increase in imports.
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> …
>
> In the provisional Regulation, the Commission concluded that the situation of the Union industry deteriorated significantly in the period 2013-2016 and recovered partially in 2017. However, the Commission considered that the Union industry, despite the temporary improvement, was still in a fragile situation and under the threat of serious injury if the increasing trend in imports continued with the ensuing price depression and profitability drop below sustainable levels.
>
> …
>
> [T]he Commission concluded that the Union industry was in a fragile situation, recovering from a period where its situation had deteriorated significantly. This recovery was attributed, inter alia, to the effectiveness of the different trade defence measures that have been adopted, in particular since 2016. … In this context, the Commission confirmed that the ongoing provisional recovery could quickly be reversed if a further increase of imports was to take place.
>
> …
>
> [D]espite the fact that in 2017 the profitability levels had significantly improved from previous years (where the [domestic] industry was either loss-making or break-even), this situation could rapidly be reversed if imports would continue to increase (or surge, as a result of *inter alia*, the US Section 232 measures). … In this context, the established risk of trade diversion would be a key element that would negatively affect the current economic situation of the Union industry if measures are not adopted.[445]

7.238. It is apparent from these passages that the European Commission projected that a further increase in import levels would result in price depression and declines in the domestic industry's profitability. The factual basis for this projection was the negative impact of increased import levels on the domestic industry in 2013-2016.[446] We consider this to be inadequate. It presumes that the market conditions prevailing in 2013-2016 would be replicated in the future, without accounting for the record evidence that suggests that those conditions may have changed. In particular, the European Commission identified the adoption of AD/CV measures as a factor that had impacted the market after 2016.[447] It also identified a trend in which imports subject to those AD/CV measures were being replaced by imports from other sources.[448] Thus, the composition of imports at the end of the POI had changed *vis-à-vis* 2013-2016.[449] Meanwhile, as imports subject to AD/CV measures declined, overall import levels continued to increase for the remainder of the POI at the same time as the domestic industry's performance improved.[450] Increased imports based on their composition after 2016 did not result in a deterioration in the domestic industry's performance in 2016-MRP. Contrary to the assertion of the European Union, the

[445] Definitive determination, (Exhibit TUR-5), recitals 89, 90, 95, and 97. See also European Union's response to Panel question No. 30, paras. 39(b)-(e).

[446] Provisional determination, (Exhibit TUR-3), recital 74.

[447] Provisional determination, (Exhibit TUR-3), recitals 52-53 and 69.

[448] Provisional determination, (Exhibit TUR-3), recitals 55-56.

[449] The European Commission alluded to this when it found that the main threat of increased imports into the future would arise from those imports not subject to AD/CV measures. (Provisional determination, (Exhibit TUR-3), recitals 35, 55, and 61).

[450] We note that the domestic industry's improved performance appears to have continued from 2017 into the first semester of 2018 whilst the increase in imports accelerated. (Definitive determination, (Exhibit TUR-5), recital 89; European Union's opening statement at the first meeting of the Panel, para. 83).

data set out in the European Commission's determination do not show that a further increase in imports would "necessarily" cause a deterioration in prices and profitability.[451]

7.239. We thus agree with Turkey that "[e]ven if imports were set to increase in 2018, this does not automatically lead to the conclusion that there is a significant overall impairment in the position of the domestic industry which is clearly imminent".[452] The European Commission did not identify data suggesting a correlation between increases in imports based on their composition at the end of the POI, on the one hand, and a negative impact on the situation of the domestic industry, on the other hand. The European Union points out that the European Commission found that prices started following a declining trend in the third quarter of 2018.[453] However, as we stated earlier, we do not consider that this necessarily implies a "new price depression" from imports at the end of the POI.[454] As we explained earlier, the European Commission itself recognized that price declines for the products at issue could be due to factors unrelated to imports, such as reductions in the cost of raw materials[455], and the European Commission engaged in no examination in this regard.

7.240. In short, the impact of increased imports on the domestic industry in 2013-2016 did not provide a sufficient factual basis for projecting the impact of increased imports on the domestic industry after the end of the POI, nor did the European Commission identify an alternative factual basis for this projection. Moreover, the fact that the domestic industry's performance improved between 2016 and the MRP whilst imports continued to increase underscores that increased import levels cannot be assumed to bring about a significant overall impairment in the situation of the domestic industry, and the European Commission did not engage with that evidence, which contradicted its conclusion. We therefore find that the European Commission's determination of a threat of serious injury was not "based on facts" as required by Article 4.1(b) of the Agreement on Safeguards.[456]

7.6.2.3 Turkey's consequential arguments relating to the European Commission's determination of threat of serious injury

7.241. Turkey appears to argue that the inconsistency of the European Commission's determination of a threat of serious injury with the requirements set out in Articles 4.1(a), 4.1(b), and 4.2(a) of the Agreement on Safeguards also results in purely consequential inconsistencies with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[457] In view of our findings under Article 4.1(b) in sections 7.6.2.1 and 7.6.2.2 above, we consider it unnecessary for the effective resolution of the dispute to reach findings on substantively the same issues under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.6.2.4 Overall conclusion on threat of serious injury

7.242. In conclusion, we find that the definitive safeguard is inconsistent with Article 4.1(b) of the Agreement on Safeguards because two central elements of the European Commission's finding of a threat of serious injury were not "based on facts", as required by that provision. First, the European Commission's finding that the domestic industry was "in a fragile and vulnerable position" despite its improved performance was not "based on facts". Second, the European Commission's finding that a further increase in import volumes in the future would bring about serious injury to the domestic industry was not "based on facts". In view of these findings, we do not consider it necessary for the effective resolution of the dispute to address Turkey's claim

[451] European Union's response to Panel question No. 30, para. 40.
[452] Turkey's second written submission, para. 182.
[453] European Union's opening statement of the first meeting of the Panel, para. 91; response to Panel question No. 30, para. 39(b).
[454] See para 7.227 and fn 423 above.
[455] See, e.g. Definitive determination, (Exhibit TUR-5), recital 123.
[456] We note that the parties also disputed whether the European Commission adequately showed that the *extent* of the negative implications of the anticipated increase in imports sufficed to meet the threshold of serious injury. (Turkey's second written submission, para. 186; European Union's comments on Turkey's response to Panel question No. 29, para. 32). In view of our finding that the European Commission did not articulate a factual basis for the proposition that the anticipated increased imports would have any such negative implications in the first instance, it is unnecessary for the effective resolution of the dispute to address these other arguments of the parties.
[457] Turkey's first written submission, para. 225. As set out elsewhere in this Report, Turkey also presents other arguments in support of its claims under Article 2.1 and Article XIX:1(a).

based on substantively identical[458] arguments under Article 4.1(a)[459], Turkey's substantively identical arguments under Article 4.2(a)[460], or Turkey's consequential arguments concerning these same aspects of the definitive safeguard under Article 2.1 of the Agreement on Safeguards[461] and Article XIX:1(a) of the GATT 1994.[462]

7.7 Causation

7.243. Turkey argues that the definitive safeguard is inconsistent with the first and second sentences of Article 4.2(b) of the Agreement on Safeguards because the European Commission failed to establish a causal link between the increased imports and the threat of serious injury to the domestic industry, and failed to ensure that injury caused by factors other than imports was not attributed to increased imports.[463] Turkey also argues that purely as a consequence of these inconsistencies, the definitive safeguard is also inconsistent with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. The European Union responds that the European Commission established a causal link between increased imports and the threat of serious injury and conducted a non-attribution assessment in accordance with those provisions.[464]

7.244. We have found above that the European Commission's determination of a threat of serious injury was inconsistent with Article 4.1(b). Article 4.2(b) is concerned with the authority's demonstration of "the existence of the causal link between increased imports of the product concerned *and serious injury or threat thereof*".[465] It presupposes the existence of a threat of serious injury. Having found that the European Commission did not properly demonstrate the existence of a threat of serious injury, we do not consider it necessary for the effective resolution of this dispute to separately review whether the European Commission followed the requirements of Article 4.2(b) in determining that the increased imports caused that threat of serious injury.[466] For the same reasons, we do not consider it necessary to address Turkey's purely consequential arguments on this point under Article 2.1 of the Agreement on Safeguards[467] and Article XIX:1(a) of the GATT 1994.[468]

7.8 Applying the safeguard only to the extent and time necessary to prevent serious injury

7.245. Turkey claims that the definitive safeguard is inconsistent with Articles 5.1 and 7.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994, because it is applied beyond the extent and time necessary to prevent serious injury.[469]

7.246. We will consider, first, Turkey's arguments under Article 5.1 of the Agreement on Safeguards (section 7.8.1) and, second, Turkey's arguments under Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 (section 7.8.2).

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[458] See fn 345 above.

[459] We recall that a panel may decline to review one or more claims if three conditions are met, i.e. that the panel has (a) already found that the same measure (b) is inconsistent with one or more other provisions of the covered agreements, and, in addition, that (c) findings under the additional claims are not necessary to resolve the dispute. (See e.g. Panel Report, *Pakistan – BOPP Film (UAE)* [appealed by Pakistan 22 February 2021], para. 7.49; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

[460] Turkey also presents other arguments in support of its claim under Article 4.2(a), but we have rejected those arguments. (See paras. 7.12-7.13, 7.41, and 7.68-7.74 above).

[461] Turkey also presents other arguments in support of its claim under Article 2.1, but we have rejected those arguments. (See paras. 7.12-7.13, 7.41-7.67, 7.69, and 7.74 above).

[462] Turkey also presents other arguments in support of its claim under Article XIX:1(a), and we have already found that the definitive safeguard is inconsistent with Article XIX:1(a).

[463] Turkey's first written submission, para. 270.

[464] European Union's first written submission, para. 226.

[465] Emphasis added.

[466] Turkey also presents other arguments in support of its claim under Article 4.2(b). We have rejected those arguments. (See paras. 7.12-7.13, 7.41, 7.68-7.69, and 7.74 above).

[467] Turkey also presents other arguments in support of its claim under Article 2.1, but we have rejected those arguments. (See paras. 7.12-7.13, 7.41-7.67, 7.69, and 7.74 above).

[468] Turkey also presents other arguments in support of its claim under Article XIX:1(a), and we have already found that the definitive safeguard is inconsistent with Article XIX:1(a).

[469] Turkey's first written submission, para. 312.

