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UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS468/R.

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LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 29 July 2014

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

General

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

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

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

Submissions

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

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

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

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

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that each party and third party considers that it is practical to do so.

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

Questions

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

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

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

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

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

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

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

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

a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by Japan.

If Ukraine chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

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

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

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

Third parties

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

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

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

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

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

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

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

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

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. The integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

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

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

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

Service of documents

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

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

b. Each party and third party shall file four paper copies of all documents it submits to the Panel, except for exhibits and executive summaries submitted in accordance with paragraphs 19 and 20. Exhibits may be filed in four copies on CD-ROM or DVD and two paper copies. Executive summaries may be filed in one single paper copy. The DS Registrar shall stamp the filed documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and such other WTO Secretariat staff as may be notified to parties and third parties. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

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

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

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

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 6 August 2014

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the party. In this regard, BCI shall include information that was previously submitted to the investigating authorities of Ukraine, the Ministry of Economic Development and Trade's Department for WTO Cooperation and Trade Remedies, as BCI in the safeguard investigation at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. These procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute.

3. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI.

8. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

10. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 11 below.

11. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body.

12. At the request of a party, the Panel may apply these working procedures or an amended form of these working procedures to protect information that does not fall within the scope of the information set out in paragraph 1. The Panel may, with the consent of the parties, waive any part of these procedures.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. INTRODUCTION

1. Japan has initiated the present proceedings in order to demonstrate that the safeguard measures imposed by Ukraine manifestly violate various procedural and substantive requirements under the Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994. First, the competent authorities imposed the safeguard measures in fundamental misunderstanding of the core requirements for their application and, in particular, the logical connection between them. Second, Ukraine failed to conduct a careful and thorough examination of the facts as reflected in the published report. Third, it violated a number of procedural requirements under the GATT 1994 and the Agreement on Safeguards.

2. THE APPLICABLE STANDARD OF REVIEW

2. **First**, Japan submits that the objective assessment of the matter at hand pursuant to Article 11 of the DSU requires the Panel to examine whether the conclusions and analysis of the competent authorities are reasoned and adequate by reference to their published report within the meaning of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[1] This is in the present case the Notice of 14 March 2013. Any explanations in other documents, such as the Key Findings or Ukraine's written submissions, are not relevant for this assessment.

3. In the course of the proceedings Ukraine appeared to argue that the Key Findings are part of the published report. However, the word "publish" in Articles 3.1 and 4.2(c) must be interpreted as meaning "to make generally available through an appropriate medium", rather than simply "making publicly available".[2] A document, such as the Key Findings, which has only been provided to interested parties, cannot be regarded as being "published" within the meaning of Article 3.1. It is even doubtful whether the Key Findings can be said to have been "made publicly available", since they were only sent to the representatives of the affected exporting countries and thus, not even to all interested parties. The Key Findings were not explicitly referred to in the Notice of 14 March 2013 either. There is no evidence that clarifies the relationship with the Key Findings and "a report and materials" mentioned in the Notice of 14 March 2013 and so Ukraine's allegation that the Key Findings were a non-confidential extract from the report of the Ministry is irrelevant.

4. Thus, Japan considers that the Panel should limit its assessment to the only published report in this case, that is the Notice of 14 March 2013. However, even by reference to the Key Findings, the explanations given by the authorities were not reasoned and adequate.

5. **Second**, Japan notes that, in its first written submission Ukraine included information on the imports and the injury factors from unidentified documents and developed *ex post* explanations or analyses on various issues, none of which can be found in the Notice of 14 March 2013 or in the Key Findings. Such *ex post* data cannot be used *a posteriori* to explain determinations made during the investigation and to justify the application of the safeguard measures.

6. Moreover, the Panel may take into account the evidence on the record of the investigation but only to assess the complexities of the facts of the case, examine whether there were other alternative explanations and ultimately determine whether the explanation provided in the published report is reasoned and adequate.[3] The Key Findings, as part of the record of the

[1] Appellate Body Report, *US – Steel Safeguards*, para. 299.
[2] Panel Report, *Chile – Price Band System*, para. 7.128.
[3] Appellate Body Report, *US – Lamb*, paras. 105-106, and Appellate Body Report, *US – Tyres (China)*, para. 123.

investigation, may therefore be useful to the Panel's examination as to whether the conclusions reached by the authorities in their published report are reasoned and adequate. For instance, the Key Findings confirm that other factors causing injury had been identified during the investigation but were not analysed by the authorities in their published report.

7. **Third**, to the extent that the Panel finds that the report of the competent authorities fails to provide a reasoned and adequate explanation of the authorities' determinations, these determinations should be found inconsistent with the specific requirements of the relevant provisions of the Agreement on Safeguards, in particular its Articles 2 and 4.[4]

3. LEGAL CLAIMS: SUBSTANTIVE REQUIREMENTS UNDER ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

8. Japan submits that Ukraine failed to make proper determinations concerning the two circumstances, namely the unforeseen developments and the effect of the obligations incurred under the GATT 1994, and the three conditions, namely an increase in imports, a serious injury or threat thereof of the domestic industry and a causal link between the increase in imports and the serious injury (or threat thereof), that must be met before a safeguard measure can be applied in accordance with Article XIX:1(a) of the GATT 1994 the Agreement on Safeguards.

3.1 Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

9. **First**, Japan argues that Ukraine violated Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards since the Notice of 14 March 2013, i.e. the "published report", does not set forth the competent authorities' findings and reasoned conclusions reached on all pertinent issues of fact and law and does not contain a detailed analysis of the case, as well as a demonstration of the relevance of the factors examined with respect to various issues.

10. The failure of the competent authorities to adequately address in the published report each pertinent issue of fact and law violates their obligation under Article 3.1, last sentence to give an account of a judgement or statement reached in a logical manner or expressed in a logical form, distinctly or in detail.[5] Article 4.2(c) is an elaboration of this requirement.[6] The absence of such "reasoned and adequate explanation" in the published report with regard to any relevant issue of law or fact entails a violation of Articles 2 and 4 of the Agreement on Safeguards.[7]

11. Furthermore, Ukraine failed to publish its report and its detailed analysis "promptly": the temporal parameter regulating the Article 3.1 publication requirement that has to be examined by reference to the time of conclusion of the investigation, i.e. at the time of the determinations.[8] Since Ukraine's decision on the application of the safeguard measures was taken on 28 April 2012, a publication of its report in the form of a Notice one year later cannot be viewed as "prompt" and therefore constitutes a violation of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

12. Finally, Ukraine's failure cannot be remedied by its claim of confidentiality. Information "by nature confidential" in the meaning of Article 3.2 of the Agreement on Safeguards refers to data confidential by reason of its content, in most cases business-sensitive information.[9] Also, "information" means data and/or evidence that is submitted by a party to the investigation or collected by the investigating authorities. Thus, Article 3.2 cannot be invoked in relation to entire reports, documents or analyses for the sole reason that they were issued by the authorities or designated as confidential by the Government.

[4] Appellate Body Report, *US – Steel Safeguards*, para. 302.
[5] Appellate Body Report, *US – Steel Safeguards*, para. 287.
[6] Appellate Body Report, *US – Steel Safeguards*, para. 289.
[7] Appellate Body Report, *US – Lamb*, para. 107.
[8] European Union's third-party response to Panel question No. 12, para. 17.
[9] Appellate Body Report, *EC – Fasteners*, para. 536, and Panel Report, *US – Wheat Gluten*, para. 8.24.

13. In any event, neither the protection of confidential information nor Ukraine's domestic law, notably Article 12(3) thereof, can dispense the authorities from the obligation to provide a reasoned and adequate explanation of how the facts support their conclusions in a published report.[10]

14. **Second**, Japan submits that Ukraine failed to conduct an investigation as required by Article 3.1, in particular, by failing to "seek out pertinent information", and to provide appropriate means through which Japan could present evidence and its views.

15. Japan observes that the meaning and scope of the obligation to carry out an "investigation" under Article 3.1, first sentence should be determined in light of its broader context, in particular Articles 2.1 and 4.2, as well as the urgent nature of the safeguard measures.

16. Article 3.1, second and third sentences set forth those investigative steps that the competent authorities must include in order to seek out pertinent information.[11] Moreover, in accordance with Article 4.2(a) as part of their "investigation" the competent authorities "must actively seek out pertinent information"[12] about the recent past and must evaluate "all relevant factors of an objective and quantifiable nature having bearing on the situation of that industry". The use of the present tense in Article 2.1 indicates not only that the increase in imports must be both sudden and recent, but also that the entire investigation period should be the recent past.[13] Similarly with respect to serious injury, Article 4.2(a) refers to the evaluation of all factors "having a bearing" on the situation of the industry and for causation, Article 4.2(b) refers to the demonstration of the "existence" of a causal link and the exclusion of other factors which are also "causing injury." The use of the present tense further supports the need for the determination to be based on the recent past.[14]

17. As for the urgent nature of the safeguard measures, these are emergency actions which, if justified, should be applied immediately. The remedy is in itself extraordinary because it involves the suspension of WTO obligations or withdrawal of concessions, and does not depend upon "unfair" trade actions.[15] Situations arising in the distant past do not deserve an urgent response and do not justify the adoption of "emergency" measures.

18. In light of the above legal standard, Japan argues that Ukraine failed to conduct a proper "investigation" as required by Article 3.1, since it failed to seek out pertinent information for the most recent period prior to application of the safeguard measures in April 2013, i.e. the period 2011 – 2012.

19. The context of Articles 3.1 and 4.2(c) clearly shows that the obligation to conduct an "investigation" requires a "careful study" of recent data. If there is a significant delay between the end of the period of investigation, the determinations and the application of the safeguard measures, it would no longer be possible to presume that the conditions required in order to apply the safeguard measures, i.e. that the imports are increasing and that current injury or threat thereof exists, are still fulfilled. Safeguard measures must be based on an investigation that determines the existence of recent "increased imports" and the existence of "serious injury".

20. It follows that Ukraine had the obligation under Article 3.1 to actively seek out relevant information in order to ensure that there was a sufficiently relevant nexus between the data examined and the determinations of "increased imports" and "serious injury".

21. Finally, Japan claims that Ukraine did not provide appropriate means through which Japan could present evidence and its views and the opportunity to respond to the presentations of other

[10] Panel Report, *US – Steel Safeguards*, para. 10.275.
[11] Appellate Body Report, *US – Wheat Gluten*, para. 54.
[12] Appellate Body Report, *US – Wheat Gluten*, para. 53.
[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130 and fn. 130.
[14] Panel Report, *US – Wheat Gluten*, para. 8.81.
[15] Appellate Body Report *Argentina – Footwear (EC)*, paras. 93-94.

parties. Very few and strictly procedural communications were sent by Ukraine to Japan during the investigation. Moreover, given the opaque and contradictory requirements in Ukraine's domestic law, Ukraine failed to ensure that the parties did have meaningful opportunities to present evidence, to submit their views and to respond to the presentations of other parties in accordance with Article 3.1 of the Agreement on Safeguards.

22. As to the March 2012 meeting, Japan was not provided with a meaningful opportunity to present evidence and its views given the very limited information concerning the elements of the investigation that had been provided beforehand and in view of the time constraints of the hearing.

3.2 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments

23. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to establish the existence of "unforeseen developments" – a legal requirement which must be demonstrated "as a matter of fact" in order for a safeguard measure to be applied lawfully.[16]

24. The Agreement on Safeguards and Article XIX of the GATT 1994 are to be considered in conjunction and any safeguard measure must be in conformity with both.[17] Furthermore, a panel would not be in a position to assess objectively the compliance with the prerequisites that must be present before a safeguard measure can be applied, if the competent authorities are not required to provide a "reasoned and adequate explanation" of how the facts support the determination of those prerequisites, including "unforeseen developments".[18] Therefore, the existence of unforeseen developments must logically be demonstrated before the safeguard measure is applied and it is the published report that must offer an explanation as to why any identified changes could be regarded as unforeseen developments.[19]

25. Ukraine failed to demonstrate this. The sole reference to "unforeseen developments" in the Notice of 14 March 2013 and in the Key Findings is the increase in imports. However, the fact that the increase in imports must be the result of unforeseen developments necessarily means that they are two distinct things.[20]

26. It was only in Ukraine's first written submission that it claimed for the first time that the "global economic crisis" was the unforeseen development. However, any identification of "unforeseen developments" after the imposition of the measure cannot lead to the consistency of the safeguard measures with Article XIX:1(a) of the GATT 1994.

27. **Second**, Ukraine failed to establish a logical connection between the alleged unforeseen developments and the increase in imports, although the competent authorities are required by Article XIX:1 to demonstrate that the unforeseen developments have "resulted" in increased imports.[21] The Notice of 14 March 2013 and the Key Findings provide no such explanation.

28. Ukraine appears to argue in its first written submission that the tariff reduction made to implement its tariff concessions resulted in an increase in imports, which coincided with the unforeseen development. However, the tariff reduction cannot be an "unforeseen development" at the time of Ukraine's accession to the WTO.

[16] Appellate Body Report, *US – Lamb*, para. 72.
[17] Appellate Body Report, *Argentina – Footwear (EC)*, para. 84.
[18] Appellate Body Report, *US – Steel Safeguards*, para. 298.
[19] Appellate Body Report, *US – Lamb*, para. 73.
[20] Panel Report, *Argentina – Preserved Peaches*, para. 7.17.
[21] Appellate Body Report, *US – Steel Safeguards*, para. 316.

29. Even if the "global economic crisis" had been recognised by the authorities as the "unforeseen development", *quod non*, it must still be demonstrated that the crisis caused a change in the competitive relationship between imported and domestic products to the detriment of the latter, thereby resulting in a sharp and sudden increase in imports. Ukraine does not demonstrate such "logical connection". In fact, the contraction in demand resulting from the global crisis cannot constitute the reason why imports increased in relative terms during 2010.

30. But even assuming that the global economic crisis may have reduced the demand for domestic products more sharply than for imported products, thereby giving rise to a relative increase in imports, any serious injury to the domestic industry would still have been the direct result of the overall fall in demand and not of the relative increase in imports.

31. Ukraine's *ex post* justifications are further undermined by the imposition in March 2009 and subsequent withdrawal towards the end of 2009 of the 13% additional duty rate on imports of cars, which appears to have caused, at least partly, the decrease in imports in 2009 and the slow increase in imports that followed in 2010.

32. **Third**, Ukraine failed to provide in its published report any reasoned and adequate explanations concerning the alleged unforeseen developments, as required by Articles 3.1 and 4.2(c). The demonstration of "unforeseen developments" must feature in the published report.[22] Thus, there must be at least some discussion by the competent authorities as to why the developments were unforeseen at the time the relevant GATT obligation was negotiated and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances described in the first clause.[23]

33. Both the Notice of 14 March 2013 and the Key Findings fail to identify any unforeseen developments, apart from the increase in imports, and *a fortiori* fail to provide any discussion or explanation as to why such events should be considered as "unforeseen" and why they resulted in an increase in imports.

34. Furthermore, there is no support whatsoever to the contention that the analysis of the unforeseen developments was confidential and that only its results were provided in the Key Findings. Clearly the Key Findings do not even contain the "results" of such an analysis. Moreover, nothing in the Notice of 14 March 2013 or any evidence in the record of the Panel indicate that Ukraine's investigating authorities treated their entire analysis as confidential pursuant to Article 3.2 of the Agreement on Safeguards. Therefore, as a matter of law, Ukraine's confidentiality treatment of its analysis or any relevant information contained therein is improper.

35. In any event, regardless of whether Ukraine properly treated the analysis (or relevant information) as confidential, the competent authorities were still required to provide a reasoned and adequate explanation on how the facts supported their determination.[24] The need to protect confidential information cannot simply dispense the competent authorities from the obligation to publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law, including the issue of unforeseen developments.

3.3 Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT 1994

36. **First**, Japan claims that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement on Safeguards because it failed to demonstrate that it incurred obligations under the GATT 1994 and how the effect of these obligations resulted in the increase in imports.

[22] Appellate Body Report, *US – Lamb*, para. 76.
[23] Panel Report, *Argentina – Preserved Peaches*, para. 7.23.
[24] Appellate Body Report, *US – Steel Safeguards*, para. 298.