7.8.1 Article 5.1 of the Agreement on Safeguards

7.247. Turkey argues that the definitive safeguard was applied beyond the extent necessary to prevent or remedy serious injury, inconsistently with Article 5.1 of the Agreement on Safeguards, for the following three reasons:

a. although it concluded that there was threat of injury based, among other things, on an increase in imports observed in the first six months of 2018, the European Commission did not take import volumes for the first six months of 2018 into account when it set the size of the TRQ component of the safeguard[470];

b. the European Commission's causation analysis was inconsistent with Article 4.2(b) of the Agreement on Safeguards[471]; and

c. by suspending the application of AD/CV duties to the extent of their overlap with the out-of-quota safeguard duty, the definitive safeguard improperly addressed the serious injury caused by dumped and subsidized imports via the safeguard.[472]

7.248. Below, we first recall the applicable requirements of Article 5.1, and we then address each of these arguments, in turn.

7.8.1.1 The applicable requirements of Article 5.1 of the Agreement on Safeguards

7.249. The first sentence of Article 5.1 of the Agreement on Safeguards provides:

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

7.250. The first sentence of Article 5.1 requires Members seeking to apply a safeguard to do so only to the "extent necessary" to (a) prevent or remedy serious injury and (b) facilitate adjustment. A safeguard that exceeds these limitations will be inconsistent with Article 5.1 of the Agreement on Safeguards.

7.251. The first part of Article 5.1 sets the maximum permissible extent to which a safeguard may be applied by reference to "serious injury". Other provisions of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994, provide relevant context to understand the phrase "serious injury" in Article 5.1. The phrase "serious injury" appears in Article XIX:1(a) and is used twenty times in the Agreement on Safeguards. Article 4 of the Agreement on Safeguards, which is titled "Determination of Serious Injury or Threat Thereof", defines serious injury or its threat, and contains requirements for the investigation of serious injury or threat. The phrase "serious injury" in Article 5.1 has the same meaning as in the remainder of the Agreement on Safeguards. Therefore, the injury relevant for the purposes of Article 5.1 of the Agreement on Safeguards is the injury determined to exist pursuant to Article 4 of the Agreement on Safeguards[473], which is caused or threatened by the increase in imports that results from unforeseen developments.

7.252. To evaluate Turkey's claims, we consider whether Turkey has established that the safeguard applied by the European Union exceeded the maximum permissible extent to which a safeguard may be applied pursuant to Article 5.1.

[470] Turkey's first written submission, para. 330.
[471] Turkey's first written submission, para. 332.
[472] Turkey's first written submission, para. 334.
[473] See also Appellate Body Report, *US – Line Pipe*, para. 249.

7.8.1.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article 5.1 of the Agreement on Safeguards

7.8.1.2.1 Whether the definitive safeguard is inconsistent with Article 5.1 because the European Commission did not take into account data from the first six months of 2018 in determining the size of the TRQs

7.253. We recall that the definitive safeguard combines TRQs and an out-of-quota duty. The size of the TRQs was based on the average imports in the period from January 2015 to December 2017 (TRQ period).[474] Turkey argues that because the European Union based its finding of threat of serious injury on, among other things, the increase in imports observed during the first six months of 2018, but did not include the data on imports during those six months when calculating the size of the TRQs, the European Union did not apply the safeguard only to the extent necessary to prevent serious injury, as required by Article 5.1.[475]

7.254. The European Union responds that the European Commission ensured that the safeguard was "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment".[476]

7.255. Among the third parties, Japan argues that the Panel must examine whether the safeguard measure at issue is in a form and at a level appropriate to or commensurate with the goal of preventing or remedying serious injury and facilitating adjustment.[477]

7.256. Turning to the published determinations, we note that there was some variation among the periods on which the European Commission relied to conclude that there was an increase in imports that threatened injury. The European Commission examined the increase in imports based on data for the period from January 2013 to June 2018.[478] In the section of the definitive determination titled "Threat of Serious injury", the European Commission examined trends in several injury factors for the years from 2013 to 2017[479]; it made a discrete finding that the level of imports in the period from July 2017 to June 2018 was higher than that in the period from January 2017 to December 2017 due to "the relatively high level of imports in the first semester of 2018"[480]; and it examined monthly imports into the European Union and the United States for the period from January 2018 to September 2018 as compared to monthly imports in the period from January 2017 to September 2017 to analyse the "likelihood of further increased exports".[481] Turkey argues that since the European Commission's determination of the threat of serious injury was based on import data which included the first six months of 2018, it should also have included the first six months of 2018 in the period that it chose as the TRQ period.[482] Turkey does not explain further why this is the case.

7.257. We first note that nothing in Article 5.1 of Agreement on Safeguards requires the period during which the Member concerned finds an increase in imports that causes or threatens to cause

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[474] Definitive determination, (Exhibit TUR-5), recital 144.
[475] Turkey's first written submission, para. 330.
[476] European Union's first written submission, para. 270.
[477] Japan's third-party statement, para. 8.
[478] Definitive determination, (Exhibit TUR-5), recital 39.
[479] Definitive determination, (Exhibit TUR-5), recitals 66-86. The European Commission noted that while it requested the EU industry associations to provide data for the first semester of 2018, that information could not be verified. The European Commission also noted that it "could not draw any reliable conclusion based on the situation of the [domestic] industry during the first semester of 2018" but that "based on these 2018 data" it "could … confirm[]" the trend of a partial recovery of the industry observed in 2017. (Definitive determination, (Exhibit TUR-5), recital 89).
[480] Definitive Determination, (Exhibit TUR-5), recital 101.
[481] Definitive determination, (Exhibit TUR-5), recitals 99 and 103.
[482] Turkey's first written submission, para. 330; second written submission, para. 229. Though its arguments on this subject are not entirely clear, we understand Turkey to link its contention that the TRQ period should have included the first six months of 2018 to the fact that the European Commission also examined data that included the first six months of 2018 when it conducted its threat of injury analysis. However, as noted above, while the European Commission's threat of injury analysis considered import data from 2018, this data was not limited to the first six months of 2018. Instead, the European Commission examined import data from the first nine months of 2018 (i.e. from January to September 2018). Given this, Turkey's argument that the TRQ period should have included the first six months of 2018 does not account for the fact that the European Commission did not examine this same period of time when it conducted its threat of injury analysis.

serious injury to be identical to the period that the Member uses to establish the level of a safeguard, or for the two periods to have the same end-points. In fact, Article 5.1 and its context establish that the Agreement on Safeguards does *not* require the two periods to be identical. We note, for example, that the second sentence of Article 5.1 generally requires that the level of a safeguard that takes the form of a quantitative restriction be set on the basis of data for "the last three representative years for which statistics are available". By comparison, Article 4 of the Agreement on Safeguards, which concerns the determination of serious injury or the threat thereof, does not prescribe a default length of the POI for the injury analysis. Thus, even though the second sentence of Article 5.1 is limited to quantitative restrictions, the comparison between Articles 4 and 5.1 illustrates that the Agreement on Safeguards does not require that the time periods that are used for setting the level of the safeguard be the same as the period that is used for the injury analysis.

7.258. Second, we note that Turkey appears to be confusing two different concepts, i.e. (a) what is *necessary to prevent or remedy* serious injury, and (b) the *period over which* an increase in imports giving rise to that serious injury is *observed*. Article 5.1 requires a safeguard to be applied only to the extent necessary to prevent or remedy serious injury. As noted above, setting a TRQ based on the level of imports during the same period as the one used by the competent authority in its examination of the increase in imports causing injury is not always necessary to fulfil this requirement, and Turkey has not explained why it was necessary in this particular case.

7.259. Referring to the panel report in *Chile – Price Band System*, Turkey argues that the TRQs that the European Commission adopted were not applied "only to the extent necessary to prevent serious injury" because they lack the required rational connection with the objective of preventing serious injury.[483] The panel in *Chile – Price Band System* found that for a safeguard to be applied only to the extent necessary to prevent or remedy serious injury and facilitate adjustment there must be "a *rational connection*" between the measure and the objective of preventing or remedying serious injury and facilitating adjustment.[484] We note that, in that dispute, the panel found that the level of the safeguard duty depended, among other factors, on a price threshold calculated on the basis of recent international prices; the panel observed that that the price threshold thus calculated was not "indicative of a state below which the domestic industry will experience (a threat of) serious injury", and it therefore bore "no rational connection to a state of the domestic industry below which (a threat of) serious injury will be experienced".[485] That report, therefore, underlines that the permissible extent of the safeguard in a particular case must not be based on considerations other than those that are connected to a state of the domestic industry below which the industry will experience serious injury. However, Turkey has not explained why TRQs established based on the data concerning the volume of steel that was imported in a period that included the first six months of 2018[486] would be connected to a state of the domestic industry below which the industry will experience serious injury, whereas the TRQs that the European Commission set based on the volume of imports from 2015 to 2017 are not. We therefore do not consider that Turkey's reference to the panel report in *Chile – Price Band System* supports Turkey's argument.

7.260. Based on the above, we consider that Turkey has not established that the European Union acted inconsistently with the first sentence of Article 5.1 of the Agreement on Safeguards by not taking into account data from the first six months of 2018 in determining the size of the TRQs.

7.8.1.2.2 Whether the definitive safeguard is inconsistent with Article 5.1 because the European Commission did not conduct a proper causation analysis

7.261. Turkey also argues that the definitive safeguard is inconsistent with Article 5.1 of the Agreement on Safeguards because the European Commission did not establish a causal link between the increased imports and the threat of injury and did not conduct the non-attribution analysis as

[483] Turkey's first written submission, para. 330 (referring to Panel Report, *Chile – Price Band System*, para. 7.183).

[484] Panel Report, *Chile – Price Band System*, para. 7.183. (emphasis original)

[485] Panel Report, *Chile – Price Band System*, para. 7.184.