37. The effect of the obligations incurred under the GATT constitutes a legal requirement. Whether qualified as a "circumstance" or "prerequisite", this demonstration must be made as a matter of fact before a safeguard measure can be applied consistently with Article XIX of the GATT 1994.[25] Moreover, it is for the importing Member to identify in its report the existence of the obligations under GATT and the link with the increase in imports causing serious injury to its domestic industry.[26] Finally, under Article XIX:1 it is the relevant tariff concession, rather than the tariff reduction made to implement it, that must exist and prevent the importing Member from taking WTO-consistent measures, in order to offset the change in the competitive relationship caused by the unforeseen development.

38. Ukraine failed to identify the relevant obligations incurred by it under the GATT 1994. Indeed, the Notice of 14 March 2013 does not identify and *a fortiori* does not analyse the effect of any obligations incurred by Ukraine. Likewise, the Key Findings are silent on this issue, in particular as regards Ukraine's tariff concessions.

39. Furthermore, Ukraine failed to demonstrate a logical connection between the effect of the obligations incurred under the GATT 1994 and the increase in imports. Article XIX:1(a) clearly requires an explanation as to how the effect of these obligations "resulted" in the product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury. Specifically, it must be explained how these obligations had the effect of preventing the Member concerned from taking WTO-consistent measures, such as an increase in import duties.

40. The Notice of 14 March 2013 and the Key Findings provide no such assessment. Contrary to Ukraine's assumptions, it is the existence of unforeseen developments that must have resulted in the increase in imports while the obligations under GATT must prevent the importing Member from taking appropriate measures to limit the increased imports that resulted from "unforeseen developments". Moreover, Ukraine appears to acknowledge that the increase in imports was principally due to the tariff reduction made at the time of Ukraine's accession to the WTO and that the decrease in demand resulting from the global economic crisis merely coincided in time.

41. **Second**, Ukraine did not provide in its published report any reasoned and adequate explanations concerning the effect of the obligations incurred under the GATT 1994. Japan does not challenge the fact that upon its accession to the WTO in 2008, Ukraine has made tariff concessions of 10% *ad valorem* with respect to passenger cars. However, the effect of obligations incurred under the GATT 1994 constitutes a pertinent issue of fact and law that must be reflected in the authorities' published report.[27] Since neither the Notice of 14 March 2013 nor the Key Findings contain any analysis to that effect, Ukraine violated Articles 3.1 and 4.2(c).

3.4 Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports

42. **First**, Japan argues that Ukraine failed to demonstrate that the increased imports were the result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994.

43. Article XIX of the GATT 1994 and the Agreement on Safeguards constitute "an inseparable package" and must be read harmoniously.[28] Since the Notice of 14 March 2013 and the Key Findings do not contain any analysis of the alleged unforeseen developments and of the effect of the GATT obligations, the competent authorities have also necessarily failed to establish the "logical connection" between these conditions and the increase in imports. Thereby, Ukraine

[25] Appellate Body Report, *Korea – Dairy*, para. 85.
[26] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[27] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[28] *See* e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para.81.

violated Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.2(a) and 11.1(a) of the Agreement on Safeguards.

44. **Second**, Ukraine failed to demonstrate an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

45. In the first place, Ukraine failed to demonstrate a "recent" increase in imports. The phrase "is being imported" in Article 2.1 implies that the increase in imports must have been sudden and recent.[29] However, the alleged increase in imports found by the competent authorities over the period 2008 – 2010 can hardly be regarded as being "recent" for the application of a safeguard measure as of April 2013.

46. If at the time the safeguard measures are applied, the product is no longer being imported "in such increased quantities" or the imports are not causing or threatening to cause serious injury, there is nothing to prevent or remedy by safeguard measures. Moreover, safeguard measures are "matters of urgency"[30], linked to an extraordinary remedy to be imposed only within strict limits. Understood in this context, safeguard measures should be applied immediately after the conclusion of an investigation finding serious injury or a threat thereof, caused by imports "in such increased quantities".

47. A two-year gap between the end of the investigation period and the actual imposition of the safeguard measures is manifestly excessive. In particular, it is clear that the increase in imports relied upon by Ukraine was not "recent enough" at the time of the application of the safeguard measures. Furthermore, a one-year gap between the conclusion of the investigation and the actual imposition of the safeguard measure is also too long. Even if such a delay could in principle be justified by good-faith efforts on the part of a WTO Member to conduct negotiations, no such efforts were made in the present case.

48. In the second place, Ukraine failed to demonstrate that the increase in imports was "sudden, sharp and significant enough". The increase was not sudden, since the authorities ignored the fact that in 2005, 2006 and 2007 imports of the product concerned were already steadily increasing. There is also no evidence in the Notice of 14 March 2013 or in the Key Findings that the alleged increase in imports was sharp and significant.

49. In its first written submission, Ukraine provided data relating to the absolute volume of imports per year and to the change of imports in relative terms, which were not included in the Notice of 14 March 2013 or in the Key Findings and are therefore irrelevant. Moreover, with regard to the ratio of imports to domestic consumption, this factor is not directly relevant for determining whether a product is being imported in such increased quantities absolute or relative to domestic production.

50. In the third place, Ukraine failed to conduct a complete "qualitative analysis" of the data concerning imports, as it failed to examine the intervening trends as well as the "amounts" of imports, failed to demonstrate the "unexpected" nature of the increase in imports and failed to examine "such conditions" under which the imports occurred.

51. Japan submits first that Ukraine failed to examine the intervening trends with regard to the data of imports. In both the Notice of 14 March 2013 and in the Key Findings, Ukraine focused its analysis on an end-to-end point comparison between a starting point, 2008, and an end point, 2010. No data have been provided and analysed for 2009. Ukraine's *ex post* analysis in its written submissions is not relevant for the Panel's assessment, since it is the explanation in the published

[29] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[30] Appellate Body Report, *Korea – Dairy*, para. 86.

report that allows competent authorities to demonstrate that a product is being imported "in such increased quantities".[31]

52. In any event, the data provided by Ukraine in the course of the proceedings confirm the relevance of the analysis of the intervening trends. Indeed, the data concerning the imports in relation to domestic production shows first an 8.9% decrease between 2008 and 2009 followed by an increase in 2010. The competent authorities should have provided an explanation of how these trends support the finding that the requirement of "such increased quantities" was fulfilled. Otherwise, since no clear and uninterrupted upward trend in imports existed, the simple end-point-to-end-point analysis could easily be manipulated.[32]

53. Moreover, both the Notice of 14 March 2013 and the Key Findings only indicate a "rate" of decrease in absolute terms and a "rate" of increase in relative terms but not the "amounts" – a factor expressly required under Article 4.2(a). The overview in the Notice of hypothetical increase in imports after 2010 for a number of countries is not relevant, since Article 2.1 requires actual increase in imports.

54. In addition, Ukraine did not provide an explanation as to why the increased imports were "unforeseen" or "unexpected", given that its commitment in respect of cars upon accession to the WTO would logically entail such an increase.

55. Finally, Ukraine did not examine "such conditions" under which the imports occurred. In particular, it is highly relevant that while the imports in relative terms increased, the volume of imports in absolute terms substantially decreased by 71%. The analysis was important in order to properly evaluate whether the increased quantities were such as to qualify as "increased imports" under Article 2.1.[33]

56. **Third**, although the condition that there must be "increased imports" constitutes a pertinent issue of fact and law within the meaning of Article 3.1, the Notice of 14 March 2013 does not set forth any findings and reasoned conclusions on this issue. The Notice also fails to provide any "detailed analysis" of the conditions under which increased imports occurred and "a demonstration of the relevance of the factors examined", as required by Article 4.2(c).

3.5 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of serious injury and/or threat of injury

57. **First**, Ukraine's failure to clearly identify in its published report whether the determination made was one of serious injury and/or of threat thereof constitutes in itself a violation of the relevant provisions of the Agreement on Safeguards. Even in its first written submission, Ukraine still failed to expressly clarify whether the competent authorities made a finding of serious injury and/or threat thereof. It only resolved the ambiguity and confirmed that it made a determination of "threat of serious injury" upon explicit request of the Panel.[34] Japan claims that the requirement to make an adequate and reasoned explanation as to why the facts on the record support a determination of serious injury and/or threat thereof necessarily implies that the determination made (that is a determination of serious injury and/or threat of serious injury) must be clearly identified in the published report. In Japan's view, the fact that the Notice of 14 March 2013 does not clearly provide whether the determination is one of serious injury and/or one of threat thereof should in itself lead the Panel to conclude that the competent authorities did not provide an adequate and reasoned explanation as to why the facts supported their determination of serious injury and/or threat of serious injury.

[31] Appellate Body Report, *US – Steel Safeguards*, para. 374.
[32] Appellate Body Report, *US – Steel Safeguards*, para. 354.
[33] Appellate Body Report, *US – Steel Safeguards*, para. 351.
[34] Ukraine's response to Panel question No. 4.

58. **Second**, Japan submits that Ukraine failed to evaluate all relevant factors, as the competent authorities failed to provide the "amounts" of the increase in imports while this is one of the factors listed under Article 4.2(a) of the Agreement on Safeguards. Indeed, they only provided the rate of the decrease in imports in absolute terms during the POI as well as the relative rate of increase in imports in comparison to domestic production. What is relevant, however, is not only the rate of increase but also the amounts which Ukraine failed to evaluate. Without completely analysing both the rate and the amounts for imports both in absolute and relative terms, Ukraine was not in a position to reasonably conclude that the product was being imported in such increased quantities as to cause or threaten to cause serious injury to its domestic industry. The same applies to changes in various injury factors listed in Article 4.2(a) which need to be evaluated in both relative and absolute terms. Japan notes that only a relative evaluation of the changes may be misleading since large relative variations may actually reflect minor changes in absolute figures. For this reason, and in order to adequately evaluate the overall position of the domestic industry, investigating authorities were required to examine not only relative changes in the relevant factors but also the absolute amounts.

59. **Third**, Ukraine failed to provide a reasoned and adequate explanation of how the facts support their determination of threat of serious injury. The relevant section on injury in the Notice of 14 March 2013 and the Key Findings are not reasoned and adequate to demonstrate how the facts support a determination of threat of serious injury.

60. In the first place, Ukraine failed to "evaluate" the injury factors and, in particular, it did not examine the intervening trends over the period of investigation. Indeed, the Notice of 14 March 2013 does not contain any "evaluation", namely any "process of analysis and assessment, requiring the exercise of judgment on the part of the investigating authorities"[35] of the injury factors. Furthermore, the Notice of 14 March 2013 and the Key Findings only indicate the rate of increase/decrease between the beginning and the end of the period of investigation in defiance of the case law requiring intervening trends to be "systematically considered and factored into the analysis"[36]. The charts and explanations included in Ukraine's first written submission constitute *ex post* justifications which are therefore entirely irrelevant for the Panel's assessment of the matter before it.

61. In the second place, Ukraine failed to demonstrate the existence of a "significant overall impairment" that is "clearly imminent" in accordance with "the very high standard of [threat of serious] injury" [37] under the Agreement on Safeguards. Since in both the Notice of 14 March 2013 and the Key Findings there is no analysis based on "data relating to the most recent past"[38] and, in particular, no analysis of the data for 2010 in comparison to 2009, Ukraine did not provide an evaluation of and reasoned conclusions based on the most recent data pertaining to the existence of a threat of serious injury. Moreover, Ukraine neither demonstrated "that the anticipated 'serious injury' […] [is] on the very verge of occurring" nor that there is "a high degree of likelihood that the anticipated serious injury will materialize in the very near future."[39] The Notice of 14 March 2013 and the Key Findings do not contain a "prospective analysis" as to why the injury factors examined indicate that there is a high degree of likelihood that "serious injury" will materialize in the very near future.

62. In the third place, Ukraine also failed to make a determination of "threat of serious injury" which is based on the "recent past" [40] by relying on data of the period 2008 – 2010 while the safeguard measures were decided in 2012 and applied in April 2013. Indeed, for the purposes of making a fact-based determination in a future threat analysis "data relating to the most recent

[35] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.
[36] Panel Report, *Argentina – Footwear (EC)*, para. 8.216.
[37] Appellate Body Report, *US – Lamb*, para. 126.
[38] Appellate Body Report, *US – Lamb*, para. 137.
[39] Appellate Body Report, *US – Lamb*, para. 125.
[40] Panel Report, *US – Wheat Gluten*, para. 8.81.

past will provide competent authorities with an essential, and usually, the most reliable, basis for a determination of a threat of serious injury."[41]

63. **Fourth**, it clearly follows from the above that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, as it failed to provide a reasoned and adequate explanation as to how the facts support a determination of threat of serious injury in its published report. Contrary to Ukraine's claims, neither the Notice of 14 March 2013 nor the Key Findings contain "the indexed results of the conducted analysis of injury factors."[42] In particular, in the Notice of 14 March 2013 the competent authorities do not provide the explanations "to fullest extent possible"[43], since it does not even contain any data concerning 2009 or any absolute figures "in a modified form (e.g. aggregation or indexing)."[44] The protection of confidential information cannot be a justification for not complying with the requirements laid down in Articles 3.1 and 4.2(c) of the Agreement on Safeguards, considering that "even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation."[45]

3.6 Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the threat of serious injury

64. **First**, since Ukraine failed to demonstrate the existence of unforeseen developments and, *a fortiori*, any change in the competitive relationship between the domestic and imported products, it could not correctly perform the causation analysis. According to Article 2.1 a safeguard measure may be applied only if it has been determined that a product is being imported, *inter alia*, "under such conditions" as to cause or threaten to cause serious injury. Thus, in the demonstration of causation the nature of the interaction between the imported and domestic products in the domestic market of the importing country must be examined.[46] In the present case, the Notice of 14 March 2013 and the Key Findings do not, however, contain any assessment of the conditions of competition in the domestic market for the product in question that would explain the interaction of the imported and domestic product.

65. Therefore, the competent authorities failed to establish an impact on the competitive relationship between domestic and imported products that resulted in the increase in imports, thereby causing threat of serious injury to the domestic industry.

66. Moreover, a coincidence in time between the increase in imports and the impairment of the domestic industry cannot prove causation. Its absence, however, creates serious doubts as to the existence of a causal link.[47] In the present case a *prima facie* contradiction exists between the import volumes which substantially decreased in absolute terms and the alleged threat of serious injury. Furthermore, the imports increased relative to domestic production only between 2009 and 2010 but decreased even in relative terms between 2008 and 2009. Conversely, while the injury indicators deteriorated between 2008 and 2009, most of them actually improved between 2009 and 2010. There is thus no clear coincidence in time between the movements in imports and the movements in injury factors.

67. The absence of a coincidence would have required a very compelling analysis of why causation could still be considered to be present. By contrast, the examination of the competent

[41] Appellate Body Report, *US – Lamb*, para. 137.
[42] Ukraine's first written submission, para. 147.
[43] Panel Report, *US – Steel Safeguards*, para. 10.274.
[44] Panel Report, *US – Steel Safeguards*, para. 10.274.
[45] Panel Report, *US – Steel Safeguards*, para. 10.275.
[46] Panel Report *Argentina – Footwear (EC)*, para. 8.250, confirmed in Appellate Body Report, Argentina – *Footwear (EC)*, para. 145.
[47] Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

authorities does not contain any analysis of the relationship between the movements in imports (volume and market share) and the movements in injury factors.

68. **Second**, Ukraine failed to make the non-attribution analysis as required by Article 4.2(b) of the Agreement on Safeguards, although, undisputedly, the competent authorities acknowledged in their Key Findings the existence of four other factors with possible injurious effects on the domestic industry at the same time as the alleged increased imports: the global financial and economic crisis, the non-competitiveness of the domestic industry, the 13% additional duty rate and the end of the government support granted to the automobile industry between 1997 and 2008.

69. Under Article 4.2(b), second sentence, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. To this end the competent authorities must identify the nature and extent of the injurious effects of the other known factors and distinguish them explicitly, through a reasoned and adequate explanation, from the effects of the increased imports.[48]

70. The Notice of 14 March 2013, while accepting that interested parties had claimed that the deterioration of the domestic industry was due to other factors, contains no further assessment. As the Key Findings are not part of the "published report", the Panel should not examine whether the competent authorities provided a reasoned and adequate explanation therein. In any event, this document contains only a very brief analysis that manifestly fails to comply with the requirements of the Agreement on Safeguards.

71. The global financial and economic crisis was recognised in the Key Findings as having a negative impact on the domestic industry as it resulted in decreased consumption. However, no analysis was carried out separating the injurious effects of the crisis from those of the increased imports. Ukraine's *ex post* justifications, while irrelevant to the Panel's analysis, are also unable to explain what injurious effects the crisis had on the domestic industry, or the process by which the competent authorities would have separated the injurious effects of the crisis from the other injurious effects.