[486] Turkey does not explicitly state what the starting point of the TRQ period should have been in its view. Given that the gist of Turkey's argument appears to be that a period used in the threat of injury analysis should also be included in the TRQ period, one might infer that Turkey would take the view that the TRQ period should begin January 2013 (i.e. the same point as the beginning of the injury analysis). However, as noted, Turkey's submissions were not explicit on this point. It is only in its comments on the interim report that Turkey made explicit that it was arguing that the starting point of the TRQ period should be 2015. (Turkey's request for interim review, para. 39).

required under Article 4.2(b) of the Agreement on Safeguards.[487] The European Union argues that because the European Commission properly established the existence of a causal link between the increased imports and the threat of serious injury, Turkey's argument should be dismissed.[488]

7.262. We note that Turkey's argument is purely consequential to its claim under Article 4.2(b) of the Agreement on Safeguards. Having already found that the definitive safeguard is inconsistent with Article 4.1(b) of the Agreement on Safeguards, we have considered it unnecessary to decide whether the definitive safeguard is also inconsistent with Article 4.2(b).[489] Likewise, we do not consider it necessary to consider Turkey's purely consequential argument that the definitive safeguard is inconsistent with Article 5.1 as a result of the claimed inconsistency with Article 4.2(b).[490]

7.8.1.2.3 Whether the double remedy regulation rendered the definitive safeguard inconsistent with Article 5.1

7.263. We recall that as defined by Turkey, the legal instruments setting out the definitive safeguard include the double remedy regulation.[491] This regulation suspends the application of AD/CV duties on a particular product to the extent they overlap with the out-of-quota safeguard duty applicable to that product.[492] According to Turkey, this means that the definitive safeguard addresses the injury caused by dumped and subsidized imports. Turkey argues that the definitive safeguard is therefore inconsistent with Article 5.1 of the Agreement on Safeguards, because this provision permits the application of a safeguard only to the extent necessary to address the serious injury caused by the increased imports within the meaning of Article 2.1 and Article XIX:1(a).[493]

7.264. The European Union responds that, as set out in the double remedy regulation, the European Commission suspended the AD/CV duties to the extent of their overlap with the out-of-quota safeguard duty in order to avoid "a greater effect than desirable", and thus the suspension cannot be characterized as a failure to apply the measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[494]

7.265. Among the third parties, Japan argues that the Panel must examine whether the safeguard measure at issue is in a form and at a level appropriate to or commensurate with the goal of preventing or remedying serious injury and facilitating adjustment.[495] The Republic of Korea comments that safeguards and AD/CV measures are not mutually exclusive and may be applied in combination.[496]

7.266. At the outset of our evaluation, we note that Turkey's claim does not concern the question whether a safeguard can be applied to dumped and subsidized imports. Turkey clarified in response to a question from the Panel that it is not arguing that a safeguard cannot be applied to a product that is also subject to AD/CV duties.[497] Turkey argues that by suspending AD/CV duties to the extent

[487] Turkey's first written submission, paras. 331-332.
[488] European Union's first written submission, para. 277.
[489] See para. 7.242 above.
[490] We consider, and reject, Turkey's other arguments in support of its Article 5.1 claim at paras. 7.253-7.260 above and paras. 7.263-7.271 below.
[491] See section 2.1 above. See also Turkey's panel request, paras. 13 and 17; and response to Panel question No. 14, para. 52.
[492] Double remedy regulation, (Exhibit TUR-7), Article 1 (if the safeguard duty is lower, the difference between the anti-dumping or countervailing duty and the safeguard duty is also applied). In the definitive determination, the European Commission noted that in order to prevent the cumulation of AD/CV duties with safeguards when the safeguard TRQ is exceeded, the European Commission could, pursuant to a framework to be developed at a later stage, suspend or reduce the level of existing AD/CV duties that were being assessed on certain covered imports. (Definitive determination, (Exhibit TUR-5), recital 186). Subsequently, the European Commission adopted the double remedy regulation stipulating that in cases where the safeguard duty exceeds the equivalent rate of the higher of the AD/CV duty rate applicable to the same product categories, only the safeguard duty shall be collected.
[493] Turkey's first written submission, para. 334; second written submission, para. 233.
[494] European Union's first written submission, para. 282. See also European Union's closing statement at the second meeting of the Panel, paras. 34-36.
[495] Japan's third-party statement, para. 8.
[496] Korea's third-party submission, para. 25.
[497] Turkey's response to Panel question No. 42, para. 78. See also Turkey's comments on the European Union's response to Panel question No. 38, para. 49.

they overlapped with the safeguard duty, the European Union addressed the injury caused by the dumped and subsidized imports via the safeguard measure.[498] The question that we must address to resolve Turkey's claim, therefore, is whether Turkey has shown that *by suspending AD/CV duties* to the extent that they overlap with the safeguard duty, the European Union failed to apply the safeguard only to the extent necessary to prevent serious injury due to increased imports within the meaning of Article 2.1 and Article XIX:1(a), thereby acting inconsistently with Article 5.1 of the Agreement on Safeguards.

7.267. Turkey appears to suggest that merely because AD/CV duties were suspended to the extent of their overlap with the safeguard duty, the safeguard duty should be considered to perform the function of the suspended AD/CV duties, i.e. addressing the injury caused by dumping and subsidization, such that the safeguard duty becomes inconsistent with Article 5.1 of the Agreement on Safeguards. We do not agree. We note that the European Commission explained its determination to suspend any AD/CV duties to the extent that they overlapped with the safeguard duty by stating that:

> [T]he combination of anti-dumping and/or anti-subsidy measures and safeguard measures … would … have an effect greater than that intended or desirable in terms of the Union's trade defence policy and objectives[.][499]

7.268. As such, the European Commission did not indicate that it was suspending the AD/CV duties because they addressed the *same* injury as the safeguard. Instead, the European Commission indicated that the combined effect of all measures would have been greater than desirable. Turkey has not countered this explanation. Specifically, Turkey has not demonstrated that rather than choosing *not to address* the additional injury caused by dumping and subsidization (i.e. injury other than the serious injury caused by increased imports within the meaning of Article 2.1 and Article XIX:1(a)), the European Union was addressing that injury via the definitive safeguard by suspending the AD/CV duties to the extent of their overlap with the safeguard duty.[500] We therefore consider that the suspension of the AD/CV duties to the extent of their overlap with the safeguard duty does not, on its own, establish that the safeguard duty was being applied beyond the extent necessary to prevent serious injury caused by increased imports within the meaning of Article 2.1 and Article XIX:1(a).

7.269. We also note the following statement made by Turkey:

> Where there are already anti-dumping and countervailing measures in place, prior to the increase in imports resulting from unforeseen developments, a subsequent finding that the imposition of safeguard measures is warranted may result in the imposition of a safeguard measure to offset the serious injury caused by the increased imports in addition to the existing anti-dumping or countervailing duty.[501]

7.270. Turkey thus acknowledges that a Member may apply a safeguard to offset the serious injury caused by increased imports even if those imports are also subject to AD/CV measures. Notwithstanding this, Turkey asserts that the definitive safeguard, and in particular the double remedy regulation, was nonetheless inconsistent with Article 5.1 of the Agreement on Safeguards because it suspended the AD/CV duties that overlapped with the safeguard duty.[502] In making these statements, Turkey appears to argue that an inconsistency with Article 5.1 may not have presented itself had the European Commission continued to apply both the full amount of the pre-existing AD/CV duties and the safeguard duty on the relevant imports, but that the European Commission acted inconsistently with Article 5.1 because it suspended part of the AD/CV duties. To us, this position is internally contradictory.

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[498] Turkey's second written submission, para. 233; response to Panel question No. 42, para. 80.

[499] Double remedy regulation, (Exhibit TUR-7), recital 15.

[500] In this regard, we note that the application of AD/CV measures to counteract dumping and/or subsidization in accordance with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is a right that Members may, but are not mandated to, exercise. Members are also not mandated to apply the full amount of AD/CV duties that they are permitted to apply by the Anti-Dumping Agreement and the SCM Agreement.

[501] Turkey's response to Panel question No. 42, para. 80.

[502] Turkey's response to Panel question No. 42, para. 80.

7.271. Based on the above, we consider that Turkey has not established that the double remedy regulation resulted in the application of the definitive safeguard beyond the extent necessary to prevent serious injury.

7.8.2 Article 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994

7.272. Turkey argues that because the European Commission did not perform a proper causation analysis in accordance with Article 4.2(b), the European Union was unable to ensure that the safeguard was applied only for the period of time necessary to address the serious injury attributed to increased imports. On this basis, Turkey claims that the definitive safeguard was inconsistent with Article 7.1 of the Agreement on Safeguards[503] and Article XIX:1(a) of the GATT 1994.[504] The European Union argues that Turkey's contention ought to be rejected.[505]

7.273. We note that Turkey's claim under Article 7.1 of the Agreement on Safeguards, and Turkey's relevant argument under Article XIX:1(a) of the GATT 1994, are purely consequential to Turkey's claim under Article 4.2(b) of the Agreement on Safeguards, and that we have not reached findings of inconsistency under Article 4.2(b). Given that we have already found the definitive safeguard to be inconsistent with other provisions of the Agreement on Safeguards, and that the additional findings requested by Turkey are not necessary to resolve the dispute, we exercise economy on Turkey's consequential claim under Article 7.1 of the Agreement on Safeguards, and we do not review Turkey's consequential argument[506] under Article XIX:1 of the GATT 1994.

7.9 The allocation of shares in the TRQs

7.274. Turkey claims that the definitive safeguard is inconsistent with Article XIII:2(d) and the *chapeau* of Article XIII:2 of the GATT 1994 because it allocates country-specific shares in the TRQs based on a period that is not representative, and without taking due account of any special factors affecting the trade in the product concerned.[507] Turkey claims that the definitive safeguard is also inconsistent with Article 5.2(a) of the Agreement on Safeguards, "for the same reasons".[508] The European Union contends that the European Commission fully conformed with the requirements of Article XIII of the GATT 1994.[509] The European Union also contends that Article 5.2(a) of the Agreement on Safeguards does not apply to TRQs.[510] On these bases, the European Union requests the Panel to reject Turkey's claims.

7.275. In the following sections, we first address Turkey's claims under the relevant provisions of Article XIII:2 of the GATT 1994 (section 7.9.1), and then Turkey's claim under Article 5.2(a) of the Agreement on Safeguards (section 7.9.2).

7.9.1 Article XIII:2 of the GATT 1994

7.276. In the definitive determination, the European Commission determined that "a country specific [TRQ] should be allocated to countries having a significant supplying interest, based on their imports over the last 3 years".[511] While the import volumes data from the first six months of 2018 were on the record before the European Commission, the European Commission did not take those data into account when it allocated the country-specific shares in the TRQs for the relevant product categories.

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[503] 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.

[504] Turkey's first written submission, para. 333; response to Panel question No. 13, para. 51.

[505] European Union's first written submission, para. 279.

[506] Turkey makes other arguments in support of its claim under Article XIX:1(a), and we have already found that the definitive safeguard is inconsistent with Article XIX:1(a).

[507] Turkey's first written submission, para. 336.

[508] Turkey's first written submission, para. 336.

[509] European Union's first written submission, para. 296.

[510] European Union's first written submission, para. 285.

[511] Definitive determination, (Exhibit TUR-5), recital 147.

7.277. First, Turkey argues that the European Commission's decision to allocate the country-specific shares in the TRQs based solely on import volume data from 2015 to 2017 and without considering data from the first six months of 2018 was inconsistent with Article XIII:2(d) of the GATT 1994 on the following alternative grounds: (a) the "previous representative period" used by the European Commission should have included the first half of 2018, because the first half of 2018 formed part of the MRP preceding the application of the safeguard, and because in the first half of 2018 the European Union had introduced new trade remedy measures (the representative period argument); or (b) there had been changes in imports shares from various countries following the imposition of new trade remedies measures in the first half of 2018, and these changes were a "special factor" of which the European Union did not take due account (the special factor argument).[512] Turkey asserts that the Panel must address the special factor argument "if [it] were to be concluded that there was no obligation for the European Union to have included the first six months of 2018 into the representative period".[513]

7.278. Second, Turkey argues that for the same reasons, this allocation of country-specific shares was inconsistent with the *chapeau* of Article XIII:2.[514]

7.279. Below, we first set out the applicable requirements of Article XIII:2 of the GATT 1994. We then address Turkey's claim under Article XIII:2(d) of the GATT 1994, before turning to Turkey's claim under the *chapeau* of Article XIII:2 of the GATT 1994.

7.9.1.1 The applicable requirements of Article XIII:2 of the GATT 1994

7.280. Article XIII:2 *chapeau* and Article XIII:2(d) of the GATT 1994, in relevant part, provide:

> In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
>
> …
>
> (d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

7.281. The *chapeau* to Article XIII:2 provides that "in applying import restrictions" to a product, the contracting parties "shall aim at a distribution of trade … approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions". The ordinary meaning of "aim" includes "[t]o have (something) as an object, intention, or desired outcome … to seek to achieve or obtain", and to "direct one's course towards a particular point or destination, or to make this one's object".[515] This provision therefore requires a Member, when applying import restrictions to a product, to seek to achieve or obtain a distribution of trade that approaches, "as closely as possible", the shares that other Members "might be expected to obtain" in the overall imports of the product concerned "in the absence of *such restrictions*".[516] The phrase *such restrictions* refers to the import restrictions that are applied by the Member concerned under Article XIII:2. The *chapeau* further specifies that the subparagraphs that follow *shall* be observed to achieve the "end" specified in the *chapeau*. The *Ad* Note to Article XIII:2(d) refers to

[512] Turkey's first written submission, paras. 347-348; response to Panel question No. 43, para. 89.
[513] Turkey's response to Panel question No. 43, para. 89.
[514] Turkey's first written submission, para. 352; response to Panel question No. 44, para. 90.
[515] Oxford Dictionaries online, definition of "aim", v., meanings 6 and 7, https://www.oed.com/view/Entry/4348?rskey=daocNi&result=4&isAdvanced=false#eid (accessed 22 September 2021).
[516] Emphasis added.

the *chapeau* as containing a "general rule". The provisions of Articles XIII:2(a) to XIII:2(d) specify ways in which the general rule in the *chapeau* of Article XIII:2 may be fulfilled in certain instances.[517]

7.282. Subparagraph (d), which concerns "cases in which a quota is allocated among supplying countries" as the means to achieve the "end" stipulated in the *chapeau*, prescribes two methods through which the Member concerned may determine the "allocation of shares in the quota" among Members that have "a substantial interest in supplying the product concerned". The present dispute involves the second of these methods, which is set out in the second sentence of Article XIII:2(d). This method requires the Member applying the import restriction at issue to allocate shares in the quota for imports of the product concerned among the relevant contracting parties "based upon the proportions, supplied by such contracting parties during a previous representative period". Aside from specifying that the previous period to be used for this purpose must be *representative*, the provision does not prescribe how long the period must be or what must be the start and end points of this period. Notably, the provision refers to "a" previous representative period, not "the" previous representative period. Further, the second sentence of Article XIII:2(d) also requires the Member applying the import restriction at issue to take "due account" of "any special factors which may have affected or may be affecting the trade in the product" when allotting shares in the quota to the relevant Members.

7.9.1.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article XIII:2(d) of the GATT 1994

7.283. Turkey contends that the European Commission acted inconsistently with Article XIII:2(d) of the GATT 1994 on the following two alternative[518] grounds: (a) the European Commission failed to properly choose the previous representative period for the purposes of Article XIII:2(d) by not including the first six months of 2018 in the representative period (the representative period argument)[519]; and (b) the European Commission failed to take into account the change in the share of imports from the exporting countries following "the newly imposed trade defence measures" during the first half of 2018 as a "special factor" that justified the adjustment of the TRQ allocation (the special factor argument).[520] We will first consider the representative period argument, and then the special factor argument.

7.9.1.2.1 The representative period argument

7.284. Turkey argues that the European Commission should have included the first six months of 2018 in the reference period used to allocate country-specific shares in the TRQs for relevant product categories, because the first half of 2018 formed part of the MRP preceding the application of the safeguard, and because in the first half of 2018 the European Union had introduced new trade remedy measures.[521] According to Turkey, by not including data from the first six months of 2018, and instead allocating the country-specific shares in the TRQs based on data from January 2015 to December 2017, the European Commission did not allocate country-specific shares in the TRQs for various product categories based on the MRP not distorted by the TRQs, and therefore acted inconsistently with Article XIII:2(d).[522]

7.285. The European Union argues that there is no general rule in Article XIII:2(d) of the GATT 1994 always requiring the use of the most recent three-year period preceding the entry into force of a TRQ.[523] The European Union also asserts that the reference period used by the European Commission, i.e. 2015-2017, was also a recent one, and meets the criterion of a "previous representative period".[524] According to the European Union, the consideration of average imports during the last three calendar years prior to the initiation of the investigation (in this instance, 2015-2017) fulfils the requirements of Article XIII of the GATT 1994.[525] The European Union also

[517] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.
[518] Turkey's response to Panel question No. 43, para. 89.
[519] Turkey's first written submission, para. 351.
[520] Turkey's response to Panel question No. 43, para. 89.
[521] Turkey's first written submission, para. 348.
[522] Turkey's first written submission, paras. 348 and 351.
[523] European Union's first written submission, para. 288; comments on Turkey's response to Panel question No. 43, para. 70 (both referring to Panel Report, *EU – Poultry Meat (China)*, para. 7.353).
[524] European Union's first written submission, para. 290.
[525] European Union's first written submission, para. 291.

contends that unlike the obligation in respect of the examination of the increase in imports, the obligation in respect of the previous representative period did not require a significant focus on the first six months of 2018.[526] The European Union adds that, in fact, it is important to use full years to ensure representativeness, because of seasonal variations.[527]

7.286. We note that in the definitive determination the European Commission determined that a country-specific TRQ should be allocated to countries having a share of more than 5% of imports for the product category concerned in the period 2015-2017, and that a global TRQ based on the average of the remaining imports in the same period should be allocated to all other supplying countries.[528] The Commission based the size of the TRQs, country-specific as well as global, on the average volume of imports in the period 2015-2017, plus 5%.[529]

7.287. Referring to the panel reports in *EC – Bananas III (Article 21.5 – Ecuador)* and *US – Line Pipe*, Turkey argues that it is necessary for the "previous representative period" for purposes of Article XIII:2(d) to be the MRP not distorted by restrictions, i.e. not distorted by the TRQ in question.[530] Turkey argues that to achieve this, the European Commission should have allocated country-specific shares in the TRQs based on data including the first half of 2018.[531]

7.288. We note that the second sentence of Article XIII:2(d) requires the allocation of country-specific shares in a TRQ based on proportions supplied by the relevant Members during "*a* previous representative period".[532] The use of the indefinite article "a" instead of the definite article "the" in reference to the notion of "previous representative period" shows that the Member applying the TRQ has a margin of discretion in selecting a previous period that it considers to be representative for the purpose of allocating country-specific shares in the TRQ at issue.[533] Indeed, the panel in *EC – Bananas III (Article 21.5 – Ecuador)*, to which Turkey refers in support of its contention, noted that "Members have a degree of discretion in choosing a previous representative period".[534] We also do not consider that the observation of the panel in *US – Line Pipe* referred to by Turkey that "trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure" supports the proposition that only the MRP before the *application* of the TRQ, including where applicable the most recent half-year, could constitute a valid previous representative period for the purpose of Article XIII:2(d).

7.289. The period 2015-2017 used by the European Commission to allocate country-specific shares in the TRQs comprised the most recent three calendar years before the *initiation* of the investigation.[535] We have some difficulty with the notion that the European Union could be held to have acted inconsistently with Article XIII:2(d) of the GATT 1994 on the ground that the period it used to allocate shares in the TRQs was not the most recent, despite the inclusion of the three most recent full years before the initiation of the investigation. In our view, the European Commission's decision to consider the most recent three calendar years before the initiation of the investigation for the allocation of country-specific shares in the TRQs was within the margin of discretion available to the European Commission in selecting a previous representative period pursuant to Article XIII:2(d) of the GATT 1994. Therefore, we reject Turkey's contention that

[526] European Union's first written submission, paras. 292-294.
[527] European Union's first written submission, para. 295.
[528] Definitive determination, (Exhibit TUR-5), recitals 146-147.
[529] Definitive determination, (Exhibit TUR-5), recitals 144 and 146-147.
[530] Turkey's first written submission, para. 351 (referring to Panel Reports, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.39; and *US – Line Pipe*, para. 7.54).
[531] Turkey's first written submission, para. 351; second written submission, para. 237.
[532] Emphasis added.
[533] We note that the panel in *EU – Poultry Meat (China)* also took the view that "the reference to 'a' previous representative period in Article XIII:2(d) implies that there is no general rule that applies in all cases regarding the selection of the reference period". (Panel Report, *EU – Poultry Meat (China)*, para. 7.349).
[534] Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.50. We also note that the observation of the panel to which Turkey refers in support of its contention was made by the panel when discussing its view that "if data from a period are out of date or imports distorted because the relevant market is restricted, then using that period as a representative period cannot achieve the aim of the chapeau". (Ibid. para. 6.39). In this case, Turkey has not argued that data from the period 2015-2017, which were used by the European Commission to allocate country-specific shares in the relevant TRQs, were "out of date". Turkey has also not contended that imports in this period were distorted by restrictions.
[535] The notice of initiation of the investigation is dated 26 March 2018. (Notice of initiation, (Exhibit TUR-1), p. 29).

the European Commission was obliged to include data from the first six months of 2018 in the period used as the basis to allocate country-specific TRQs on the basis that these were the most recent data undistorted by the TRQs.