72. Although the termination of the Government support that existed between 1997 and 2008 was referred to in the Key Findings as a factor that could have negatively impacted the domestic industry's financial condition, the authorities refused to analyse it, as it was a factor outside the period of investigation. The fact that the Government programme ended on 1 January 2008 means, however, that between 1997 and 2008 the domestic car industry was enjoying significant support from which it could no longer benefit during the investigation period. Therefore, the alleged deterioration of the domestic industry situation between 2008 and 2010 could quite likely flow from the absence of this support and the authorities were required to distinguish its injurious effects from those of the increased imports.

73. The 13-percent additional duty rate, introduced in 2009 on *inter alia* cars, was a third factor identified in the Key Findings. However, contrary to the statement therein and based on the text of the relevant law, the 13-percent additional duty covered all non-critical imports irrespective of their country of origin, including imports from countries with which Ukraine has free trade agreements. Furthermore, the fact that, according to the Key Findings, this additional duty did not rule out imports does not constitute a reasoned and adequate explanation as to why the injury caused by the termination of this duty was not attributed to the increased imports.

74. The non-competitiveness of the domestic products is the fourth factor identified by the competent authorities in the Key Findings for which no analysis was provided.

[48] Appellate Body Report, *US – Line Pipe*, para. 215.

75. **Third**, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards, since the published report does not contain reasoned and adequate explanations regarding the existence of the causal link between the increased imports and the alleged threat of serious injury, nor does it include a proper non-attribution analysis.

3.7 Ukraine violated Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because it applied safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment

76. **First**, Ukraine failed to apply safeguard measures only to the extent necessary to prevent or remedy serious injury. As already mentioned above, Ukraine failed in its causation and non-attribution analysis by setting the duty rate and the duration of the safeguard measure in such a manner that it addresses also injury attributed to other factors. Since the compliance with Article 5.1 is linked with the observance of the causation requirement established in Article 4.2(b), it can be presumed that the safeguard measures have not been applied only to the extent necessary under Article 5.1.[49] Furthermore, Ukraine did not clarify why and how its tariff concession prevented it from taking measures to offset the change generated by the unforeseen development and therefore failed to establish that the safeguard measure was applied only to the extent necessary to prevent or remedy such serious injury. Japan also notes that since Ukraine applied its safeguard measures only in April 2013 on the basis of an analysis of imports and of the situation of the industry concerning the period prior to 2011, such measures cannot be regarded as having been applied "only to the extent necessary to prevent or remedy serious injury."

77. **Second**, Ukraine failed to progressively liberalize the safeguard measures and failed to apply them only to the extent necessary to facilitate adjustment. In the present case, Ukraine introduced the safeguard measures for a period of three years. It was therefore under the legal obligation to progressively liberalize these measures at regular intervals during the period of their application. Ukraine failed to meet this obligation since it did not provide for the progressive liberalization in the initial decision imposing the safeguard measure as reflected in the Notice of 14 March 2013 and an *a posteriori* decision which became effective on 28 March 2014 does not render the measures consistent with Article 7.4 of the Agreement on Safeguards. Indeed, the requirement to provide for a progressive liberalization, by submitting a relevant timetable, has to be satisfied before the safeguard measures are applied as confirmed by Article 12.2 of the Agreement on Safeguards which provides that in the notification made pursuant to Articles 12.1(b) and 12.1(c) the Member proposing to apply the safeguard measure must provide the "timetable for progressive liberalization." Moreover, Ukraine also defied progressive liberalization as a means to achieve the purpose of facilitating adjustment in accordance with Article 7.4 and, therefore, failed to apply the safeguard measures only "to the extent necessary to facilitate adjustment" in violation of Article 7.1 and 5.1.

78. **Third**, Japan considers that by failing to provide a timetable for progressive liberalization in its Notice of 14 March 2013, Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards since a timetable for progressive liberalization constitutes a "pertinent issue of fact and law" within the meaning of Article 3.1 and therefore should be part of the report published by the competent authorities. Likewise, the lack of a timetable for progressive liberalization constitutes a violation of Article 4.2(c) which requires the publication of a detailed analysis of the case and a demonstration of the relevance of the factors examined.

3.8 Ukraine violated Article II:1(b) of the GATT 1994

79. Japan claims that the unlawfulness of Ukraine's safeguard measures has been demonstrated beyond all doubt. Therefore, it must be concluded that Ukraine imposed duties which are in excess of those set forth in its schedule, thereby violating Article II:1(b) of the GATT 1994.

[49] Appellate Body Report, *US – Line Pipe*, para. 261.

4. LEGAL CLAIMS: PROCEDURAL REQUIREMENTS UNDER ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS

80. Japan claims that Ukraine has violated Articles 12.1 and 12.2 of the Agreement on Safeguards, since it has failed to immediately notify the Committee on Safeguards in accordance with the requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards. Furthermore, Japan submits that Ukraine violated Articles 12.3, 12.5 and 8.1 of the Agreement on Safeguards.

4.1 Ukraine failed to comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards

81. **First**, Ukraine failed to notify "immediately" the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply safeguard measures, thereby violating Article 12.1 of the Agreement on Safeguards. Article 12.1 of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards at three points: a) when initiating an investigatory process; b) when making a finding of serious injury; and c) when taking a decision to apply or extend a safeguard measure. In all three cases, the notification must be made "immediately." An "immediate" notification is to be made "without delay, at once, instantly"[50] in order to allow "the Committee on Safeguards, and Members, *the fullest possible period* to reflect upon and react to an ongoing safeguard investigation."[51] Article 12.1 sets out "three separate obligations" to make notification to the Committee on Safeguards, "each of which is triggered 'upon' the occurrence of an event specified in one of the three subparagraphs."[52]

82. In the first place, Ukraine failed to "immediately" notify the Committee on Safeguards upon initiating the safeguard investigation. In the present case, the decision to initiate the safeguard investigation published in the Official Journal on 2 July 2011 was only notified on 13 July 2011, i.e. 11 days after its publication. Japan does not dispute that the need for translation into one of the WTO's working languages, invoked as a justification for the delay by Ukraine, is a factor that may be taken into account to determine the degree of urgency required under Article 12.1 of the Agreement on Safeguards. However, Japan does not agree with Ukraine that this factor claimed to have a bearing on the degree of immediacy in this case, justifies a notification period of 11 days and would, as a result, allow to consider a notification made in that period of time to be "immediate" under Article 12.1(a). In particular, in light of the "the character of the information supplied"[53], the need to prepare a document counting 604 words in one of the WTO's working languages cannot justify a delay of 11 days, especially with regard to a Member's obligation under Article 12.1 to limit the amount of time taken to prepare a notification to a "minimum".[54]

83. In the second place, Ukraine violated its obligation to notify "immediately" upon making a finding of a serious injury or threat thereof pursuant to Article 12.1(b) of the Agreement on Safeguards and upon taking a decision to apply a safeguard measure pursuant to Article 12.1(c). It follows from the text of Article 12.1 and the intention of the drafters that the relevant date by reference to which the Panel should assess the existence of any delay in notifying the relevant information pursuant to Articles 12.1(b) and 12.1(c) is respectively the moment of making a finding of injury for the purposes of Article 12.1(b) and the moment of taking a decision to apply a safeguard measure for the purposes of Article 12.1(c). Indeed, the aforementioned triggering event under Articles 12.1(b) and 12.1(c) gives "the (…) Members, *the fullest possible period* to reflect upon and react"[55] to the corresponding stage in the investigation given the imminence of the application of the measure entailing the opportunity for WTO Members to exercise their rights under the Agreement on Safeguards, in particular Article 12.3, and to require the imposing

[50] Panel Report, *Korea – Dairy*, para. 7.128 confirmed by Appellate Body Report, *US – Wheat Gluten*, para. 105.
[51] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).
[52] Appellate Body Report, *US – Wheat Gluten*, para. 102.
[53] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[54] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[55] Appellate Body Report, *US – Wheat Gluten*, para. 106 (emphasis in the original).

Member's compliance with the substantive obligations under the Agreement on Safeguards. In the present case, the "decision" to impose safeguard measures taken by Ukraine on 28 April 2012 which was published in the Official Journal on 14 March 2013 has been notified to the Committee on Safeguards on 21 March 2013. Since, as noted above, the triggering event is the "taking" of the decision which took place on 28 April 2012, the notification was made almost one year after the taking of the decision and is therefore clearly inconsistent with the requirement of "immediate" notification under Article 12.1(b) and (c) of the Agreement on Safeguards.

84. **Second**, Ukraine violated Article 12.2 of the Agreement on Safeguards. Article 12.2 requires the Member proposing to apply a safeguard measure to provide the Committee on Safeguards with "*all* pertinent, not just *any* pertinent, information."[56] The notifications under Article 12.1(b) and 12.1(c) must "*at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."[57]

85. In the first place, the notification made by Ukraine pursuant to Article 12.1(b) and Article 12.1(c) of the Agreement on Safeguards on 21 March 2013 does not include evidence of serious injury or threat thereof caused by the increased imports, as the following mandatory information is absent from the notification: the amounts of the decrease in imports in absolute terms and the amounts of the increase in imports in relative terms over the investigation period, the intervening trends for 2008-2009 and for 2009-2010 in relation to each injury factor, the absolute figures for each injury factor and "the causal link between increased imports of the product concerned and serious injury or threat thereof".

86. In the second place, in violation of Article 12.2, Ukraine did not provide any "timetable for progressive liberalization" in its initial notification made on 21 March 2013. The fact that Ukraine's notification made on 28 March 2014, i.e. more than a year after its notification on 21 March 2013, includes a timetable for progressive liberalization cannot render the previous notification made by Ukraine on 21 March 2013 consistent with Article 12.2 of the Agreement on Safeguards. In that respect, it should be underlined that "the notification serves essentially a transparency and information purpose,"[58] enabling in particular exporting Members to "be in a better position to engage in meaningful consultations, as envisaged by Article 12.3"[59]. The absence of the required information, including the timetable for progressive liberalization, defeats this fundamental goal of "transparency and information".

4.2 Ukraine failed to comply with the requirements of Article 12.3 of the Agreement on Safeguards

87. **First**, Ukraine did not provide an adequate opportunity for prior consultations with Japan after Ukraine notified the Committee on Safeguards under Article 12.1(c) and 12.2 of the Agreement on Safeguards on 21 March 2013. Despite the repeated requests of Japan and other WTO Members for consultations under Article 12.3 after Ukraine's notification on 21 March 2013, no consultations were held with a view to reviewing the information provided by Ukraine in its notification pursuant to Article 12.2 of the Agreement on Safeguards made on 21 March 2013.

88. It follows from the wording of the Agreement on Safeguards and the findings of previous panels and the Appellate Body that the requirements under Article 12.3 cannot be satisfied, if consultations took place on the basis of all the information under Article 12.2 provided by different means than the notifications under Articles 12.1(b) or 12.1(c). Indeed, Article 12.3 provides that an adequate opportunity for prior consultations are to be provided "with a view to, *inter alia*, reviewing the information ***provided under paragraph 2***" of Article 12. The information "provided under paragraph 2" is the information that has been provided "in making the notifications" under

[56] Appellate Body Report, *Korea – Dairy*, para. 107.
[57] Appellate Body Report, *Korea – Dairy*, para. 109.
[58] Appellate Body Report, *Korea – Dairy*, para. 111 referring to Panel Report, *Korea – Dairy*, para. 7.126.
[59] Appellate Body Report, *Korea – Dairy,* para. 111.

Article 12.1(b) and 1(c) to the Committee on Safeguards. Thus, the wording clearly confirms that the opportunity for prior consultations must be given once the notification has been made pursuant to Articles 12.1(c) and 12.2 of the Agreement on Safeguards. Furthermore, the "information provided under paragraph 2" covers not only "all pertinent information" but also any "additional information" provided upon the request of the Council for Trade in Goods or the Committee on Safeguards. In the absence of any notification under Articles 12.1(b) and 12.1(c), it would appear impossible to provide the "additional information" at the request of the Council for Trade in Goods or the Committee on Safeguards.

89. **Second**, in any event, the consultations held on 19 April 2012 do not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards. Article 12.3 requires that the Member proposing to apply the safeguard measure provide exporting Members with sufficient time and sufficient information for meaningful consultations. [60]

90. The Key Findings sent by the Ministry of Economic Development and Trade of Ukraine on 11 April 2012 to the Embassy of Japan in Ukraine did not provide sufficient information to enable meaningful consultations, as they did not contain a proposed date of application, any precise details, such as the rate of the safeguard measure or any pertinent information of essential nature concerning injury, causation and other elements mentioned in Article 12.3.

91. Furthermore, Ukraine did not provide Japan with "sufficient time" to enable meaningful consultations since the Key Findings was only provided to Japan 8 days prior to the date of the consultations.

4.3 Ukraine violated Article 12.5 of the Agreement on Safeguards

92. Japan claims that even if it were to be found that consultations were held between Ukraine and Japan, the results of these consultations have not been notified, and *a fortiori* not notified "immediately" to the Council for Trade in Goods. Thereby, Ukraine violated Article 12.5 of the Agreement on Safeguards.

93. Indeed, it is the Member "proposing to apply or extend a safeguard measure" under Article 12.3 who is obliged to make the notification as a "Member concerned" within the meaning of Article 12.5.

94. Neither the alleged failure of Japan to notify the results of the consultations under Article 12.5 nor the alleged harmless nature of the violation has any bearing on the fact that Ukraine did not comply with the requirement stated in Article 12.5 of the Agreement on Safeguards.

95. If the Panel were to hold that consultations within the meaning of Article 12.3 were held, the Panel must sustain Japan's claim under Article 12.5, since it is not contested that any result of alleged consultations under Article 12.3 in this case has ever been notified to the Council for Trade in Goods.

4.4 Ukraine violated Article 8.1 of the Agreement on Safeguards

96. Japan claims that Ukraine failed to comply with Article 8.1 of the Agreement on Safeguards since it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994 in accordance with Article 12.3 of the Agreement on Safeguards.

97. As pointed out above, Ukraine has failed to "provide an adequate opportunity for prior consultations" within the meaning of Article 12.3. For that reason alone, Ukraine should therefore be found to violate Article 8.1 of the Agreement on Safeguards. Indeed, "[i]n view of the explicit

[60] Appellate Body Report, *US – Wheat Gluten*, para. 136.

link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot […] 'endeavor to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure."[61]

98. In this regard, Article 8.2 does not serve as a rectification of a violation of Article 8.1. Article 8.2 does not address the breach of Article 8.1, since it is concerned with a temporary relief to the harm of a safeguard measure as a consequence of the failure to reach an agreement on adequate means of trade compensation under Article 8.1.

5. CONCLUSIONS

99. Japan respectfully requests the Panel to find that Ukraine acted inconsistently with its obligations under the Agreement on Safeguards and the GATT 1994, and in particular, that the safeguard measures adopted by Ukraine are in violation of the following provisions:

- Articles 3.1 and 4.2(c) of the Agreement on Safeguards because Ukraine failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined;

- Article 3.1 of the Agreement on Safeguards because Ukraine failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and the alleged "unforeseen developments"; and failed to provide reasoned and adequate findings and conclusions with regard to such "unforeseen developments";

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide reasoned and adequate findings and conclusions with regard to the increase in imports;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to examine all relevant injury factors; and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of threat of serious injury;

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards because Ukraine failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged threat of serious injury; failed to make a proper non-attribution analysis; and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link

[61] Appellate Body Report, *US – Wheat Gluten*, para. 146.

between the increased imports and the alleged threat of serious injury and non-attribution of other factors;

- Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards because Ukraine has failed to apply safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measures by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measures are necessary to prevent or remedy the alleged threat of serious injury;

- Article II:1(b) of the GATT 1994 because Ukraine imposes duties which are in excess of those set forth in its schedule through the unlawful safeguard measures at issue;

- Articles 12.1 and 12.2 of the Agreement on Safeguards because Ukraine did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

- Article 12.3 of the Agreement on Safeguards because Ukraine did not provide adequate opportunities for prior consultations on the proposed safeguard measures and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;

- Article 12.5 of the Agreement on Safeguards because Ukraine did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards;

- Article 8.1 of the Agreement on Safeguards because Ukraine did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994, in accordance with Article 12.3 of the Agreement on Safeguards.

100. Japan also respectfully requests the Panel to recommend that the DSB requests Ukraine to bring its measures into conformity with the Agreement on Safeguards and the GATT 1994 by revoking its safeguard measures.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

LIST OF ABBREVIATIONS

This document uses abbreviations as follows:

- **The Agreement**: Agreement on Safeguards;
- **The Commission:** the Interdepartmental International Trade Commission;
- **The Key Findings:** the Key Findings of the Ministry of Economic Development and Trade of Ukraine Based on Special Investigation on Import of Motor Cars to Ukraine Regardless of Country of Origin and Export;
- **The Law**: Law of Ukraine "On Application of Safeguard Measures against Imports to Ukraine";
- **The Ministry:** the Ministry of Economic Development and Trade of Ukraine;
- **The Notice**: the Notice on the application of safeguard measures on the imports of motor cars into Ukraine regardless of the country of origin or export published on 14 March 2013.

I. Introduction

1. This dispute concerns a safeguard measure on certain passenger cars, one of the first safeguards adopted by Ukraine as a newly-acceded Member who liberalized its tariff from 25 per cent to 10 per cent and was hit hard by the 2008 global crisis immediately after its accession.

2. The safeguard measure grants such Members the ability to escape from otherwise inflexible obligations under the WTO. In the event of unforeseen developments threatening domestic industry, only the safeguard measures may guarantee the stability of Member's commitments and enable the Member to restore competitiveness of domestic industry facing a surge of imports and the resulting serious injury. It is clear that domestic industries protected by safeguard measures gain the benefit of a temporary respite from competition with imports to build-up its competitiveness.

3. The global financial crisis had a severe impact on the economy of Ukraine and especially its motor car industry. The referred crisis resulted in a 15% decrease in Ukrainian GDP and rapid depreciation of the national currency. Its effect on the passenger car industry was even more severe.

4. The impact of 2008 global financial crisis and liberalized trade as a result of accession to the WTO caused an increase in imports relatively to the domestic production and consumption was an unforeseen development that called for emergency action on imports given that there was a surge in imports relative to domestic production during that same period.

5. All of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 were evident. Therefore, Ukraine had the right to impose the challenged safeguard measure on certain passenger cars.

6. The measure was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The safeguards measure was significantly liberalized during the period of its application.

7. Finally, Ukraine also complied with the procedural obligations contained in Articles 3, 8 and 12 of the Agreement, as well as Article XIX:2 of GATT 1994, regarding the consultations at certain stages of the process, notifications, and publications. These procedural obligations are different from the substantive obligation set forth in Article 2 which determines the right to impose safeguard measures and still were complied fully.

8. Thus Japan's claims to the contrary must therefore be rejected.

II. Arguments of Ukraine

1. Japan's claim that Ukraine violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards because it did not conduct a proper "investigation" and did not publish a sufficiently detailed report is flawed

a. Introduction

9. Ukraine conducted a proper investigation under Article 3.1 of the Agreement and published a sufficiently detailed report under Articles 3.1, last sentence, and 4.2(c) of the Agreement.

b. Legal argument

10. First, Ukraine maintains that the investigation was conducted in accordance with the limited obligations of Article 3.1 of the Agreement. The Agreement does not stipulate any particular requirement to investigation determination period. According to the Article 8.2 of the domestic Law the "period of investigation shall be normally from one to three years". As it was made clear in the Notice and appropriate notification to the WTO, during the investigation period in 2010 compared to 2008 import of cars in Ukraine increased relative to the domestic production and consumption that threaten to cause serious injury to domestic industry. Thus, the conclusions were based on the period in 2010 compared to 2008. Furthermore, the investigating authority also presented some more recent data that was available before the investigation was concluded for the 1st half of 2011 compared to 2008 and 2010 in the Key Findings, particularly, about the further increase in import volumes in relative terms.

11. Ukraine set the period of investigation as 2008 through 2010 when it initiated the safeguard investigation on 2 July 2011 and carefully investigated the information inside this period. The investigating authority is not obliged to review the data outside the period of investigation as erroneously claimed by Japan.

12. Therefore, the investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected. There is no obligation in the Agreement to continue to update the information following the end of the period of investigation and certainly not following the end of the investigation.

13. Moreover, it was generally accepted by the parties and the third parties that a delay before the imposition of safeguard measures could possibly be justified by good faith efforts to negotiate safeguard measures. It is important that a number of consultation and meetings between the Ukrainian officials and the representatives of other exporting Members were held to discuss the possible imposition of safeguard measure before the application of the measures.

14. Second, Japan complains about the fact that there was a gap between the date of the termination of the investigation and the date of application of the measure. However, there is nothing in the Agreement that provides that the application of the measure must follow the finish of the investigation within a certain period of time. Moreover, this matter does not concern the investigation but only the application of the measure and does not invoke the substantive norms of Article 3.1 and Article 4.2 that are limited to the actions of the investigating authority in the investigation, which was finished on 28 April 2012. Therefore, Ukraine was not obliged in any way to consider any additional factors or periods after the safeguard investigation was finished.

15. Furthermore, Article 3.1 of the Agreement does not prescribe any deadline for the publication requirement. It merely provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". In the context of Article 3.1 and especially Article 4.2 that requires the Member to publish such report "promptly", this publication obligation arises only at the time of adoption of the measure, and not before that time.

16. Third, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defence of their interests, in accordance with the procedural obligation of Article 3.1.

17. Ukraine contacted the Embassy of Japan during the investigation and provided it and all the other registered interested parties with a summary of their rights and obligations as an interested party of the safeguard investigation, as well as the relevant procedures and a mechanism to actively participate in the investigation according to the Law and the Agreement.

18. In the Notice on initiation the interested parties were provided a 45-day period to send the comments and views to the investigating authority for a consideration. A number of the interested parties used the right to present their position regarding whether or not the application of a safeguards measure was necessary. The arguments of the interested parties were taken into consideration by the investigating authority. Japan, however, did not send its comments to the investigating authority.

19. As for the hearings, all of the interested parties had a notice of and an ample opportunity to participate in the hearings held on 22 March 2012 and to present evidence and its views and arguments. A number of the interested parties used the right to participate actively in the hearings and to present their positions, which were taken into consideration by the investigating authority.

20. Japan did not request to have access to the information provided by other interested parties, particularly the application by the domestic industry, and did not complain about not being provided such information by these parties automatically. It was concluded by the investigating authority during the investigation that Japan was fully informed by the other interested parties, supplied with all the available evidence, views, submissions, and presentations.

21. It is important that the Member is obliged only to provide an opportunity for the participation, but obviously cannot force the interested parties to present their interests. Japan was able to participate much more actively in the investigation like the other interested parties did, but did not fully exercise its rights at that moment. It is highly doubtful that Japan's limited participation by providing only declarative statements during the investigation was the fault of the Ukrainian investigating authorities in the light of all of the above facts. If such arguments are taken for granted, any interested party in any future investigation that ignored its right to communicate with others interested parties and authorities can question the safeguard measure afterwards on a similar premise.

c. Conclusion

22. The investigation took into account all of the data relating to the period of investigation and Ukraine updated this information with more recent information that was available before the investigation was concluded. Japan's apparent argument that the authority should have continued to update the information even after the end of the investigation is not supported by the text of the Agreement and must be rejected.

23. Ukraine published its detailed analysis of the investigation promptly upon adoption of measure and therefore complied with the publication-related obligations of Articles 3.1 and 4.2(c) of the Agreement. There is no set of rules in the Agreement or Article XIX of GATT 1994 concerning the format of published report.

24. Similarly, Ukraine involved the Japanese interested parties in the course of the investigation and provided appropriate means for the defense of their interests, in accordance with the procedural obligation of Article 3.1. Japan's claim to the contrary is not supported by the facts on the record.

25. Therefore, Ukraine requests that all of Japan's claims under Article 3.1 and 4.2 (c) of the Agreement be rejected.

2. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to its determination on unforeseen developments is flawed

a. Introduction

26. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Article 11.1(a) of the Agreement is not justified because Ukraine properly demonstrated the existence of "unforeseen developments", their logical connection to the increase in imports relatively to the domestic production, and consequently fulfilled its obligations under Articles 3.1 and 4.2(c) of the Agreement.

b. Legal argument

27. Unforeseen developments are a circumstance that is found in Article XIX of GATT 1994 and must be demonstrated as a matter of fact. Moreover, the unforeseen developments can only be viewed together with the binding effect of the obligations under the GATT. As the injury to the domestic industry or threat thereof has to be caused by the significant increase of imports, but not by the unforeseen developments or the obligations incurred under GATT 1994 directly. It is the causal relationship between the increase in imports and the injury to the domestic industry or threat thereof that is the prerequisite for the application of safeguard measures and need to be analysed during the safeguard investigation. The unforeseen developments and the obligations incurred under GATT 1994 are the circumstances that shall cause the significant increase of imports.

28. In the present case the global financial and economic crisis that was neither foreseen nor expected by Ukraine earlier during its trade negotiations on concessions, and the obligations assumed during Ukraine's accession caused the increase in imports relatively to the domestic production. One of these circumstances alone could not result in a significant enough change in competitive relationship between imports and domestic products.

29. The facts confirm that the increased imports can only be associated with the combination of a global economic crisis just after the liberalization and other major changes in the Ukrainian economy as a result of the WTO accession. These circumstances existed as a matter of fact and were identified in the Key Findings, the Notice, and the notification to the WTO even though the latter included only a reference to the results of these circumstances.

30. As the 2008 global financial and economic crisis is a widely accepted and an uncontested fact, it does not indeed require any additional evidence to prove its existence. Moreover, as this circumstance was not questioned by the interested parties, it was concluded by the investigating authority that it existed as a matter of fact and did not need any confirmation.

31. The investigating authority explained that it was unforeseen that imports would increase by 37.9 per cent relative to domestic automobile production in Ukraine in 2010 compared to 2008, despite the decrease in import volumes in absolute terms. This relative increase in imports decreased the market share of the domestic industry by 35.45 per cent. The significant increase in market share of imports came on the heels of the global financial crisis, which had a significant impact on the Ukrainian passenger car industry. Japan was obviously aware of the global crisis during the period of investigation.

32. Ukraine did provide an analysis of the consequences of the global financial and economic crisis. Moreover, Ukraine also analysed other factors that were caused directly by the crisis, namely the consequent decrease in consumption in the non-attribution section of the Key Findings. It was determined that this effect of the global economic crisis could not be responsible for the injury to the domestic industry.

c. Conclusion

33. Ukraine established a clear relationship between the unforeseen developments that existed as a matter of fact and the increase in imports that threatened to seriously injure the domestic industry.

34. Japan's argument Ukraine did not provide sufficient "reasoned conclusions" on "all pertinent issues" including the unforeseen developments in violation of the requirement to provide a report on these issues is not supported by the evidence on the record.

35. Therefore, Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement must fail.

3. Japan's claim that Ukraine violated Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards with respect to the determination of the effect of the obligations incurred under the GATT is without merit

a. Introduction

36. Contrary to Japan's claim, Ukraine's determination was conducted in accordance to Article XIX:1(a) in context of the "effect of obligations incurred under the GATT". Ukraine mentioned the effect of its GATT obligation under Article II:1(b) to maintain tariffs on these products at no more than 10 percent, did address the logical connection of those obligations to the increase in imports, and reported on these "pertinent" elements under Articles 3.1 and 4.2 of the Agreement.

b. Legal argument

37. To accede to the WTO, Ukraine committed to reduce the import duty on passenger cars in 2008 from 25 percent to 10 percent with no phase-down period. Unfortunately, after the tariffs decreased as a result of Ukraine's obligations the global financial and economic crisis started. Due to these circumstances the imports of passenger cars into Ukraine relative to domestic production increased in the same time as the absolute amount of imports decreased as referred to in the Notice.

38. The reduction of the tariff to 10 percent was analysed in the non-attribution section of the Key Findings. It was concluded that its effect on the imports of passenger cars into the Ukraine market during the period of investigation was limited though and could not cause the significant increase in imports by itself.

39. Furthermore, there is no need for any detailed conclusions and other explanation when as a matter of fact it is uncontested that Ukraine made significant tariff commitments in respect of passenger cars when it joined the WTO in 2008. Of all countries, Japan cannot seriously deny that as a matter of fact this is the case given its active involvement in the Ukraine's accession negotiations.

40. It is a fact that Ukraine made significant tariff concession on passenger cars when it joined the WTO on 16 May 2008. This is a fact Japan cannot deny given its active involvement in the Ukraine's accession negotiations. Moreover, Ukraine mentioned the obligations in the Key Findings incurred under the GATT in a specific context clearly presenting the results of the analysis of causality between the obligations and the increase in imports.

c. Conclusion

41. Ukraine therefore requests the Panel to reject Japan's claim of violation of Article XIX:1(a) of the GATT 1994 in combination with Article 11.1(a) of the Agreement, and Articles 3.1 and 4.2(c) of the Agreement.

Claim 4: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of increased imports must fail

a. Introduction

42. Ukraine obviously fulfilled its obligations in regard to its determination of the increased imports. Japan's claims must fail because Ukraine showed that the increased imports were caused by unforeseen developments and the effect of its GATT 1994 obligations, and the investigating authority did examine all the elements relating to increased imports, that is:

the evidence of import increase is recent;
the increase was sufficiently recent, sudden, sharp and significant;
the qualitative analysis of the imports increase was conducted;
the unforeseen or unexpected aspects of the increase were obvious;
the conditions of the increase in imports were analysed.

43. Therefore, Ukraine acted in accordance to Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Moreover, Ukraine reported these elements pursuant to Articles 3.1 and 4.2(c) of the Agreement. Japan's claims are not supported by the facts on the record and are without merit.

b. Legal argument

44. First, as explained in the prior section, Ukraine demonstrated that the increased imports were the result of unforeseen developments and the effect of the tariff commitments it made on passenger cars. The first argument of Japan, which is a purely consequential argument that is based on its flawed claims relating to Article XIX of GATT 1994, is thus without merit.

45. Second, Ukraine met its obligations under the Agreement by examining all elements related to the increase in imports. The data used by Ukraine in its analysis was the most recent data available as was explained above.

46. Third, the increase in imports that caused a threat of serious injury was sufficiently recent, sudden, sharp and significant. Although the volume of passenger car imports into Ukraine decreased by 71 percent, there was a significant increase in imported passenger cars in relative terms. In 2010, the most recent year of data, imports of passenger cars relatively to domestic consumption and domestic production showed a sudden and significant increase. In 2010, they sharply increased by 37.1 and 37.9 percent respectively from 2008. The increase by over 30 percentage points is obviously sudden, sharp and significant.

47. Ukraine analyzed the amounts and rates of the increase in imports and taking into account the non-disclosure requirements of Article 3.2 provided the non-confidential summary of such analysis in the Key Findings, Notice and notification to the WTO.

48. Japan aims to add to the obligations of Ukraine under Article 4.2 of the Agreement a responsibility that would be simultaneously a violation of Article 3.2 provision which explicitly states that: "such information shall not be disclosed without permission of the party submitting it". As explained by the Panel in *US – Steel Safeguards*, the non-disclosure requirement is more important as far as the authority is able to resort to "ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality".

49. However, by providing not only the rates, but also the amounts, hence, the absolute figures of the import increase or any of other relevant factors having a bearing on the situation of that industry Ukraine would violate its obligations under Article 3.2 and invalidate all the efforts it took to protect confidential data of the domestic industry by making the confidentiality of the indexed data vulnerable to a simple numerical analysis.

50. In its Key Findings, Notice, and WTO notification Ukraine managed to present a sufficiently detailed picture of the increased imports and oblige its non-disclosure obligations by indicating that "the volume of imports of motor cars into Ukraine in quantitative terms decreased by 71%, the share of imports increased by 37.1% to domestic consumption and by 37.9% to domestic production". It is obvious that the rates of increase in imports were based on the absolute figures.

51. As discussed in more detail when addressing Japan's injury related claims, this sudden increase in imports relative to domestic production and consumption threatened to cause further serious injury. The domestic industry's market share decreased by 35 percent in 2010 over 2008 levels.

52. This analysis was fully conducted by the investigating authority during the investigation and was properly summarized in the Key Findings, the Notice and the WTO notification. The absolute figures, however, were confidential and were therefore not disclosed.

c. Conclusion

53. Japan's claims regarding the determination of increased imports under Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected.