7.290. Turkey also argues that the use of data relating to the first six months of 2018 was necessary because the European Commission had imposed a number of trade remedies in that period that resulted in a significant change in the shares of imports from a number of countries.[536] Turkey contends that imports from countries not subject to AD/CV measures increased to the detriment of imports from countries subject to those measures.[537] Turkey asserts that had the first six months of 2018 been included in the period based on which country-specific shares were allocated, Turkey would have received larger country-specific quotas and would have been allocated a country-specific TRQ for at least two additional product categories.[538]

7.291. We consider that the imposition of trade remedies by the European Commission in the first six months of 2018 does not establish that the period 2015 to 2017 could not have been a previous representative period for the purpose of the second sentence of Article XIII:2(d) of the GATT 1994. We do not see anything in the text of Article XIII:2(d) that makes a period in which new trade remedies have been imposed a mandatory part of the "previous representative period" for the allocation of country-specific shares in the TRQ at issue in a particular investigation. Turkey has not demonstrated that the imposition of new trade remedies in 2018 made it necessary to include the first six months of 2018 in this proceeding, and indeed it has not even identified the new trade remedies at issue, or explained how they differed from trade remedies already applied during 2015-2017. Therefore, in our view, the imposition of trade remedies by the European Commission in the first six months of 2018 and any associated change in the proportions of imports supplied by various countries does not, by itself, call into question the representativeness of the period 2015 to 2017 for the purpose of Article XIII:2(d) in this case. In this regard, we agree with the observation of the panel in *EU – Poultry Meat (China)* that "there is nothing unusual about Members applying WTO-consistent measures which may, directly or indirectly, affect the importation of certain products".[539] Thus, we do not consider that the application of trade remedies in 2018 undermined the representativeness of the period 2015-2017 for the purposes of the second sentence of Article XIII:2(d) of the GATT 1994.

7.292. Finally, we note Turkey's assertion that the European Commission's consideration of data from the first six months of 2018 in its examination of increase in imports "confirms that the data relating to that period was reliable and relevant for the purpose of imposing the safeguard measures at issue".[540] To the extent that Turkey is arguing that the inclusion of the first six months of 2018 in the examination of increase in imports obliged the European Commission to include the first six months of 2018 in the period based on which it allocated country-specific shares in the TRQs, we disagree. Article XIII:2(d) does not necessarily require the period used as the "previous representative period" to allocate country-specific shares in a TRQ and the period used by the competent authority to examine increased imports in a safeguard investigation to be identical. Indeed, in this case, even under Turkey's arguments the two periods would not correspond, given that the European Commission assessed the increase in imports based on data for 2013-June 2018, whereas we understand Turkey to be calling for an allocation of TRQ shares based on data for 2015-June 2018. We therefore reject Turkey's additional argument.

7.293. Based on the foregoing, we reject Turkey's contention that the European Commission was required to include the first six months of 2018 in the period based on which it allocated country-specific shares in the relevant TRQs to fulfil the requirements of Article XIII:2(d) of the GATT 1994. Having rejected Turkey's contentions concerning the representative period, we now

[536] Turkey's first written submission, para. 348; second written submission, para. 239.
[537] Turkey's first written submission, para. 348; response to Panel question No. 43, para. 88.
[538] Turkey's first written submission, paras. 349-350.
[539] Panel Report, *EU – Poultry Meat (China)*, para. 7.337. Although this observation was made by the panel when addressing the question whether certain sanitary and phytosanitary (SPS) measures that reduced China's ability to export the relevant products were a "special factor" under Article XIII:2(d), we consider that based on the same logic, AD/CV measures do not, in and of themselves, undermine the representativeness of the reference period selected to allocate shares in a TRQ in all circumstances.
[540] Turkey's second written submission, para. 238.

proceed to examine the special factor argument, which Turkey presented as an alternative to the representative period argument.[541]

7.9.1.2.2 The special factor argument

7.294. Turkey argues that the change in the share of imports from the exporting countries following the new trade remedies imposed during the first half of 2018 was a "special factor" that required an adjustment to the TRQ allocations.[542] Turkey asserts that the reduction in imports following the imposition of the new AD/CV measures from the countries subject to those measures constitutes a special factor that has affected or is affecting the trade in the product concerned.[543] Referring to the report of the panel in *EU – Poultry Meat (China)*, Turkey argues that the reference in Article XIII:2(d) of the GATT 1994 to special factors that "may be affecting" trade implies that a special factor that the competent authority ought to consider in allocating shares in a TRQ may arise between the end of the representative period and the time of the allocation of the TRQ.[544]

7.295. We agree with Turkey that by referring to "special factors which … may be affecting" trade in the product concerned, Article XIII:2(d) recognizes the possibility that developments outside the previous representative period could constitute special factors, of which due account must be taken in the allocation of shares. We also note that the panel in *EU – Poultry Meat (China)* found that "in certain exceptional (i.e. 'special' circumstances), *changes in the imports shares held by different Members* that have occurred between the end of the representative period selected and the time of the TRQ being allocated" could constitute a special factor under Article XIII:2(d) of the GATT 1994.[545] However, in that dispute China put forth evidence before that panel that indicated that the increase in China's imports into the European Union following the relaxation of certain EU sanitary and phytosanitary (SPS) measures after the representative period at issue was "significant[]", "dramatic", "steady", "continuous" and "rapid".[546] In contrast, Turkey has not placed sufficient evidence before us that would illustrate the existence, or the extent, of the purported "change in the share of imports from the exporting countries" and "the reduction in imports … from countries subject to those measures" that, according to Turkey, took place following the imposition of the new AD/CV measures by the European Union in 2018.[547]

7.296. In its first written submission, Turkey provided data illustrating the difference between the country-specific TRQs that the European Commission allocated to Turkey for various product categories and Turkey's annual average import volumes for those product categories based on data from 2015 to June 2018.[548] According to Turkey, these data show that Turkey would have received larger country-specific shares in the TRQs if the shares had been allocated based on data from 2015 to June 2018, and that Turkey also would have been allocated country-specific TRQs for two additional product categories.[549] While we agree that the data period that Turkey believes the European Union should have used would have been more beneficial to Turkey for several product categories, this fact, without more, does not establish that special factors existed that the European Commission was required to account for when it allocated the country-specific TRQ shares. The data submitted by Turkey do not show that the difference in the proportions of EU imports from Turkey that Turkey points to arose due to the imposition of trade remedies in the first half of 2018, and indeed Turkey has not even identified those new trade remedies.

7.297. We also note that the data that Turkey provided show that for certain product categories, namely product categories 9, 19, 25, and 26, Turkey's annual average import volume based on data from 2015 to June 2018 was in fact lower than the country-specific TRQ that the European Commission allocated to Turkey based on data from 2015-2017.[550] Further, for two product categories, 4 and 27, in respect of which Turkey argues that it would have received a country-specific TRQ had the European Commission used data from 2015 to June 2018, we note

[541] Turkey's response to Panel question No. 43, para. 89.
[542] Turkey's response to Panel question No. 43, para. 89.
[543] Turkey's response to Panel question No. 43, para. 89.
[544] Turkey's response to Panel question No. 43, para. 89 (referring to Panel Report, *EU – Poultry Meat (China)*, para. 7.355).
[545] Panel Report, *EU – Poultry Meat (China)*, para. 7.363. (emphasis added)
[546] Panel Report, *EU – Poultry Meat (China)*, paras. 7.364, 7.366, 7.369, and 7.377.
[547] Turkey's response to Panel question No. 43, para. 89.
[548] Turkey's first written submission, paras. 349-350.
[549] Turkey's first written submission, paras. 349-350.
[550] Turkey's first written submission, para. 349.

that Turkey's data show that the change in Turkey's share in the overall imports would have been only 1% (an increase from 4% to 5%).[551] This is sharply in contrast to the magnitude of the change in China's import share of the two products in respect of which the panel in *EU – Poultry Meat (China)* found that the change in import shares following the relaxation of the SPS measures was a special factor. In that proceeding, the evidence demonstrated that China's share for one of the products rose from 0% in the representative period (2006-2008) to 27.1% in 2009, 40.7% in 2010, and 52.8% in 2011. Likewise, for the other product, China's share changed from 0% in the representative period (2006-2008), to 8.7% in 2009, 17.6% in 2010, and 61.1% in 2011.[552] Notably, in respect of another product at issue in that case, for which China's import share changed from 0% in the representative period (2006-2008) to 2.8% in 2009, 1.5% in 2010, and 2.9% in 2011, the panel did not find that the change in import shares after the representative period constituted a special factor.[553]

7.298. Thus, the change in China's import shares of the relevant products following the relaxation of the SPS measures in *EU – Poultry Meat (China)* was of a significantly greater magnitude than the change in Turkey's import shares of several product categories following the imposition of the new AD/CV measures that Turkey refers to. Therefore, Turkey's reliance on the *EU – Poultry Meat (China)* panel report to support the special factor argument is inapposite.

7.299. For these reasons, we do not consider that Turkey has established the existence of a special factor that the European Commission improperly failed to take into account in allocating country-specific shares in TRQs for the relevant product categories. We therefore disagree with Turkey's special factor argument.

7.9.1.3 Whether Turkey has established that the definitive safeguard is inconsistent with the *chapeau* of Article XIII:2 of the GATT 1994

7.300. Turkey argues that by failing to take into account the first six months of 2018 in determining the country-specific shares of TRQs, the European Union also acted inconsistently with the *chapeau* of Article XIII:2 of the GATT 1994.[554] According to Turkey, the country-specific shares determined on the basis of data from 2015-2017 do not approach as closely as possible the shares in the trade of the products concerned that Turkey would be expected to obtain in the absence of the safeguard measure.[555] In response to a Panel question, Turkey indicated that the same facts and arguments underly Turkey's claims under Article XIII:2(d) and the *chapeau* of Article XIII:2 of the GATT 1994.[556]

7.301. The European Union argues that it acted in full conformity with Article XIII of the GATT 1994 and ensured that the allocation of the TRQs approached as closely as possible the shares that various Members may be expected to obtain in the absence of the TRQs.[557]

7.302. In our evaluation of Turkey's claim under Article XIII:2(d) of the GATT 1994 we have found that Turkey has not established that data for a period including January to June 2018 were representative of trade flows in the absence of restrictions, but data for the period 2015-2017 were not. We have also found that Turkey has not established that the changes in import shares of various countries following the introduction of trade remedies in early 2018 was a special factor that had to be taken into account in the allocation of country-specific shares in the TRQs. Given that Turkey's claim under the *chapeau* of Article XIII:2 of the GATT 1994 rest on these same grounds, we find that Turkey has not established that the European Union acted inconsistently with the *chapeau* of Article XIII:2 of the GATT 1994.

7.9.2 Article 5.2(a) of the Agreement on Safeguards

7.303. Turkey argues that "for the same reasons" as those underlying its claims under the relevant provisions of Article XIII:2(d) of the GATT 1994, the definitive safeguard is also inconsistent with

[551] Turkey's first written submission, para. 350.
[552] Panel Report, *EU – Poultry Meat (China)*, para. 7.364.
[553] Panel Report, *EU – Poultry Meat (China)*, paras. 7.364 and 7.369.
[554] Turkey's first written submission, para. 352.
[555] Turkey's first written submission, para. 352.
[556] Turkey's response to Panel question No. 44, para. 90.
[557] European Union's first written submission, paras. 291 and 296.