Claim 5: Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its determination of injury and/or threat of injury is flawed

a. Introduction

54. Ukraine conducted a comprehensive investigation of injury under Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994. Japan's arguments fail for the following reasons:

Ukraine evaluated the injury factors properly;
Ukraine did determine that there was a significant overall impairment to the domestic industry;
Ukraine based the investigation on the most recent data available;
Ukraine determined a threat of serious injury pertaining to the most recent past; and
Ukraine conducted the qualitative examination of all injury factors properly.

55. Moreover, as Ukraine fulfilled its obligations in the above context, Japan's consequential claims that the failure to sufficiently explain these elements in the Notice violates Articles 3.1 and 4.2(c) of the Agreement must fail as well.

b. Legal argument

56. Serious injury is defined in Article 4.1 of the Safeguards Agreement as "a significant overall impairment in the position of the domestic industry". The same provision states that "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, adding that a determination of the existence of a threat shall be based on facts and not merely on allegation, conjecture or remote possibility.

57. Ukraine analysed all the injury factors including the market shares and provided a reasoned and adequate explanation of how the facts supported its final determination. Contrary to Japan's arguments, Ukraine conducted a full analysis of the serious injury or threat of injury factors. Ukraine summarized its confidential analysis of the factors required by the Agreement taking into account the non-disclosure requirements of Article 3.2 and the guidance of the Panel in *US – Steel Safeguards*.

58. As the public summary makes clear, Ukraine analysed the data trends over the course of the period of investigation for each factor indicated in Article 4.2 and provided a result of such analysis in the Key Findings, Notice and the WTO Notification. Each factor evidences the "the worsening financial and economic condition of the domestic producers" over the course of the period investigation. The potential for significant injury is shown in each factor that decreased significantly from 2008 to 2010.

59. Nevertheless, it was found by investigating authorities that while all the factors confirm the worsening condition of the domestic industry, the high standards of material deterioration due to the increase in imports put by the wording of the "serious injury" criterion established by the Agreement could not be met incontestably.

60. The standards concerning the current deterioration of the domestic industry under the "threat of serious injury" are lower if such threat is shown to be imminent. Appellate Body stated in its report in *US – Line Pipe* that "defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure."

61. Ukraine did find that the worsening of all the relevant factors of an objective and quantifiable nature coupled with a significant export potential of the notable exporters of motor cars into Ukraine can qualify as a "threat of serious injury".

62. As was concluded by the investigating authority, the significant worsening of domestic industry (including the major increase in the market share) was a consequence of the increasing imports at that moment. Ukraine analysed the capacity in the exporting countries, they had significant available productive capacity ready to be exported to Ukraine.

63. The significant export potential of the exporting countries led the investigating authority to believe that the import trends then present would continue and cause even more significant deterioration of the domestic industry. The foreign industries referred to in the Notice are responsible summarily for more than 90 per cent of Ukrainian motor car imports; their orientation on exports and free additional capacity could be directed to Ukraine.

64. As the share of specific importing countries in the total imports was not expected to change notably and the total exports from these countries was supposed to increase, the amount of exports from these countries to Ukraine was supposed to grow majorly as well.

65. Therefore, Ukraine not only analysed the injury factors to conclude the fact of imminent serious injury, but also included the export potential of the exporting countries in its analysis.

66. Ukraine provided an adequate public summary of its reasoned and adequate explanation of how the seven injury factors were examined and applied in the injury investigation. Ukraine's analysis of the domestic passenger car industry in absolute figures, however, was confidential. In its Key Findings, Notice and notification to WTO Ukraine provided a public summary of its confidential analysis. Ukraine followed the guidance of the Panel in *US – Steel Safeguards*, which discussed a way to provide the relevant explanations while addressing the confidentiality issues.

67. In order to protect the domestic passenger car industry's confidential information about sensitive technological, productive, managerial, financial and aspects of its activity that may cause a damage to the commercial interests of the company if disclosed, the results of the quantitative and qualitative evaluation of threat of serious injury to the domestic industry were not presented by the investigating authority in absolute terms. Acknowledging the need to disclose as much relevant information as possible, the investigating authority published the indexed results of the conducted analysis of injury factors. Therefore, Ukraine addressed the requirements of both Articles 3.1 and 4.2(c) of the Agreement as much as it was possible in these circumstances.

c. Conclusion

68. For all of the reasons above, it is clear that a proper determination of threat of serious injury was made and that all relevant factors were examined. All of Japan's claims under Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of GATT 1994 must therefore be rejected.

6. Japan's claim that Ukraine violated Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in its determination of the causal link between the increase in imports and the serious injury or threat of injury is flawed.

a. Introduction

69. Ukraine fulfilled its obligations as it demonstrated the existence of a causal link between increased imports and serious injury or threat thereof and ensured that the injury caused by factors other than the increased imports is not attributed to the increased imports.

70. Alleged violations of Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 11.1(a) of the Agreement claimed by Japan are without merit. Consequential arguments that the lack of reasoned conclusions on this issue is a violation of Articles 3.1 and 4.2(c) of the Agreement must therefore fail as well.

b. Legal argument

71. Ukraine conducted the causation analysis required by Article 4.2(b). During the investigation, Ukraine "established that the volume of the Product under investigation imported into Ukraine has been growing throughout the period of investigation in relation to production volume of the domestic industry". Ukraine also recognized that although imports of passenger cars decreased by 71 percent from 2008 to 2010 in absolute terms, imports increased by 38 percent relative to the Ukrainian domestic passenger car production. These data demonstrated that, although there was a decline in the passenger car across the market, imports were still able to increase in relation to domestic production.

72. During the investigation, Ukraine found that although the imports decreased in absolute terms, the volume of the product under investigation imported into Ukraine has been growing throughout the period of investigation relatively to the production volume of the domestic industry and the domestic consumption.

73. Ukraine recognized that although imports of passenger cars decreased by 71 per cent from 2008 to 2010 in absolute terms, imports increased by 37.9 per cent relatively to the Ukrainian domestic passenger car production and by 37.1 relatively to domestic car consumption. These data demonstrated that imports were still able to increase in relative terms.

74. Ukraine found that the consumption of passenger cars fell by 78.8 per cent between 2008 and 2010 while the domestic producers' market share fell by 35 per cent over the same period and concluded that, in light of the increase in imports relative to production volumes and the conditions of such imports, the domestic passenger car industry was driven out of the Ukrainian market by imports. The growing market share of imports resulted in "a worsening of the poor state of the domestic industry and a threat of serious injury in the future".

75. It was for Japan to demonstrate that despite this clear correlation, the causation analysis of Ukraine was lacking. In addition, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. The genuine and substantial relationship of cause and effect between the increase in imports and the threat of serious injury cannot be in doubt.

76. The investigating authority concluded that the domestic product has characteristic features that are very similar to the characteristic features of the product that was the subject of investigation, and therefore can be considered to be a "similar good" within the meaning of the provisions of the Agreement and the Law. Moreover, the relatively narrow definition of the good under investigation and its high similarity to the imported good led the investigating authority to believe that the imports and the domestic production are engaged in a clear direct competitive relationship and can be easily substituted for each other.

77. Such a relationship means that because the importers and domestic industry are competing for a contracting domestic market, any change in market share taken by imports has an obvious and direct influence on the demand for the production of the domestic industry, its financial and economic state. Therefore, the conditions of competition between the domestic products and the imported products were such that there cannot be any doubt about the direct effect in terms of sales between the two. Japan has failed to provide evidence that imported and domestic passenger cars covered by the investigation were not in direct competition.

78. Moreover, as far as it concerns the other claims of Japan Ukrainian investigating authorities conducted a proper non-attribution analysis.

79. As such, Ukraine recognized that the decrease in consumption caused by global financial crisis was an objective factor that influenced every industry in Ukraine and abroad. As the deterioration of automotive industry is more significant than it was expected from Ukrainian industry or a car producer in any other country, it was concluded that the decrease in consumption could be responsible for only a limited part of the injury to the national industry.

80. Regarding the abolition of government support in 2008 and the corresponding deficient competitiveness of the domestic products, the investigating authority noted that these factors could cause the deterioration of the domestic industry, but cannot explain the coinciding increase

of imports. It was also noted that the government support of motor car producers ended before 2008 and the investigation authority did not consider earlier data. The deterioration of the domestic industry could be attributed to the sudden lack of competitiveness caused by abolition of government support if the investigation period included 2007, but the claim that it could influence the domestic industry negatively after 3 years later is presumptuous.

81. As for the imposition of the additional 13 % import surcharge imposed on the imports of motor cars under the WTO Balance of Payments mechanism, Ukraine has noted that this surcharge could have influenced the extent of injury caused to the domestic industry only in a limited way as it was in force only during a short period from March till September 2009 and therefore could not be attributed to the trends in 2008 and 2010. The countries unaffected by this duty were the Members of CIS FTA, the Russian Federation with a 30 % share of total imports in 2009.

c. Conclusion

82. For all of these reasons, Japan's claim of violation of Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement and Article XIX:1(a) of the GATT 1994 must be rejected. Ukraine determined that there was a clear causal link between the increase in imports and the injury to the directly competitive domestic industry and ensured that any injury caused by other factors was not attributed to the increased imports.

7. Japan's claim that Ukraine violated Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to its imposition of the measures to the extent necessary to prevent or remedy serious injury and to facilitate adjustment is without merit

a. Introduction

83. Ukraine acted in accordance to Article XIX:1(a) of the GATT 1994 and Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement by applying the safeguard measures only to the extent necessary to prevent the threat of serious injury: the duty level and the length of the application was appropriate, as well as the progressive liberalization of the measure.

b. Legal argument

84. Ukraine clearly took into account the level of causal impact of the increase in imports on the serious injury to the domestic industry when it set the level of duty, the duration of the measure, and the scheme for progressive liberalization of the measure allowing the domestic industry to adjust.

85. Ukraine's measure is imposed strictly to the extent necessary to remedy the serious injury. It was therefore appropriate to apply a rate of duty sufficient to remedy the entirety of the serious injury that was threatened to be caused by the increased imports.

86. The investigation of the injury revealed that the level of duty requested by the domestic industry (33.4 to 47 per cent), which is comparable to the deterioration of the domestic industry, was excessive in light of the effect on the imports and the possibility of imposing a lesser duty sufficient to remedy and prevent the serious injury. Therefore, a level of duty of only 6.46 to 12.95 per cent was imposed.

87. Japan claimed that this level of duties is excessive as it was seemingly understood by Japan that to prevent the whole deterioration to the domestic industry.

88. However, Ukraine wants to recall the explanations of the Appellate Body in US — Line Pipe, which concluded that although the "serious injury" in Article 5.1 and Article 4.2 was "one and the same", the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied "only to the extent that they address serious injury attributed to increased imports", not "all serious injury".

89. It must be emphasised that these duties were imposed on such a level that was intended only to prevent the imminent serious injury. That was the reason why Ukraine did apply safeguard

measures only 6.46 to 12.95 per cent, but not the requested 33.4 to 47 per cent: the latter duty could stop the deterioration of the domestic industry but would definitely be in excess of the extent necessary to prevent the serious injury caused by the increase in imports.

90. Thus, Ukraine acted in accordance with Article XIX:1(a) of the GATT 1994 and Article 5.1 of the Agreement.

91. Second, the duration of the measure was determined to be strictly necessary to remedy the amount of serious injury. Due to the high level of serious injury a safeguard measure of sufficient duration to remedy the injury and to allow the industry to adjust was required.

92. Importantly, Ukraine once again did not go to the maximum of what it was entitled to do. It did not impose a measure for four years as possible under Article 7.4 of the Agreement, but imposed a measure of a shorter duration of three years only. In addition, it provided for a rapid and steep liberalization of the measure, again going well beyond what it is required to do. Thus the measure is in line with Article XIX:1(a) of the GATT 1994 and Article 7.1 of the Agreement, and is not more restrictive than necessary.

93. Third, the three-year measure triggered the requirement to progressively liberalize the measure over its full duration. Ukraine satisfied that requirement by implementing a plan of progressive liberalization that provided for a step-wise reduction in the duty level after 12 months and then after 24 months of the application of the safeguard measures.

94. Article 7.4 of the Agreement stipulates that a Member imposing a safeguard measure "shall progressively liberalize it at regular intervals during the period of application". This substantive obligation to liberalize a safeguard measure of greater than three years duration is of course related to the procedural requirement to notify a timetable for liberalization to the WTO Committee on Safeguards. However, the obligations are different. In this context, the substantive obligation to liberalize a measure at regular intervals requires a plan that is put into place and then implemented. The timing for notification of the timetable to the WTO is a separate obligation that must be addressed separately under Article 12.2.

95. Hence, Ukraine satisfied the Article 7.4 requirement by implementing a plan of progressive liberalization. The plan provided for a step-wise reduction in the duty level by the third after 12 months of implementation and then 24 months. By devising, implementing and notifying this plan, Ukraine has satisfied its obligation under Article 7.4 of the Agreement.

c. Conclusion

96. The safeguard measure was applied by Ukraine to facilitate adjustment in its every relevant aspect: level and duration, and scheduled progressive liberalization. The measure eases the process of economic adjustment to the competition of the domestic industry.

97. Thus, by taking into account all of these factors, Ukraine's investigation and determination are in line with Articles 5.1, 7.1, 7.4 and 11.1(a) of the Agreement.

8. Japan's claim that Ukraine violated Article II:1(b) of the GATT 1994 is a merely consequential claim that has to be rejected

98. Japan claimed that that Ukraine violated Article II:1(b) of the GATT 1994 by applying an unjustified safeguard measure and therefore imposing a tariff higher than the bound rate is not supported by the evidence.

99. A safeguard measure, implemented in accordance with Article XIX of the GATT 1994 and the Agreement, are permitted as "emergency action on imports of particular products".

100. As Ukraine's measure is a lawful safeguard measure applied under XIX of GATT 1994 and the Agreement that appropriately applies a separate form of duty on particular products to prevent or remedy serious injury or threat thereof caused by increased imports, it does not violate Article II:1(b) of the GATT 1994. Because Japan's predicate claims above must fail, so must fail this consequential claim.

101. Therefore Ukraine acted in accordance to Article II:1(b) of the GATT 1994 by imposing a safeguard measure according to Article XIX of GATT 1994 and the Agreement.

9. Japan's claim that Ukraine did not comply with the notification requirements under Articles 12.1 and 12.2 of the Agreement on Safeguards is in error

a. Introduction

102. Ukraine notified the Committee on Safeguards "immediately" under Article 12.1 of the Agreement upon initiating the safeguard investigation, making a finding of serious injury and of taking a decision to apply measures. Japan's claims are not supported by the evidence and should be rejected.

b. Legal argument

103. All notifications made by Ukraine were as immediate as possible in the light of the Ukrainian language not being an official WTO language. Ukraine has satisfied its notification obligations under the Agreement and Japan's claims to the contrary must be rejected.

104. As to the Article 12.1(a) requirement to notify the initiation of the investigation, Ukraine took the decision to initiate the investigation on 30 June 2011, published that decision on 2 July 2011, and notified the WTO on 13 July 2011. Ukraine submits that eleven days after publication of the notice about the decision to initiate is clearly "immediate" notification in accordance with Article 12.1 (a).

105. As to the Article 12.1(b) requirement to notify the injury determination and the Article 12.1(c) requirement to notify the decision to impose a measure, Ukraine took a decision on 28 April 2012, published the Notice about that decision on 14 March 2013, notified the WTO on 21 March 2013, and made the measure effective on 14 April 2013.

106. Ukraine considers that the 28 April 2012 date cannot be viewed to be the triggering event of taking a decision. According to the Ukrainian Safeguard Law, the investigation is finished after the relevant decision of the Commission is taken. The decision itself, however, is the document of internal use and cannot be viewed as an appropriate legal document until the official publication of the notice about the decision is made. Thus, it is the decision to publish the notice (and thus to allow its entry into force thirty days later) that is the key decision for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

107. The publication of the Notice, which provides findings and reasoned conclusions reached on all pertinent issues of fact and law under Articles 3.1 and 4.2 of the Agreement that makes the subsequent application of the safeguard measure imminent, is a key event for purposes of timeliness of Ukraine's Article 12.1(b) and (c) notifications.

108. Thus, given the triggering event occurred on 14 March 2013 and the notification to the Committee on Safeguards came on 21 March 2013, the notification seven days later is "immediate" in the sense of Article 12.1.

109. Regarding the requirement to give all pertinent information in the Article 12.1(b) notification of injury/threat determination, the Appellate Body has focused on the need to provide the information listed in Article 12.2 as well as information concerning the injury factors in Article 4.2(a). The Appellate Body in *Korea – Dairy* described "an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification".