Article 5.2(a) of the Agreement on Safeguards.[558] According to Turkey, given that the text of Article 5.2(a) is "to a large extent identical" to that of Article XIII:2(d), the European Union's failure to allocate country-specific shares in the TRQs based on a "previous representative period" would give rise to an inconsistency not only with Article XIII:2(d) of the GATT 1994 but also with Article 5.2(a) of the Agreement on Safeguards.[559, 560]

7.304. Referring to the panel report in *US – Line Pipe*, the European Union contends that Article 5.2(a) of the Agreement on Safeguards is not applicable to TRQs.[561] Therefore, the European Union request the Panel to reject Turkey's claim under Article 5.2(a) of the Agreement on Safeguards.

7.305. Article 5.2(a) of the Agreement on Safeguards provides:

> In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

7.306. The European Union, relying on a finding of the panel in *US – Line Pipe*, argues that a TRQ is not a "quota" in the sense of Article 5.2(a) of the Agreement on Safeguards.[562] Turkey, on the other hand, disagrees with that finding of the panel in *US – Line Pipe* and argues that TRQs include a "quota" component, and that Article 5.2(a) applies to TRQs.[563]

7.307. While the parties disagree as to whether Article 5.2(a) of the Agreement on Safeguards applies to TRQs and therefore to the measure at issue, we consider that even assuming *arguendo* that it does, Turkey has not established that the European Union acted inconsistently with the provision. As noted above, Turkey asserts, on the same grounds as those that it relied on in the context of its claim under Article XIII:2(d) of the GATT 1994, that the European Union's failure to allocate country-specific shares in the TRQs based on a "previous representative period" gave rise to an inconsistency with Article 5.2(a) of the Agreement on Safeguards.[564] However, as we have found above, Turkey has not established that the period used by the European Commission for the allocation of country-specific shares in TRQs did not qualify as a "previous representative period" under Article XIII:2(d) of the GATT 1994.[565] On this *arguendo* basis, we consider that the relevant findings that we made when addressing Turkey's claim under Article XIII:2(d) of the GATT 1994 apply to Turkey's claim under Article 5.2(a) of the Agreement on Safeguards. Therefore, Turkey has not established that the definitive safeguard was inconsistent with Article 5.2(a) of the Agreement on Safeguards.

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[558] Turkey's first written submission, para. 353; second written submission, para. 242.

[559] Turkey's second written submission, para. 242.

[560] See also United States' third-party response to Panel question No. 9, para. 27; Canada's third-party response to the Panel question No. 9, paras. 3-5; Switzerland's third-party response to Panel question No. 9, paras. 13-17; and Brazil's third-party response to Panel question No. 9, paras. 25-28.

[561] European Union's first written submission, para. 285 (referring to Panel Report, *US – Line Pipe*, para. 7.69); response to Panel question No. 45, para. 100.

[562] European Union's response to Panel question No. 45, para. 100.

[563] Turkey's response to Panel question No. 45, paras. 95-96.

[564] Turkey's second written submission, para. 242.

[565] We note that the parties have not argued that the notion of "a previous representative period" under Article 5.2(a) of the Agreement on Safeguards differs substantively from that under Article XIII:2(d) of the GATT 1994. We need not, and do not, take any view on this issue, because Turkey has argued that the definitive safeguard is inconsistent with Article 5.2(a) of the Agreement on Safeguards "for the same reasons" as those underlying Turkey's claim under Article XIII:2(d) of the GATT 1994, and we have disagreed with those reasons in addressing Turkey's claim under Article XIII:2(d) of the GATT 1994.

7.10 Reduction in the pace of liberalization and increased restrictiveness

7.308. Turkey claims that the definitive safeguard was inconsistent with Articles 7.4 and 5.1 of the Agreement on Safeguards because the first and the second review regulations[566] made it more restrictive and reduced its pace of liberalization.[567] The European Union contends that Turkey's claims under Articles 7.4 and 5.1 of the Agreement on Safeguards ought to be rejected.[568]

7.309. In the sections below, we first address Turkey's claim under Article 7.4 of the Agreement on Safeguards (section 7.10.1) and we then turn to Article 5.1 of the Agreement on Safeguards (section 7.10.2).

7.10.1 Article 7.4 of the Agreement on Safeguards

7.310. Turkey argues that the definitive safeguard was inconsistent with Article 7.4 of the Agreement on Safeguards for the following reasons:

a. by reducing the pace of liberalization of the TRQs from 5% at the end of the first and the second years of the application of the definitive safeguard (as stipulated in the definitive determination) to 3% at the same points in time (pursuant to the first review regulation), the European Union acted inconsistently with Article 7.4 of the Agreement on Safeguards[569]; and

b. certain modifications made to the definitive safeguard through the first and the second review regulations made the definitive safeguard more restrictive than originally determined, inconsistently with Article 7.4 of the Agreement on Safeguards.[570]

7.311. Below, we first recall the applicable requirements of Article 7.4 of the Agreement on Safeguards (section 7.10.1.1), and we then address each of these arguments, in turn (sections 7.10.1.2.1 and 7.10.1.2.2).

7.10.1.1 The applicable requirements of Article 7.4 of the Agreement on Safeguards

7.312. The first sentence of Article 7.4 of the Agreement on Safeguards provides:

> In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application.

7.313. The first sentence of Article 7.4 of the Agreement on Safeguards applies to measures with an expected duration of over one year. The first sentence provides that the covered safeguards "shall" be liberalized progressively at regular intervals. Thus, the first sentence imposes the obligation on the Member applying a covered safeguard to liberalize the measure (a) "progressively" and (b) at "regular intervals". The ordinary meaning of "progressive" includes "[p]roceeding by steps or stages".[571] The provision does not prescribe what the magnitude of progressive liberalization should be at each liberalizing step. The ordinary meaning of "regular" includes "[r]ecurring or taking place repeatedly at (short) uniform intervals" and "[r]ecurring or repeated at fixed times (although not necessarily at uniform intervals)".[572] The provision does not prescribe how long the regular intervals between each liberalizing step must be, or at what point in time the progressive liberalization must begin.[573] The first sentence of Article 7.4 also indicates, however, that the

[566] See para. 2.4 above.
[567] Turkey's first written submission, para. 355.
[568] European Union's first written submission, para. 306.
[569] Turkey's first written submission, para. 365.
[570] Turkey's first written submission, para. 366.
[571] Oxford Dictionaries online, definition of "progressive", meaning 3 https://www.oed.com/view/Entry/152244?redirectedFrom=progressive#eid (accessed 22 September 2021).
[572] Oxford Dictionaries online, definition of "regular", meanings c and d https://www.oed.com/view/Entry/161414?redirectedFrom=regular#eid (accessed 22 September 2021). See also Panel Report, *Ukraine – Passenger Cars*, para. 7.362.
[573] Panel Report, *Ukraine – Passenger Cars*, paras. 7.363-7.364.

purpose of the requirements contained in the sentence is "to facilitate adjustment" of the domestic industry.

7.10.1.2 Whether Turkey has established that the definitive safeguard is inconsistent with Article 7.4 of the Agreement on Safeguards

7.10.1.2.1 Whether the reduction in the pace of liberalization was inconsistent with Article 7.4

7.314. We recall that in the definitive determination, the European Commission announced that it would increase the size of each TRQ by 5% at the end of the first and second years of the application of the definitive safeguard.[574] Subsequently, in the first review regulation, the European Commission changed the pace of liberalization to "3% + 3% for the second and third year of application of the safeguard measures".[575]

7.315. Turkey argues that the requirement under Article 7.4 of the Agreement on Safeguards to "progressively liberalize" the safeguard "at regular intervals" implies that once the competent authorities have determined a schedule of liberalization, they cannot decrease the pace of liberalization.[576] Turkey argues that the object and purpose of Article 7.4 of the Agreement on Safeguards, i.e. to "facilitate adjustment", also supports Turkey's view that Article 7.4 does not permit a reduction in the pace of liberalization once a schedule of liberalization has been announced, because a reduced pace would create a disincentive for the domestic industry to undertake adjustment.[577] Turkey posits that the requirement of progressive liberalization is consistent with the reference in the preamble of the Agreement on Safeguards to "the importance of structural adjustment and the need to enhance rather than limit competition in international markets".[578] Turkey argues that the immediate context provided by the second and third sentences of Article 7.4 also supports Turkey's view that once announced, the pace of liberalization cannot be decreased.[579] On this basis, Turkey argues that the European Union acted inconsistently with Article 7.4 of the Agreement on Safeguards by reducing the pace of liberalization from 5% to 3% for the second and the third years of the application of the definitive safeguard.[580]

7.316. The European Union argues that by setting the pace of liberalization at 3% for the second and third years of the application of the definitive safeguard, it fulfilled the requirement of progressive liberalization set out in Article 7.4 of the Agreement on Safeguards.[581] The European Union contends that nothing in the text of the Agreement on Safeguards supports Turkey's view that once a competent authority has determined a schedule of liberalization, it cannot decrease the pace of liberalization.[582] The European Union argues that acceptance of Turkey's view would imply that a Member that announces a pace of liberalization of 5% after each year of operation of the measure and then revises it to 3% will be found to have acted inconsistently with Article 7.4, but not a Member that applies the 3% liberalization pace after each year of operation of the measure without making any initial announcement. According to the European Union, this would incentivize Members to announce a low pace of liberalization initially, thus forestalling the announcement of a higher pace of liberalization that would provide a "more demanding signal to the domestic industry as regards how it is expected to adjust".[583]

7.317. Among the third parties, the Republic of Korea takes the view that, as there are no WTO disciplines governing the degree of liberalization that a Member must implement, as long as a safeguard measure applied for longer than one year is liberalized at regular intervals, the degree of each liberalization could vary.[584] For the United Kingdom, Article 7.4 of the Agreement on Safeguards does not prohibit a reduction in the pace of liberalization after an initial schedule of liberalization had

[574] Definitive determination, (Exhibit TUR-5), recital 188; First review regulation, (Exhibit TUR-9), recital 134.
[575] First review regulation, (Exhibit TUR-9), recital 147.
[576] Turkey's first written submission, para. 356; second written submission, paras. 247-249.
[577] Turkey's second written submission, para. 252.
[578] Turkey's second written submission, para. 253.
[579] Turkey's first written submission, paras. 357-358; second written submission, para. 250.
[580] Turkey's first written submission, para. 365; second written submission, para. 254.
[581] European Union's first written submission, paras. 300 and 302.
[582] European Union's first written submission, paras. 301-302.
[583] European Union's first written submission, para. 302.
[584] Korea's third-party statement, para. 31.

been set, as long as the revised pace of liberalization results in progressive liberalization.[585] Switzerland argues that Article 7.4 of the Agreement on Safeguards does not permit a reduction in the pace of liberalization.[586]