110. These notifications sufficiently described the measure, which had not yet entered into force. Ukraine also notes that it is relevant that it had also provided Japan with the Key Findings, which provided it with information to undertake consultations, as is the stated purpose of the Article 12.1 notification requirements before the consultations and sent a number of letters over the period of 25 August 2011 to 25 March 2013. This is important given that, as confirmed by the Appellate Body in *Korea – Dairy*, another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions with a view to

allowing "any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation". Japan had the information it needed and did consult with Ukraine back in 2012 based on the information that was made available.

c. Conclusion

111. Ukraine's notifications relating to the investigation on passenger cars to the WTO Committee on Safeguards were timely and of sufficient content so as to be found consistent with its WTO obligations. For all of the above reasons, Ukraine considers that Japan's notification claims under Articles 12.1 and 12.2 of the Agreement must fail.

10. Japan's claim that Ukraine did not comply with the requirements of Article 12.3 of the Agreement on Safeguards is without merit.

a. Introduction

112. Japan's claims under Article 12.3 of the Agreement that Ukraine's consultations process violated its obligations must fail for two reasons: Ukraine did provide an adequate opportunity for prior consultations after its notification to the Committee on Safeguards, and the consultations that Ukraine held with Japan on 19 April 2012 were clearly sufficient to fulfil the requirements of the Agreement.

b. Legal argument

113. The requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, then that is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation and Article XIX:2 of GATT 1994.

114. Contrary to Japan's claims the wording of the Appellate Body in *US – Wheat Gluten* clearly states that the information required to be provided under Article 12.2 is not a simple equivalent to the notifications under Article 12.1 of the Agreement, but the information that is needed to enable meaningful consultations to occur under Article 12.3.

115. Ukraine argues that Japan's focus on the Article 12.1 notification of the pertinent information given in Article 12.2 is misplaced. Ukraine provided Japan with the relevant information on its proposed measure prior to either the decision taken on 28 April 2012 or to the decision to publish that measure on 14 March 2013.

116. This requirement for consultations thus builds on an exchange of the information provided in Article 12.2. Ukraine consider highly relevant the fact that the consultations must be based on the "information provided under paragraph 2" and not on the Article 12.1 notification itself. Thus, if an interested Member has received the information that is (subsequently) covered by an Article 12.1 notification, it is sufficient to allow for proper consultations in satisfaction of the Article 12.3 obligation.

117. Japan and Ukraine held substantive consultations under Article 12 on 19 April 2012, after which the originally proposed level of 15.1 per cent duty for cars with engine volumes in the range of 1500 cm^3 – 2200 cm^3 was reduced to 12.95 per cent. Japan's claims that the information provided before the consultation was incorrect due to this liberalization and thus does not provide an opportunity to hold a meaningful consultations are faulty.

118. Ukraine also notes that additional consultations (after the Notice was published and before the safeguard measures entered into force) on this issue between the Ukrainian officials and the representative of the Ministry of Economy, Trade and Industry of Japan took place on the 09 April 2013.

c. Conclusion

119. In light of these facts which confirm that the substance of the information obligation of Article 12.3 was met, and the lack of any harm or prejudice to Japan in undertaking effective consultations given the positive result of the 19 April 2012 consultations with Japan, Ukraine has fulfilled its obligation under Article 12.3 of the Agreement. Ukraine therefore requests the Panel to reject all of Japan's claims under Article 12.3 of the Agreement.

11. Japan's claim that Ukraine violated Article 12.5 of the Agreement on Safeguards is to be rejected

120. Japan's argument that Ukraine did not notify immediately the results of the consultations to the Committee on Safeguards, thereby violating Article 12.5 of the Agreement, is faulty.

121. However, Ukraine asserts that this provision imposes an obligation on the "Members concerned" in the plural. A Member, like Japan, that has not itself complied with this obligation is estopped from complaining about an alleged violation of this notification obligation.

122. If Ukraine decided to provide any kind of concessions to compensate for the safeguard measures and thus noticeably influencing its trade regime, such concessions would be notified to the Council for Trade in Goods.

12. Japan's claim that Ukraine did not endeavour to maintain a substantially equivalent level of concessions and therefore violated Article 8.1 of the Agreement on Safeguards is in error

a. Introduction

123. Ukraine has always endeavoured to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and Japan as well as with the other exporting Members and acted in accordance to Article 8.1 of the Agreement.

b. Legal argument

124. It is important that consultations took place in April 2012 already well before the implementation of the measure and the Members concerned were properly informed about the proposed measure beforehand. Japan's claim must be rejected for that reason alone.

125. In addition, Article 8 must be read in a holistic manner. There is no "violation" of a legal provision requirement, if the legal provision itself provides for a balancing mechanism as does Article 8. Indeed, Article 8.2 provides that, if there was no agreement following consultations, the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure.

126. Unlike other WTO Members Japan took a passive stance and did not execute its right to balance the influence of the safeguard measure.

c. Conclusion

127. Ukraine considers that sufficient consultations were held and that it always endeavoured to maintain an equivalent level of concessions with Japan such that Article 8.1 cannot be said to have been violated. In addition, given the available option of approved self-help, Japan's claim of a violation of Article 8.1 is without merit.

III. Conclusions

128. As was just presented, the imposition of the challenged safeguard measures and the respective safeguard investigation were conducted by Ukrainian investigating authorities in full compliance with the substantive and procedural requirements for the adoption of safeguard measures in the Agreement and Article XIX of GATT 1994.

129. Specifically, all of the required substantive conditions of Article 2 of the Agreement were met, and the circumstances referred to in Article XIX of GATT 1994 existed as a matter of fact. Moreover, all the procedural obligations concerning the safeguard investigation under Article 3 and 4 of the Agreement were met. Therefore, Ukraine had a right to impose the challenged safeguard measure on certain passenger cars.

130. Furthermore, Ukraine correctly applied the measure in the context that it was imposed only to the extent necessary to remedy the threat of serious injury and to facilitate adjustment, as required by Article 5 of the Agreement. The decrease of the proposed safeguard duty level following the April 2012 consultations and the subsequent 2014 liberalization of the measure are evidence of Ukraine's good faith.

131. Finally, a number of procedural obligations relating to the notification and publication of the measure and consultations at certain stages of the process imposed by the Agreement were also duly met by Ukraine during the investigation.

132. Therefore, Ukraine applied the safeguard measures on the imports of passenger cars into Ukraine in strict accordance with the Agreement, Articles XIX and II of GATT 1994. While some aspects and procedures are not explicitly or implicitly stipulated by the relevant WTO jurisprudence the investigating authority used a guidance of Ukrainian domestic regulations or acted in good faith on its own discretion.

133. For all of the above reasons, Ukraine requests that all of Japan's claims be rejected.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. DELAY IN APPLYING A SAFEGUARD MEASURE SUGGESTS THAT "SUCH INCREASED QUANTITIES" OF IMPORTS DO NOT EXIST RECENTLY ENOUGH AS TO CAUSE OR THREATEN TO CAUSE SERIOUS INJURY

1. The *Agreement on Safeguards* and Article XIX of the *General Agreement on Tariffs and Trade 1994* (GATT) together establish that safeguard measures are temporary emergency actions that can only be taken where necessary to prevent or remedy serious injury caused by a surge in imports.[1] Safeguard measures give domestic industry the opportunity to adjust to different economic conditions by temporarily restricting import competition.

2. If an investigation finds that a safeguard measure is necessary, a delay in applying the safeguard measure following that investigation may raise doubt as to whether the imposition of the measure is justified. A delay may mean that the increase in imports that originally supported the imposition of the measure is no longer recent enough to justify an emergency measure to remedy "increased imports".

3. Australia accepts that the *Agreement on Safeguards* does not establish a specific timeframe for the imposition of a safeguard measure once the requisite determinations have been made. However, the conclusion that a delay may render the safeguard measure inconsistent with the *Agreement on Safeguards* is implicit in the requirements that the increased imports be recent, that such imports have caused or threatened to cause serious injury and that a safeguard measure is imposed only to the extent necessary to remedy this injury.

4. The Appellate Body in *Argentina – Footwear (EC)* found that the language "such increased quantities" in Article 2.1 of the *Agreement on Safeguards* requires that the increase in exports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[2] The Appellate Body also noted that "the phrase, 'is being imported' implies that the increase in imports must have been sudden and recent."[3] Australia agrees with these findings.

5. In Australia's view, the language of Article XIX:1(a) of the GATT, Article 4.2(b) of the *Agreement on Safeguards* and Appellate Body jurisprudence[4] support the view that the injury suffered, or threat thereof, must be recent in order to justify the imposition of safeguard measures. That is, the serious injury must have been caused by a recent increase in imports, and must therefore logically also be recent itself. This is consistent with the Appellate Body's finding in *Argentina – Footwear (EC)* that safeguard measures be "emergency actions".[5]

6. Similarly, suspending the application of a safeguard measure following a determination of serious injury would indicate that there was no longer a need to prevent or remedy serious injury or to facilitate adjustment. The subsequent reapplication of the safeguard measure after one year would also raise doubts as to whether the same serious injury (or threat thereof) still existed.

7. In addition, if the serious injury or the threat thereof is not recent, it may be difficult to show that the measure is still "necessary" to prevent or remedy serious injury or facilitate adjustment within the meaning of Articles 5.1 and 7.1 of the *Agreement on Safeguards.* In particular, noting that safeguard measures are intended to be *emergency* actions to prevent or remedy injury, a delay before the safeguard measure is applied suggests that there may no longer be the urgency that previously necessitated such a measure.

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[1] Appellate Body Report, *United States – Steel Safeguards*, para. 331.
[2] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[3] Ibid., para. 130.
[4] Ibid.
[5] Ibid., paras. 93-94.

8. If a Member decides to extend a safeguard measure during its four year application period, the authorities must show that it continues to be necessary under Article 7.2 and in conformity with the procedures set out in Articles 2, 3, 4 and 5. That is, the authorities must demonstrate that the emergency measures continue to be justified due to a serious injury or threat thereof caused by increased imports.

9. Finally, Australia notes that the extent to which a delay in application of the safeguard measure renders it inconsistent with the requirements of the *Agreement on Safeguards* will largely depend on the facts of each case.

II. NOTIFICATION OF SAFEGUARD MEASURES

10. Article 12.1 of the *Agreement on Safeguards* creates three discrete obligations for Members to immediately notify the initiation of a safeguard investigation and the reasons for initiation; any findings of serious injury or threat of serious injury caused by increased imports; and any decision taken to apply or extend a safeguard measure. Australia understands a "finding" under Article 12.1(b) to mean a determination within the meaning of Article 2 of the *Agreement on Safeguards* made pursuant to an investigation under Article 3 that a product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

11. Article 12.2 of the *Agreement on Safeguards* sets out further requirements for Members when making notifications referred to in Article 12.1, including the provision of a "timetable for progressive liberalization." Australia notes that the Appellate Body in *United States – Wheat Gluten* specifically clarified that the notification obligations set out in Articles 12.1(b), 12.1(c) and 12.2, although related, are discrete.[6]

12. Australia emphasises the importance of not conflating the requirements of Articles 12.1(a), 12.1(b) and 12.1(c). The initiation of an investigation, the making of a finding that domestic industry has suffered a serious injury or is suffering from the threat of a serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are three discrete matters. Immediate notification of each of these actions to the Committee on Safeguards is important in order to preserve the transparency of emergency safeguard measures and to ensure that WTO Members are able to monitor the progress of safeguard investigations and measures.

13. In Australia, the Productivity Commission is the competent authority that undertakes safeguard investigations following referral from the Australian Government. The Productivity Commission's report on its findings and recommendations is submitted to the Australian Government upon completion of its investigation. Under the *Productivity Commission Act 1998* (Cth), the Productivity Commission must table and make public its report within 25 sitting days of Parliament. Australia's practice has been to publish the report within a timeframe ranging between the same day or up to three days with notification to the WTO on the same day.

14. The Productivity Commission's findings and recommendations are not legally binding. As such, the Australian Government may choose not to accept the Productivity Commission's recommendation to impose a measure.

III. REQUIREMENTS FOR THE PUBLICATION OF A REPORT CONTAINING THE FINDINGS OF THE SAFEGUARD INVESTIGATION

15. Together, Articles 3.1 and 4.2(c) establish that the report of the competent authorities, setting out the findings and reasoned conclusions resulting from the investigation, must be published promptly and should include a detailed analysis of the investigation and the factors examined. Australia emphasises that these two requirements cannot be read in isolation from one another.

16. Given that Article 12 contains discrete obligations to notify both the findings of the competent authority and the government's decision to apply a safeguard measure, the obligation

[6] Appellate Body Report, *United States – Wheat Gluten*, para. 124.

to publish a report in Article 3.1 is clearly distinct from the timing of any subsequent decision to apply a safeguard measure and related notification requirements. It is important not to conflate the obligations to publish a report of the findings of the safeguard investigation; to notify the Committee on Safeguards; and to notify Members with a substantial interest as exporters of the relevant product if a safeguard measure is actually adopted under Article 12.1 and 12.3. For instance, WTO Members are still required to publish the findings of their investigation where these findings reflect that a safeguard measure is not justified.

IV. ADDITIONAL OBSERVATIONS AS TO THE SCOPE OF THE SAFEGUARD MEASURE

17. In addition to the conditions of Article 2.1, Australia notes the more detailed requirements of Article 4.2(a) and (b) of the *Agreement on Safeguards* in relation to injury and causation.

18. Following the initial application of the safeguard measure, Ukraine appears to have removed the measure from a subset of the products on which its original determination was based.[7] This raises the question of whether injury caused by the increase in imports of the remaining products would have, by itself, justified the imposition of the measure.

[7] Ukraine's Notification to the WTO, G/SG/N/10/UKR/3/Suppl.1, 22 May 2013.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The EU welcomes the adoption of BCI procedures in this case. We consider that BCI procedure should be broadly similar in all trade remedy cases and that ADA and ASCM BCI procedures should be aligned on those adopted in the present case. Members submitting BCI are not required to obtain prior written authorisation from any firm. They should not be obliged – merely encouraged – to follow the confidentiality designation given by the investigating authority. Not only parties, but also panels and third parties should have the right to challenge BCI designation.

2. Art. 3.1 AoS, first sentence, does not contain any express obligation that the investigation be objective. However, the term "investigation" implies objectivity, and this is confirmed by the use of the term "objective" in other provisions of the AoS. Art. 3.1, first sentence, does not contain any express obligation regarding the time between the end of an investigation period and the entry into force of a safeguard measure. Investigating authorities thus have a discretion with respect to this matter, albeit not one that is unfettered. There should not be an excessive period between the end of an investigation period and the initiation of an investigation, the determination, or the application of the measure, particularly given the emergency nature of safeguard measures. Up-dated data should be accepted as long as this remains possible, subject to the requirements of due process. The determination and application of a measure should be based on sufficiently recent data. In this respect, the ADA and ASCM provide relevant context.

3. There is a difference between determination and application, but they are not clinically isolated. As a gap opens up, the investigation and determination may no longer support the application. The situation is not analogous to a Member deciding to apply or not to apply a bound tariff rate. In the case of a contingent trade remedy a Member only has a right to apply the duty if certain conditions are present. If those conditions are not present, there is no right to apply the relevant duty. There is a textual connection between investigation and application in Art. 5(1) of the AoS, which refers to "the last three representative years".

4. For example, assume a data-lag of three months. Imports of the relevant product are: 2010 (95), 2011 (0), 2012 (105), 2013 (100). There is a sudden increase in imports in the first six months of 2014. An investigation is initiated on 1 July 2014 (based on data for January to March 2014). The record closes on 1 October 2014 (with data for the first six months of 2014 confirming the sudden increase). The measure is adopted and applied on 1 January 2015. The quantitative restriction is 100 based on "the average of the last three representative years". 2011 (where there was an unrelated exogenous shock) is rejected as unrepresentative. The first six months of 2014 are not representative, because they constitute the sudden increase being investigated. Data for the second six months of 2014 is, quite properly, not on the record. The measure is consistent with the AoS. Now assume there is a gap of one year between adoption (1 January 2015) and application (1 January 2016). At the moment of application (1 January 2016) the quantitative restriction must be based on the last three representative years. Otherwise, there may be a breach of Art. 5.1, but also a breach of Art. 3.1, contextually informed by Art. 5.1. We would apply the same logic to suspension and un-suspension.

5. The EU observes that the AoS does not contain any further elaboration of the term "reasonable public notice". It may reasonably be understood in light of the context provided by the ADA and the ASCM. One would expect the publication of a document providing reasonable notice of the investigation to all interested parties. The term "interested parties" in the AoS should be understood to include the exporting Member. The EU doubts that Ukraine's notice complied with these requirements. Further, we observe that the obligation to publish a report setting forth the findings and reasoned conclusions reached on all pertinent issues of fact and law, in conjunction with the obligation of notification under Art. 12.2, should also serve the purpose of Art. 12.3 of providing an adequate opportunity for prior consultations with those Members having a substantial interest as exporters, including with respect to the compensation provided for in Art. 8.1. The EU is not persuaded that these requirements were satisfactorily complied with in this case.

6. A failure to publish the report/analysis constitutes a breach of the procedural obligations in Arts. 3.1 and 4.2(c). The EU suggests that the Panel also assess the WTO consistency of the report/analysis. If the Panel determines that the report/analysis is inconsistent with one or more other procedural or substantive obligations, it would be appropriate to include such findings in the Panel's report.

7. The temporal parameter regulating the publication obligation is the term "promptly" in Art. 4.2(c) of the AoS. This term refers to publication after some other event. Such other event is not the application of a safeguard measure, because that would imply an element of retroactivity. We suggest an harmonious reading with Art. X of the GATT. Pursuant to Art. X:1 of the GATT publication must be made "promptly", meaning promptly following the determination itself. However, under Art. X:2, enforcement can only occur on or after publication. Consequently, Art. 4.2(c) of the AoS requires publication promptly following the determination that the conditions justifying the use of a safeguard measure are present, and the form that such safeguard measure would take.

8. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. The measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. This may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. However, there is no express reference to the global financial crisis.

9. The measure at issue must contain a reasoned and adequate explanation regarding the existence of unforeseen developments, sufficient for the importing Member to understand and contest if it so wishes. In the municipal proceedings, such unforeseen developments must be demonstrated to have existed pursuant to evidence on the record. Such evidence should be referenced in the measure or be on the record and adduced by the importing Member to the Panel, at its own initiative or on request.

10. The term "result" in Art. XIX:1(a) of the GATT 1994 supports the view that there must be a logical connection or causal link between the unforeseen developments and the increase in imports. One way of getting at the question of whether or not there is such a link is to look at the question of whether or not the unforeseen developments have modified the competitive relationship between imported and domestic products, causing a decrease in domestic sales. The causal link should be genuine and substantial. Non-attribution factors, including foreseen or foreseeable developments, should be discounted.

11. The unforeseen developments must be unforeseen at the time of the negotiations, and specifically when they close. In the event of a difference, we would agree that the latter date provides a better guide.

12. The obligations in Art. 12 to notify and provide opportunities for consultations are an integral part of the transparency process related to the adoption of safeguards. The Appellate Body has clarified that the notification obligations set out in Arts. 12.1(b), 12.1(c) and 12.2, although related, are discrete. The action of initiating an investigation, the action of an investigatory authority coming to a finding that a domestic industry has suffered serious injury or is suffering from the threat of serious injury caused by increased imports, and the decision of a government to apply a safeguard measure based on those findings, are separate matters. Each of these actions must be immediately notified to the Committee on Safeguards.

13. Ukraine did not make an immediate notification of the initiation of a safeguard investigation under Art. 12.1(a). Furthermore, Ukraine also notified its safeguard investigation findings and measure under Art. 12.1(b) at the same time as its notification under Art. 12.1(c). As a third party joined in the consultations, the EU participated in the consultations between Japan and Ukraine. Like Japan and the United States, we think that the information shared by Ukraine prior to 19 April 2012, (i.e., the Key Findings) lacked much of what is required under Art. 12.2. Ukraine had to provide "all pertinent information," not just the listed mandatory components in Art. 12.2. The Appellate Body has clarified that "all pertinent information" is assessed objectively and should include, at a minimum, the items listed in Art. 12.2 as well as the factors evaluated pursuant to Art. 4.2. This would include at least the proposed date of introduction of the safeguard measure,

the expected duration of the safeguard, and the timetable for progressive liberalization. Neither Ukraine's written submission, nor the Key Findings that spurred the 19 April 2012 consultations, indicate that any of this information was provided to Japan in advance of those consultations. The EU therefore agrees that Ukraine failed to provide adequate opportunity for prior consultations under Art. 12.3.

14. A Member cannot hold Art. 12.3 consultations after sharing the information that Art. 12.2 requires in notifications under Art. 12.1(b) and (c), even if it has not actually submitted its Art. 12.1(b) and (c) notifications. Art. 12.2 provides that "[t]he Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure." Thus, the "information provided under paragraph 2" would include any information provided at the request of the Council for Trade in Goods or the Committee on Safeguards. However, Ukraine gives no indication of how any such request could be made in the absence of Art. 12.1(b) and (c) notifications. Therefore, even if the documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

15. The Appellate Body has clarified that, in order for a safeguard measure to be imposed, it must be demonstrated that there are unforeseen developments resulting in increased imports. We note that the measure at issue does not state that the increased imports are the unforeseen developments, but rather that the unforeseen developments are explained by the increased imports. As we understand it, this may be taken to mean that the unforeseen developments are evidenced by the increased imports, in the sense that the unforeseen developments have resulted in the increased imports. We consider that the measure at issue does not demonstrate that the increase in imports was recent enough, sudden enough, sharp enough or significant enough to justify the measure; and that there is a lack of persuasive qualitative analysis of the data in the measure at issue.

16. The EU considers that publication of indexed figures in relation to the injury requirements may comport with the requirements of Arts 3.1 and 4.2(c) of the AoS, provided that it is possible, on such basis, to properly assess the measure against the obligations in the AoS. The EU further considers that, in the context of panel proceedings, in which confidential information is protected, the investigating authority (that is, the defending Member) is required to adduce such confidential information as is necessary for the assessment of consistency. Failure to do so may justify the drawing of reasonable inferences and reliance on the facts available.

17. Art. 2.1 of the AoS refers to an increase in imports relative to domestic production, not consumption. By contrast Art. 3.2 of the ADA and Art. 15.2 of the ASCM refer to an increase in imports relative to production or consumption. Certain items are included in production but not consumption, such as exports. Thus, when comparing with domestic production, a decrease in exports could give the impression of a relative increase in imports, when none would in fact exist. However, given that the terms of the different agreements are clearly precise and different on this point, the EU would conclude that there is no obligation, in Art. 2.1 of the AoS, to make the comparison with domestic consumption, or with domestic production and domestic consumption.

18. However, Art. 4.2(a) of the AoS refers expressly to the "share of the domestic market taken by increased imports" and Art. 4.2(b) requires a causation and non-attribution analysis. Therefore, even if the issue of consumption may not be relevant for the determination of increased imports, it will be relevant for the assessment of whether or not serious injury has been caused.

19. Art. 4.2(a) requires an investigating authority to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. The term "changes" indicates that all changes during the period of investigation may be relevant. In the example given above one would ideally expect the domestic industry indicators to be positive and stable during 2010 to 2013, but to deteriorate during the first six months of 2014, as a result of the unforeseen developments and the imports. However, if, during each of the nine six month periods making up the investigation period, the domestic industry indicators simply toggle between negative and positive, that could undermine the proposition that the unforeseen developments and the imports have caused the negative indicators in the first six months of 2014. It might rather suggest, for example, that there is a seasonal variation, with a downward turn in the first six months of each year.

20. One approach to injury and causation is to assess them, at least initially, separately, in a so-called bifurcated analysis. First one determines whether or not there is serious injury. Second, one determines its cause. This can work for some kinds of serious injury, where the existence of the injury is determined by reference to historical data and trends. For other types of serious injury (such as price suppression or impedance) a unitary analysis is necessary, because it is not possible to distinguish between the existence of the injury and what is causing it. Ultimately all injury and causation analysis must be unitary, in the sense that the analysis must eventually be made on a holistic basis. Although Art. 4.2(a) focuses on injury and Art. 4.2(b) focuses on causation and non-attribution, they are part of a single and continuous process of analysis designed to ascertain whether or not the unforeseen developments and the imports have explanatory force for the serious injury. Thus, if, in the context of Art. 4.2(a), an investigating authority ignores intervening trends in the data, it is just "kicking the can down the road" to Art. 4.2(b). Rather than such a compartmentalised approach, a better approach is to see the two provisions as related and as requiring a logical progression of analysis.

21. Art. 4.2(b) requires objective evidence of a causal link between the imports and the serious injury; and that injury caused by other factors shall not be attributed to the imports. As we see it, the question is whether or not the other factors are such as to sever any genuine and substantial relationship of cause and effect between the imports and the serious injury. For example, the facts might demonstrate that the state of the domestic industry is rather the result of a very large debt incurred to make an investment that has failed. Perhaps a licence was revoked, or an envisaged market did not materialise. We believe that an investigating authority is required to examine and assess such alleged non-attribution factors when they are brought to the notice of the investigating authority, and particularly when they are put to the investigating authority during the course of the municipal proceedings by one or more of the interested parties.

22. Assessing causation and non-attribution is rarely an easy or an exact science. Qualitative methods involve weighing all the evidence and assessing the temporal relationship between different events, in order to come to a rational and reasonable conclusion about what caused what. Quantitative methods, which are not required by the AoS, would involve setting up a model of the market; testing and calibrating the model in order to ensure that it provides a reasonable picture of how the market actually works; and then shocking the model by eliminating the putative cause and analysing the results.

23. Art. 7.4 of the AoS does not preclude liberalisation through decisions post-dating the initial determination or the initial application. However, it is difficult to reconcile the obligation of liberalisation with the proposition that, following the determination, during an initial period the measure should be relatively more permissive (that is, not applied at all) and in a subsequent period relatively more restrictive (that is, applied). Viewed over time, such a measure does not progressively liberalise. It does the opposite: it progressively protects.

24. Art. 12.2 of the AoS mandates that the notification shall include a timetable for progressive liberalisation. If this is not done, and the measure at issue is silent, the evidence would support the view that no progressive liberalisation is provided for, has occurred, or is occurring. If the Panel's assessment reveals that there is a measure before it with a duration of three or four years, and that one or more regular intervals has passed without any progressive liberalisation, then the Panel would be in a position to determine a breach not only of Art. 12.2, but also of Art. 7.4. What amounts to a regular interval would need to be assessed on a case-by-case basis, but any period in excess of one year would generally be difficult to justify. In such circumstances, if the defending Member wishes to avoid an adverse finding under Art. 7.4, it would be for the defending Member to adduce evidence pertinent to the question of progressive liberalisation.

25. In the case of initial application, the determination must be duly supported by a finding that increased imports have caused serious injury or threat thereof, as detailed in the investigation. If there is an excessive period of time between the determination and the application, the results of the investigation may no longer objectively support the application. This could be cured by re-opening the record and up-dating the data, subject to due process. In the case of extension, Art. 7(2) of the AoS requires a separate finding that the safeguard measure continues to be necessary to prevent or remedy serious injury. In the case of remedy, this means that there will be a separate finding of serious injury to justify the extension. In the case of prevention, there will have to be a separate finding that removal of the measure would result in serious injury.

26. There are circumstances in which the concept of estoppel can serve as a useful analytical tool, particularly when the actions or the conduct of a Member may reasonably be taken to imply a particular conclusion.

27. In principle, pursuant to Art. 3.8 of the DSU, an infringement is considered prima facie to constitute a case of nullification or impairment. Members have occasionally attempted to rebut that presumption, but none has ever succeeded. It would be particularly problematic for a WTO adjudicator to step into a municipal proceeding and substitute its own judgment for the future judgment of an investigating authority as to what other consequences a breach might or might not have in the specific context of the municipal proceedings. It is for the defending Member, in the first place, to decide how it wishes to pursue the objective of compliance. Should a panel wish to do so, it can make suggestions pursuant to Art. 19(1) of the DSU.

ANNEX C-3

ORAL STATEMENT OF KOREA, REPUBLIC OF

Mr. Chairman, Members of the Panel,

1. The Republic of Korea appreciates this opportunity to present its views to the Panel as a third party. While several important issues are raised in this dispute, Korea would like to focus its statement on the meaning of "explanation" presented in the Agreement on Safeguards.

2. As has been previously confirmed by the Appellate Body, the importing Member's safeguard measures amount to "extraordinary measures"[1]. This is true in part because safeguards "do not depend on 'unfair' trade action, as is the case with anti-dumping or countervailing measures."[2] Rather, an importing Member may impose a safeguard measure when the increase in imports is caused by developments which were not foreseen at the time that the WTO commitments were made.

3. The extraordinary nature of safeguards requires that a high standard be met when it is imposed. The measure must be temporary and carefully administered. Appropriate compensation needs to be provided. And importantly for this argument, explanation that details the measure's rationale is required.

4. "Explanation" is not language that explicitly appears in the Safeguards Agreement. This is a departure from other trade remedy agreements, such as the Subsidies Agreement and the Anti-Dumping Agreement. Nevertheless, Korea is convinced that the Safeguards Agreement obligates a Member seeking to impose a safeguard measure to provide adequate explanation as to why the extraordinary measure was necessary.

5. Specifically, Articles 3.1 of the Safeguards Agreement states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) states that "[t]he 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." An examination of the Agreement's provisions reveals that the competent authorities' obligation to explain its measures is clearly laid out.

6. Moreover, the Appellate Body has established a high standard for meeting the obligation of explanation stipulated in the Agreement. In *US – Lamb*, the Appellate Body stated that "in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, "establishing explicitly" implies that the competent authorities must provide a 'reasoned and adequate explanation of how the facts support their determination.'"[3] The Appellate Body further noted that "to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[4] In *US – Steel Safeguard*, the Appellate Body stated that "a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and in a way that leaves nothing merely implied or suggested, that imports from sources covered by the measure, alone, satisfy the requirements for the application of a safeguard measure."

7. The Safeguards Agreement is an acknowledgement of the importing Member's interest in protecting its industry from increased imports. At the same time, the WTO seeks to balance the importer's interest with that of the exporter by placing the onus on the importing Member to provide detailed explanation for imposing the safeguard measure.

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[1] Appellate Body Report, *US – Line Pipe*, para. 80.
[2] Appellate Body Report, *US – Line Pipe*, para. 81 (quoting *Argentina – Footwear (EC)*, paras. 93-95.)
[3] Appellate Body Report, *US – Line Pipe*, para. 181.
[4] Appellate Body Report, *US – Line Pipe*, para. 194.

8. Detailed explanation that satisfies a certain standard also holds transparency implications. A competent authority is required to provide information as to the unforeseen developments that causes or threatens serious injury to its domestic industry. Transparency in administering safeguard measures is all the more significant given the extraordinary and exceptional nature of the measure.

9. Detailed explanation is important for due process purposes as well. It allows the exporter an opportunity to review the competent authority's decision and, if necessary, to plead the illegality of the measure before the importing Member's domestic courts or the WTO.

10. Korea posits, in light of the object and purpose of Articles 3.1 and 4.2(c) of the Safeguards Agreement, as well as relevant decisions by the Appellate Body, that a high standard of explanation has been established which needs to be met when imposing a safeguard measure. A competent authority that provides insufficiently detailed explanations for its measure would have failed to clear that standard.

11. Thank you.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. Introduction

1. Turkey is participating in this Panel not only because of its systemic interest in the interpretation and implementation of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards (AoS), but also its substantial trade interests as it is one of the major exporter countries and has been an interested party during the investigation process.

2. In the present dispute, Turkey wishes to contribute to the Panel's analysis by expressing its opinion on four issues, namely i) requirement of *unforeseen developments* within the meaning of Article XIX of the GATT 1994, ii) the analysis of increase in imports iii) serious injury or threat of serious injury and iv) the causation requirement.

II. The Requirement of Unforeseen Developments within the Meaning of Article XIX of the GATT 1994

3. In their submissions, the parties of the present dispute take different views on whether the determination of unforeseen developments is a prerequisite for imposition of a safeguard measure. While Japan asserts that the existence of unforeseen developments is a prerequisite for imposition of a safeguard, Ukraine rejects such claims.[1]

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

> If, *as a result of unforeseen developments and of the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions,* any product is being imported into the territory of that *[Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers* in that territory of like or directly competitive products, the 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 (emphasis added).