7.318. We recall that Turkey refers to the first sentence of Article 7.4, which requires Members to progressively liberalize safeguards imposed for more than a year at regular intervals during the period of application, as the basis for its argument.[587] The question before us, therefore, is whether the first sentence of Article 7.4 precludes a Member from reducing the rate of liberalization to be achieved at regular intervals after initially announcing a higher rate, as the European Union did in this case. We consider that nothing in the ordinary meaning of the text of Article 7.4 of the Agreement on Safeguards indicates that a Member is necessarily precluded from doing so. Article 7.4 requires Members to "progressively liberalize … at regular intervals". As explained above, this means that there must be liberalization, in steps, at regular intervals. The liberalization of a safeguard measure can be "progressive", i.e. proceeding by steps or stages, even if a Member reduces the magnitude of liberalization to be achieved at "regular intervals" after initially announcing a different magnitude.[588]

7.319. Turkey argues that the "object and purpose of Article 7.4" is "to facilitate adjustment", and that a reduction in the pace of liberalization relative to the initially announced pace is contrary to that object and purpose.[589] Turkey refers to the observation of the panel in *Ukraine – Passenger Cars* that "[d]elaying liberalization in this way could create a disincentive for the domestic industry to undertake appropriate efforts at adjustment from the outset of the period of application".[590] We note that the panel in *Ukraine – Passenger Cars* expressed the concern that Turkey refers to in relation to the issue of a Member "not taking any liberalization steps until a late stage in the period of application of a safeguard measure".[591] That issue is not the same as the issue before us, i.e. whether Article 7.4 precludes a Member from reducing the magnitude of liberalization to be achieved at regular intervals after initially announcing a different magnitude. Therefore, we consider Turkey's reliance on this observation of the panel in *Ukraine – Passenger Cars* to be inapposite. Aside from this reference to the panel in *Ukraine – Passenger Cars*, Turkey has not provided any other basis in support of its assertion that a reduction in the pace of liberalization relative to the initially announced pace does not facilitate adjustment. We note that even if the Member applying the safeguard reduces the magnitude of liberalization to be achieved at regular intervals after initially announcing a different magnitude, the domestic industry will be exposed to a higher amount of competition from imports after each liberalization. Turkey has not shown why such liberalization will not facilitate adjustment. Therefore, we disagree with Turkey's argument concerning the objective of Article 7.4.

7.320. We recall Turkey's argument that the context provided by the first and the second sentence of Article 7.4 of the Agreement on Safeguards also supports its view that once announced, the pace of liberalization cannot be decreased. Referring to the report of the panel in *Argentina – Footwear (EC)*, Turkey argues that the only modifications to a safeguard that the second and third sentences contemplate are those that decrease its restrictiveness.[592] The second and third sentences of Article 7.4 provide:

> If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if

[585] United Kingdom's third-party statement, para. 14; third-party submission, paras. 21-22.
[586] Switzerland's third-party submission, para. 29.
[587] Turkey's first written submission, para. 356.
[588] We note that the panel in *Ukraine – Passenger Cars* found that "a Member can … comply with its obligation in Article 7.4 even if it has not previously provided a timetable for progressive liberalization". (Panel Report, *Ukraine – Passenger Cars*, para. 7.360). The finding made by that panel accords with our understanding of Article 7.4 of the Agreement on Safeguards. In particular, as noted by the Republic of Korea, if there is no obligation in Article 7.4 to provide a timetable for liberalization, it seems difficult to conclude that a change in the magnitude of liberalization to be achieved at "regular intervals" relative to the initially announced magnitude would *per se* be a violation of Article 7.4. (See Korea's third-party submission, para. 32).
[589] Turkey's first written submission, para. 357; second written submission, para. 252.
[590] Turkey's second written submission, para. 252 (referring to Panel Report, *Ukraine – Passenger Cars*, para. 7.362).
[591] Panel Report, *Ukraine – Passenger Cars*, para. 7.362.
[592] Turkey's first written submission, para. 358; second written submission, para. 250 (referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.303).

> appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

7.321. The second sentence applies to safeguards whose duration exceeds three years. The second sentence requires the Member applying such a safeguard to withdraw the measure, or increase the pace of liberalization, "if appropriate" in light of a review to be performed not later than the mid-term of the measure. We note that nothing in the second sentence of Article 7.4 bears upon the question as to whether the pace of liberalization can be slowed relative to the initially announced pace in situations other than one in which an increase in the pace of liberalization is found to be "appropriate" pursuant to a review of a measure the duration of which exceed three years. Therefore, we do not consider that the context provided by the second sentence of Article 7.4 supports the view that the first sentence of Article 7.4 necessarily precludes a reduction in the pace of liberalization of a safeguard measure relative to the initially announced pace.

7.322. The third sentence of Article 7.4 applies to "[a] measure extended under paragraph 2", i.e. a safeguard that is extended beyond the duration of four years in accordance with Article 7.2 of the Agreement on Safeguards. The third sentence stipulates that such a measure shall not be more restrictive than it was at the end of the initial period of application. Although this sentence contemplates an upper limit to the restrictiveness of a certain category of safeguards, in respect of liberalization the sentence only states that the measure "should continue to be liberalized". This sentence says nothing about *the pace of* liberalization even in relation to the specific type of safeguards to which it applies. Thus, we do not see anything in the third sentence of Article 7.4 that supports Turkey's view that the first sentence of Article 7.4 necessarily precludes a reduction in the pace of liberalization relative to the initially announced pace.

7.323. We also consider that Turkey's reliance on the observation of the panel in *Argentina – Footwear (EC)* that "[t]he only modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its [sic] restrictiveness (i.e., to eliminate the measure or to increase the pace of its liberalisation pursuant to a mid-term review)" to be inapposite.[593] The panel made this observation in the context of its evaluation of a claim under Article 12 of the Agreement on Safeguards concerning Argentina's alleged failure to notify certain modifications to the safeguard at issue that, in the EC's view, made the measure more restrictive than originally applied. The panel noted that the Agreement on Safeguards does not contemplate restrictive modifications to a safeguard, and hence does not contain notification requirements for such modifications. However, the panel explicitly declined to express a view as to the substantive compliance of such modifications with Article 7 of the Agreement on Safeguards.[594] Thus, the panel report referred to by Turkey does not support Turkey's arguments concerning the Article 7.4 claim.

7.324. We are therefore not persuaded that the first sentence of Article 7.4 precludes a Member from reducing the magnitude of liberalization to be achieved at regular intervals after initially announcing a different magnitude.

7.325. Turkey contends that the European Commission's adjustment of the pace of liberalization on the ground that the liberalization foreseen in the definitive determination could cause the import volume in the third year of the application to reach the same level as that in 2018, was improper.[595] Agreeing with Switzerland, Turkey contends that adjusting the pace of liberalization based on developments after the imposition of the definitive safeguard that are unrelated to the increased imports on the basis of which the safeguard was applied, would fail to achieve the purpose of facilitating adjustment to the new competitive conditions caused by the increased imports.[596] Pursuant to the said adjustment, even though the TRQs would be liberalized by 3% for the second and the third years of the definitive safeguard's application instead of 5% as foreseen in the definitive determination, the domestic industry would nevertheless be exposed to higher levels of import competition because of that liberalization. Turkey has neither explained nor pointed to anything in the record evidence that would show why such liberalization would not facilitate adjustment of the domestic industry in this case.

[593] Panel Report, *Argentina – Footwear (EC)*, para. 8.303. (emphasis original)
[594] Panel Report, *Argentina – Footwear (EC)*, para. 8.303.
[595] Turkey' second written submission, para. 255.
[596] Turkey's second written submission, para. 257.

7.326. Thus, we disagree with Turkey's argument that by reducing the pace of liberalization of the TRQs from 5% for the second and the third years of the definitive safeguard's application as stipulated in the definitive determination, to 3% through the first review regulation, the European Union made the definitive safeguard inconsistent with Article 7.4 of the Agreement on Safeguards.

7.10.1.2.2 Whether certain modifications to the definitive safeguard resulted in an inconsistency with Article 7.4

7.327. Turkey argues that the definitive safeguard is inconsistent with Article 7.4 of the Agreement on Safeguards because certain modifications introduced with the first and second review regulations made it more trade restrictive than originally determined.[597] The European Union argues that the modifications to the definitive safeguard made through the first and second review regulations are consistent with Article 7.4 of the Agreement on Safeguards.[598]

7.328. Among the third parties, Switzerland argues that the Panel must assess whether the modifications that Turkey points to made the safeguard more restrictive and, if so, it must conclude that such modifications are inconsistent with Article 7.4 of the Agreement on Safeguards.[599]

7.329. Turkey identifies the following modifications to the definitive safeguard, made through the first and the second review regulations, as having made the definitive safeguard more restrictive than originally determined:

a. the establishment of a limitation for each exporting country not to exceed a share of 30% of the global TRQ for product category 1[600];

b. the restriction of imports under product category 4.B to those exporters that could demonstrate an end-use in the automotive sector[601];

c. the imposition of a cap of 30% per country on the use of the global TRQ for product categories 13 and 16[602];

d. the reduction of the pace of liberalization[603];

e. the decision to manage country-specific TRQs on a quarterly basis[604];

f. the division of the global TRQ for product category 1 into country-specific TRQs and a residual TRQ[605]; and

g. the revision of the system of access to the residual TRQ during the last quarter for the third year of the definitive safeguard for countries having a country-specific TRQs.[606]

7.330. We note that in respect of all the modifications listed in the previous paragraph, apart from items (b) and (d), Turkey has only identified the modifications concerned and asserted that the modifications made the definitive safeguard more restrictive than originally determined in a manner inconsistent with Article 7.4 of the Agreement on Safeguards. We do not consider that the mere identification of these modifications is sufficient, without any accompanying explanation, to demonstrate that the modifications made the definitive safeguard more restrictive than originally determined in a manner inconsistent with Article 7.4 of the Agreement on Safeguards. We therefore consider that Turkey has not established a *prima facie* case that the modifications identified in

[597] Turkey's first written submission, para. 366; second written submission, para. 263.
[598] European Union's first written submission, para. 305.
[599] Switzerland's third-party submission, para. 31.
[600] First review regulation, (Exhibit TUR-9), Article 1(1)(a), recital 26.
[601] First review regulation, (Exhibit TUR-9), Article 1(1)(a), recitals 29-40.
[602] First review regulation, (Exhibit TUR-9), Article 1(1)(b), recital 94.
[603] First review regulation, (Exhibit TUR-9), Article 1(2)(b), recital 156.
[604] Second review regulation, (Exhibit TUR-12), Article 1(1)(a) and Annex II, recital 40.
[605] Second review regulation, (Exhibit TUR-12), Article 1(1)(a) and Annex II, recital 49.
[606] Second review regulation, (Exhibit TUR-12), Article 1(1)(b) and Annex III, recital 88.

items (a), (c), (e), (f), and (g) above made the definitive safeguard more restrictive than originally determined in a manner inconsistent with Article 7.4 of the Agreement on Safeguards.

7.331. We therefore turn to address Turkey's argument concerning the modification to the definitive safeguard listed in item (b) in paragraph 7.329 above, namely the restriction of imports under product category 4.B to those exporters that could demonstrate an end-use in the automotive sector. In the first review regulation, the European Commission introduced a requirement for importers to demonstrate that the product concerned was intended for end-use in the automotive sector, in order to be categorized in product category 4.B (automotive end-use requirement).[607] At the same time, the European Commission extended and revised the scope of product category 4.A to ensure that products that were no longer eligible to be categorized in product category 4.B could be categorized as belonging to product category 4.A.[608] Turkey argues that with the introduction of the automotive end-use requirement, the access to the TRQ for product category 4.B became more burdensome, and thus more restrictive than originally determined and therefore inconsistent with Article 7.4 of the Agreement on Safeguards.[609]

7.332. We note, and the parties confirmed[610] in response to a question from the Panel, that the automotive end-use requirement was revoked retroactively through the amending regulation of 15 January 2020, less than four months after being introduced through the first review regulation, which entered into force on 1 October 2019.[611] Given that the automotive end-use requirement is no longer in force, we need not consider Turkey's argument concerning the automotive end-use requirement in order to resolve the present dispute, and we decline to do so.

7.333. As regards Turkey's argument concerning item (d) in paragraph 7.329 above, namely the reduction in the initially announced pace of liberalization, we have already rejected Turkey's arguments concerning the consistency of this modification with Article 7.4 of the Agreement on Safeguards in section 7.10.1.2.1 above.

7.10.2 Article 5.1 of the Agreement on Safeguards

7.334. Turkey argues that by making the definitive safeguard more restrictive than originally determined and by reducing the pace of liberalization through the first and the second review regulations, the European Union failed to apply the definitive measure only to the extent necessary to prevent serious injury and to facilitate adjustment, thus acting inconsistently with Article 5.1 of the Agreement on Safeguards.[612] Specifically, Turkey argues that by increasing the restrictiveness and reducing the pace of liberalization of the definitive safeguard when the assessment of injury or threat thereof remained the same, the European Union no longer applied the definitive safeguard only to the extent "necessary to prevent or remedy serious injury".[613] Further, according to Turkey, by making the definitive safeguard more restrictive and reducing the pace of liberalization, the European Union also created a disincentive for the domestic industry to undertake appropriate efforts at adjustment.[614]

7.335. The European Union contends that the Panel must reject Turkey's claim under Article 5.1 of the Agreement on Safeguards.[615]

7.336. We note that Turkey relies on the same facts and arguments to support its claim under Article 5.1 of the Agreement on Safeguards as it did to support its claim under Article 7.4 of the Agreement on Safeguards, addressed in section 7.10.1.2 above. We found above in

[607] First review regulation, (Exhibit TUR-9), recital 35.
[608] First review regulation, (Exhibit TUR-9), recital 37.
[609] Turkey's second written submission, para. 262.
[610] Turkey's response to Panel question No. 53, para. 1; European Union's response to Panel question No. 53, para. 7.
[611] European Commission Implementing Regulation (EU) 2020/35, (Exhibit TUR-10), recital 9 ("[t]he present Regulation should be given retroactive effect, thereby revoking, as from 1 October 2019, the end-use requirement introduced by the amending Regulation"); First review regulation, (Exhibit TUR-9), Article 3, recital 36.
[612] Turkey's first written submission, para. 367. We recall that Turkey also presented other arguments in support of its claim under Article 5.1, which we have examined separately, in section 7.8.1 above.
[613] Turkey's first written submission, para. 367.
[614] Turkey's first written submission, para. 367.
[615] European Union's first written submission, para. 306.

section 7.10.1.2.2 that Turkey did not provide any explanation as to how the relevant modifications to the definitive safeguard made through the first and the second review regulations that Turkey points to made the measure more restrictive in a manner that would give rise to an inconsistency with Article 7.4 of the Agreement on Safeguards.[616] We also rejected in section 7.10.1.2.1 Turkey's contention that the reduction in the pace of liberalization of the definitive safeguard necessarily creates a disincentive for the domestic industry to undertake adjustment. Given that Turkey's claim under Article 5.1 rests on the same grounds and suffers from the same flaws, we find that Turkey has not established that the European Union acted inconsistently with Article 5.1 of the Agreement on Safeguards.

7.11 Article II:1 of the GATT 1994

7.337. Turkey also claims that the definitive safeguard is inconsistent with Article II:1(b) of the GATT 1994. Turkey argues that the 25% out-of-quota duty set out in the definitive safeguard constitutes "other duties or charges" within the meaning of Article II:1(b), and that as a result of the claimed inconsistencies with Article XIX:1(a) of the GATT 1994, those duties or charges are not excused by Article XIX and are therefore inconsistent with Article II:1(b).[617]

7.338. We recall that we have already found that the definitive safeguard (i) is inconsistent with Article XIX:1(a), because the European Commission did not establish that the increase in imports was "as a result of" the unforeseen developments it relied upon and did not identify the obligations whose effect resulted in the injurious increase in imports, and (ii) is inconsistent with Article 4.1(b) of the Agreement on Safeguards, because it rests on a determination of threat of injury that is not "based on facts". In view of this, we do not find it necessary to examine whether, for the same reasons, the definitive safeguard is also inconsistent with Article II:1 of the GATT 1994.

8 CONCLUSIONS, RECOMMENDATION, AND REQUEST FOR A SUGGESTION

8.1. For the reasons set out in this Report, we conclude as follows:

a. Turkey *has established* that the definitive safeguard is inconsistent with:

   i. Article XIX:1(a) of the GATT 1994, because the European Commission did not ascertain that the increase in imports took place as a result of the unforeseen developments it had identified, and did not identify in its published reports the obligations whose effect resulted in the increase in imports; and

   ii. Article 4.1(b) of the Agreement on Safeguards, because two central elements of the European Commission's determination of a threat of serious injury were not "based on facts" as required by that provision.

b. Turkey *has not established* that the definitive safeguard is inconsistent with:

   i. Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(c), 4.2(a), 4.2(b), and 4.2(c) of the Agreement on Safeguards because of the European Commission's approach to product scope;

   ii. Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because of alleged errors in the European Commission's determination of an increase in imports;

   iii. Article 5.1 of the Agreement on Safeguards because the European Commission did not take into account data from the first six months of 2018 in determining the size of the TRQs, or because of the double remedy regulation, or because the European Union reduced the pace of liberalization or allegedly made the measure more restrictive;

[616] As noted in para. 7.332 above, we need not make findings on Turkey's arguments concerning the automotive end-use requirements as that requirement is no longer in force.

[617] Turkey's first written submission, paras. 375-380.

iv. Article XIII:2(d) and the *chapeau* of Article XIII:2 of the GATT 1994 and Article 5.2(a) of the Agreement on Safeguards because the European Commission did not take into account data from the first six months of 2018 in allocating the TRQs; and

v. Article 7.4 of the Agreement on Safeguards because the European Union reduced the pace of liberalization and allegedly made the measure more restrictive.

c. We do not consider it necessary to decide whether the definitive safeguard is inconsistent with:

i. Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards for reasons substantively identical to those put forward under Article 4.1(b) of the Agreement on Safeguards;

ii. Article 2.1 of the Agreement on Safeguards as a consequence of the inconsistency with Article 4.1(b) of the Agreement on Safeguards;

iii. Article 4.2(b) of the Agreement on Safeguards because of errors in the determination of causation;

iv. Articles 2.1, 5.1, and 7.1 of the Agreement on Safeguards as a consequence of the claimed inconsistency with Article 4.2(b) of the Agreement on Safeguards; and

v. Article II:1(b) of the GATT 1994 as a consequence of the inconsistency with Article XIX:1(a) of the GATT 1994.

d. The automotive end-use requirement is no longer in force, and we do not consider it in reviewing the definitive safeguard.

e. The provisional safeguard is no longer in force, and we do not make findings on its consistency with the covered agreements.

8.2. Under Article 3.8 of the DSU, "where 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". We conclude that, to the extent that the definitive safeguard is inconsistent with the GATT 1994 and the Agreement on Safeguards, it has nullified or impaired benefits accruing to Turkey under those agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measure into conformity with the Agreement on Safeguards and the GATT 1994.

8.4. In addition to requesting recommendations, Turkey asks us to suggest that the European Union implement our recommendation by revoking the safeguard at issue, pursuant to Article 19.1 of the DSU.[618]

8.5. Article 19.1 of the DSU contains two prongs. First, "[w]here a panel or the Appellate Body 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".[619] Thus, panels are required to make such a recommendation when an inconsistency is established. Second, "[i]n addition … the panel or Appellate Body *may* suggest ways in which the Member concerned could implement the recommendations".[620] Thus, suggestions are additional to recommendations, and the choice whether to make such suggestions falls squarely within the discretion of each panel.[621]

[618] Turkey's first written submission, para. 382.
[619] Emphasis added; fn omitted.
[620] Emphasis added.
[621] See also e.g. Appellate Body Report, *US – Continued Zeroing*, para. 389.

8.6. Some panels have made suggestions under Article 19.1 of the DSU.[622] Others have preferred to decline to do so, reasoning in particular that the choice on the manner of implementation is, in the first place, for the Member concerned.[623]

8.7. In this case, we decline to make a suggestion under Article 19.1 of the DSU.

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[622] Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.3-8.7; *US – Offset Act (Byrd Amendment)*, para. 8.6; *US – Cotton Yarn*, paras. 8.4-8.5; *Guatemala – Cement II*, paras. 9.4-9.6; *US – Underwear*, paras. 8.1-8.3; *Mexico – Steel Pipes and Tubes*, paras. 8.7-8.12; *Ukraine – Passenger Cars*, paras. 8.7-8.8; *US – Lead and Bismuth II*, para. 8.2; *India – Quantitative Restrictions*, paras. 7.1-7.7; *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.154-6.159; *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)*, paras. 8.4-8.5; *EC – Export Subsidies on Sugar (Australia), EC – Export Subsidies on Sugar (Brazil), and EC – Export Subsidies on Sugar (Thailand)*, paras. 8.6-8.8; and *Pakistan – BOPP Film (UAE)* [appealed by Pakistan 22 February 2021], para. 9.6.

[623] See e.g. Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 8.6.