5. First of all, as underlined in the previous Appellate Body and Panel Reports, Article XIX of the GATT 1994 and the Safeguards Agreements are to be applied cumulatively.[2] Thus, in order to impose a WTO-consistent safeguard measure, a Member must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.[3]

6. Regarding the effects and the requisite nature of the circumstances in the first clause of Article XIX:1(a), the Appellate Body provided useful guidelines, which, in Turkey's view, should be followed. According to the Appellate Body, the first clause of Article XIX:1(a), which includes i) *unforeseen developments* and ii) *the effect of the obligations incurred by a [Member] under the GATT*, do not establish independent conditions, additional to the conditions set forth in the second clause of Article XIX:1(a), which are reiterated in Article 2.1 of the AoS.[4] However the circumstances in the first clause must be demonstrated as a matter of fact, in order for a safeguard measure to be applied consistently with Article XIX of the GATT 1994.[5]

7. As the Appellate Body use the word "circumstances" instead of a singular form, in reference to the situations in the first clause, a Member wishing to apply a safeguard measure must

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[1] Japan's first written submission, para. 75; Ukraine's first written submission, para. 73.

[2] *See*, for example, Appellate Body Reports in *Argentina – Footwear (EC),* para. 92; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71; and Panel Reports in *Argentina – Preserved Peaches*, para. 7.12; *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.

[3] Appellate Body Reports, *Argentina – Footwear (EC),* para. 84.

[4] Appellate Body Report, *Korea – Dairy*, para. 85

[5] Appellate Body Report, *Korea – Dairy*, para. 85 and Appellate Body Report, *US – Lamb*, para. 71.

demonstrate that increase in imports is not only the result of "unforeseen developments" but also the result of "the effect of the obligations incurred by the Member under the GATT 1994", as well.[6] It should also be noted that such circumstances must be established through a reasoned and adequate explanation in the document that put the measure in effect.[7]

8. Moreover, increase in imports should be the result of the factual circumstances referred to in the first clause of the Article XIX of the GATT 1994 and cannot be regarded as the unforeseen development itself. In this regard, as indicated by the Panel in *Argentina — Preserved Peaches,* "[a] statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen *developments.*[8]

9. Thus, Turkey considers that the existence of absolute or relative increase in imports cannot amount to a demonstration of the presence of unforeseen developments. Such an interpretation of the unforeseen developments requirement has been previously rejected by a WTO Panel[9] and would be inconsistent with Article XIX:1(a) of the GATT 1994.

10. Furthermore, as emphasized by the Appellate Body in *US-Lamb*, demonstration of the existence of unforeseen developments must be made before the safeguard measure is applied.[10] Therefore, in Turkey's view, any identification of "unforeseen developments" after the imposition of the measure, cannot make the measure consistent with Article XIX:1(a) of the GATT 1994.

III. The Analysis of Increase in Imports

11. Article 2.1 of the AoS states that;

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

12. Accordingly, increased imports, in absolute or relative terms, is a condition for the application of a safeguard measure. As the jurisprudence of WTO confirms, Turkey notes that "the increased imports requirement *can* be met not only if there is an absolute increase in imports, but also if there is an increase relative to domestic production".[11]

13. However, in Turkey's view, certain conditions should be met in order to be in compliance with the Article XIX of the GATT 1994 and AoS. First of all, as the Appellate Body explained, "the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination."[12] Instead, the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[13] This means that a simple determination of increase in imports either in absolute or relative terms do not make the measure consistent with Article XIX and AoS. On the contrary, Turkey considers that an investigating authority should make a detailed and reasoned analysis both quantitatively and qualitatively for establishing that increase in imports is sudden, recent, sharp, and significant enough to cause or threaten to cause serious injury.

14. Secondly, it should be noted that a simple comparison of imports levels at the start and the end of the period of investigation (POI) is not acceptable. According to the Appellate Body in *US – Steel Safeguards*, such a determination "could easily be manipulated to lead to different results,

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[6] Appellate Body Report, *Korea – Dairy*, para. 85

[7] Appellate Body Report, *US – Lamb*, para. 76. *See* also Panel Report, *Dominican Republic – Bag and Fabric Safeguards*, para. 7.128.

[8] Panel Report, *Argentina – Preserved Peaches*, para. 7.24 (emphasis in original).

[9] Panel Report, *Argentina – Preserved Peaches*, para. 7.24

[10] Appellate Body Report, *US – Lamb*, para. 72

[11] Appellate Body Report, *US – Steel Safeguards*, para. 390 (emphasis in original).

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

depending on the choice of end points".[14] Rather, the Appellate Body emphasized the significance of the *trend* in imports over the entire POI and the need for "an *explanation* of how the *trend* in imports supports the competent authority's finding".[15] Similarly, the Appellate Body in *Argentina – Footwear* stated that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)".[16] This means that the investigating authority should examine both "the *rate* and *amount* of the increase in imports … in absolute and relative terms."[17]

15. Therefore, in Turkey's view, especially where there is an absolute decline in imports over the POI, an adequate and justified explanation is indispensable for a conclusion that imports in "such increased" quantities caused serious injury to the domestic industry. In the absence of that explanation, the safeguard measure would be inconsistent with Article 2.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994.

16. Thirdly, as it was highlighted by the Appellate Body in *Argentina – Footwear (EC)* the increase in imports must have resulted from an "unforeseen development" and the increase in imports should also be "unforeseen" or "unexpected".[18]

17. For the foregoing reasons, Turkey respectfully asks the Panel, to take into account the above mentioned conditions in analysing the consistency of the measure at issue with Article XIX:1(a) of the GATT 1994 and provisions of AoS.

IV. Serious Injury or Threat of Serious Injury

18. Both Article XIX of the GATT 1994 and Article 2 of the AoS provide that a safeguard measure may only be imposed if the increased imports are made "under such conditions as to cause or threaten to cause serious injury". Article 4 of the AoS lays down more detailed rules in regard to determination of serious injury or threat thereof.

19. In the case at hand, Turkey would like to draw the Panel's attention to requirement of Article 4.2(a) for the determination of serious injury and threat of serious injury. Article 4.2(a) necessitates investigating authorities to "evaluate *all relevant factors* of an objective and quantifiable nature having a bearing on the situation of the 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". (emphasis added)

20. Turkey would like to note that the Appellate Body has established that *all* but not some of the factors mentioned in Article 4.2(a) must be considered by the investigating authority during the investigation.[19] Moreover, the investigating authority's consideration of each listed factor must be "reasoned and adequate".[20] In this regard, an evaluation of each listed factor might not necessarily show that each such factor is "declining", in Turkey's view, however, they all - together with any other relevant factors- have to be evaluated by the investigating authority. Subsequently, the outcome of such evaluation has to demonstrate a significant overall impairment in the position of the domestic industry. Therefore, if one or some of the factors have not been evaluated by the investigating authority at all, or investigating authority's consideration of each listed factor is not "reasoned and adequate", then the measure would become inconsistent with the Article 4.2(a).

V. The causation requirement

21. Article XIX: 1(a) of the GATT 1994 and, Article 2.1 and 4.2(b) of the AoS require the demonstration of the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. Article 4.2(b) of the AoS further specifies that

[14] Appellate Body Report, *US – Steel Safeguards,* para. 354.
[15] Appellate Body Report, *US – Steel Safeguards*, para. 374 (emphasis in original).
[16] Appellate Body Report, *Argentina – Footwear*, para. 129.
[17] Appellate Body Report, *Argentina – Footwear*, para. 129, quoting with approval the panel finding in that dispute.
[18] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[19] Appellate Body Report, *Argentina – Footwear (EC),* para. 136.
[20] Appellate Body Report, *US – Lamb,* para. 103.

"when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".

22. Thus, in order to meet the causation requirement the investigating authority must demonstrate, first, the existence of the causal link between increased imports and serious injury or threat thereof and second, non-attribution of injury caused by factors other than the increased imports.[21]

23. In regard to causal link between increased imports and serious injury or threat thereof, the Appellate Body has clarified that "in an analysis of causation, 'it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[22] The Appellate Body further emphasized that there must be a "genuine and substantial relationship of cause and effect" between increased imports and serious injury.[23] Therefore, in Turkey's view, in order to comply with the requirements of Article 4.2(a), an investigating authority has to provide reasoned and adequate explanation that confirms the link, in terms of timing and movements, between increased imports and serious injury and/or threat of serious injury.

24. Concerning the non-attribution analysis, in *US – Lamb,* the Appellate Body clarified that an investigating authority has to separate and distinguish the injury caused as a result of increased imports from the injury caused as a result of other factors.[24] Accordingly, in order to make a proper non-attribution analysis, the investigating authority is required not only to identify the nature and extent of the injurious effects of the known factors other than increased imports, but also to separate and distinguish injurious effects of those other factors from the injurious effects of the increased imports.

VI. Conclusion

25. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review carefully the comments stated in this submission, in interpreting Article XIX of GATT 1994 and the AoS.

[21] Appellate Body Report, *US – Line Pipe,* para. 208.
[22] Appellate Body Report, *Argentina – Footwear*, para. 144.
[23] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[24] Appellate Body Report, *US – Lamb*, paras. 178-181.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. Views Expressed in the U.S. Third Party Submission

1. The report that must be published by the competent authorities pursuant to SGA Articles 3.1 and 4.2(c) serves an essential role in the review of safeguard measures. It allows other Members to understand why a safeguard measure has been adopted, and - in the event of a WTO dispute settlement proceeding - allows a WTO panel to assess whether a safeguard action complies with the substantive obligations contained in GATT Article XIX and the SGA. Not surprisingly then, published reports must address in considerable detail a broad range of issues, including unforeseen developments under GATT Article XIX:1(a), the rationale for finding the requisite increased imports based on consideration of the entire period of the investigation rather than simply comparing end points. The published report must set out in equal detail the competent authority's evaluation of all relevant factors and a reasoned explanation for concluding that the domestic industry suffered serious injury or the threat thereof, that the increased imports ***caused*** the serious injury or threat thereof, and that other factors causing injury to the domestic industry are not attributed to the increased imports.

2. The report published by Ukraine is concise in the extreme. Furthermore, in many instances, Ukraine's written submission provides justifications for its determinations that appear nowhere in its published report. The Appellate Body has rejected a panel's reliance on supplemental information provided during dispute settlement proceedings.

3. Having recognized the considerable importance of a thorough, reasoned published report, the United States notes that some conclusions and sets of facts require more explanation than others, and the length of an explanation with respect to any single issue should not be dispositive. Although panels should not be put in the position of having to infer the competent authority's reasoning, they also need not ignore reality or invent ambiguity or complexity where none exists.

4. The SGA does not specify how soon a safeguard measure must be put into place. If a Member were within its rights to impose a safeguard measure for four years, it would be odd to suggest that delaying application of the measure for a year and putting it in place for three years in and of itself creates an inconsistency. Delay following a decision to impose safeguard measures may in some instances reflect desirable behavior. A Member may be working to address concerns raised in consultations following notification of the proposed measures. Thus, requiring a Member to choose between (1) implementing a safeguard measure during a very short window after the decision is taken, or (2) losing the right to impose it at all, could cause a Member to take more restrictive measures than it would otherwise. On the other hand, significant delay in imposing safeguard measures tends to undercut the notion that such measures constitute an "emergency action" necessary to prevent or remedy serious injury and to facilitate adjustment. This is equally true where an investigation has resulted in a finding of a threat of serious injury, which requires that the anticipated serious injury be "imminent," or "on the very verge of occurring." Extended uncertainty as to the timing and degree of the final safeguard measure may disrupt trade more than actual imposition of a measure.

5. It is not clear that a Member can hold Article 12.3 consultations after sharing the ***information*** that Article 12.2 requires in notifications under Article 12.1(b) and (c), even if it has not actually submitted its Article 12.1(b) and (c) notifications. Article 12.2 allows the Council for Trade in Goods or the Committee on Safeguards to request such additional information as they may consider necessary. Thus, the "information provided under paragraph 2" presumably would include any information provided in response to such a request. However, Ukraine gives no indication of how any such request could be made in the absence of Article 12.1(b) and (c) notifications. Therefore, even if documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

6. In addition, Japan argues that the information shared by Ukraine prior to April 19, 2012, (*i.e.*, the Key Findings) lacked much of what is required under Article 12.2. Japan appears to be correct that neither Ukraine's written submission, nor the Key Findings that spurred the April 19, 2012, consultations, indicate that the proposed date of introduction of the safeguard, the expected duration of the safeguard, or the timetable for progressive liberalization was provided to Japan in advance of those consultations.

7. The United States has concerns with Japan's challenge to the validity of the April 19, 2012, consultations on the basis of the change in one duty rate from 15.1 percent (the rate for cars with larger engines proposed prior to consultations) to 12.95 percent (the rate for those cars that was eventually applied). The proposed measure on which the Members consult need not be identical in every respect to the one that is eventually applied. Prior consultations allow interested Members to seek, *inter alia*, modification of the measure. Indeed, Ukraine implies that it lowered the duty rate as a result of the consultations it held with Japan. Precluding modification of a measure in response to concerns expressed by interested Members (or always requiring one additional round of consultations that leads to no changes) would diminish rather than preserve or enhance the value to interested Members of Article 12.3 consultations. Because modification of a measure would subject the Member implementing the safeguard to either a finding that it breached its Article 12.3 obligations, or the delay and expense of additional consultations, Japan's interpretation would create a significant disincentive to modification of measures in the interested Member's favor, including a reduction of duty rates. Thus, the modification of the duty rate should not support a finding that the April 19, 2012, consultations were inconsistent with Article 12.3.

8. Japan claims that Ukraine breached its obligations under Article 7.4 because it did not provide for a progressive liberalization of the measure when the safeguard was initially imposed as reflected in the March 14, 2013, published notice of the decision. Japan relies on the same facts to claim that Ukraine breached its notification obligations under Article 12.2 of the SGA. Ukraine argues that the substantive obligation under Article 7.4 to progressively liberalize the safeguard measure is distinct from the procedural obligation under Article 12 to notify the timetable for liberalization. Ukraine maintains that it complied with its obligations under Article 12.1(b) and (c) through its March 21, 2013, notifications, but it acknowledges that it did not notify any timetable for progressive liberalization until March 2014. The United States notes that Article 12.2 explicitly states that notifications under Article 12.1(b) and (c) "shall include," *inter alia*, a "timetable for progressive liberalization." These requirements serve an import transparency and information purpose, including by allowing for meaningful consultations.

II. Views Expressed in the U.S. Oral Statement

9. The EU suggests that BCI procedures should be substantially similar across disputes under the AD Agreement, the SCM Agreement, and the SGA. These panel proceedings are not an appropriate forum for pursuing such an objective. Any systemic solution should be sought through the WTO bodies designed to solicit and reflect the views of all Members.

10. The critical point with respect to paragraph 1, sentence 3 of this Panel's BCI procedures is whether the competent authorities treated the information as BCI, either because they accepted the submitter's designation or because they resolved a challenge in favor of confidentiality. If that is the case, a panel should, in the first instance, follow the designations of the competent authorities. Accordingly, this sentence could be clarified by substituting the words "treated by" for the words "submitted to" so that it reads, in relevant part: "BCI shall include information that was previously treated by the investigating authorities of Ukraine…as BCI in the safeguard investigation at issue in this dispute."

III. Views Expressed in U.S. Responses to Questions from the Panel

11. The SGA sets out no explicit obligation that fixes a specific time, either relative to the data in the underlying investigation or the date the decision is taken, by which a safeguard measure must be put into force. However, the U.S. position does not imply that, because no explicit obligation on timing exists, any action, however far removed from the end of an investigation, is consistent with the SGA. It may well be that in a specific dispute, the complaining party will demonstrate that one or more SGA obligations has been breached under the particular facts and circumstances of that dispute.

12. For example, a Member's discretion to apply a safeguard measure is at all times limited by the requirement that such application be necessary to prevent or remedy serious injury and to facilitate adjustment. A long delay in applying a measure may be a relevant factor to consider in assessing whether it is necessary because the long absence of the measure undercuts the supposedly urgent nature of the safeguard measure, and it becomes more difficult to determine that a measure is necessary to prevent or remedy the particular serious injury that was previously found. Because the SGA does not establish a bright line rule as to the time for putting a safeguard into effect, it would not be appropriate to create such a rule through dispute settlement.

13. The SGA also does not explicitly require supplemental analyses or notices thereof after application of a safeguard measure has been postponed for a particular amount of time. Rather, any delay in the application of a safeguard measure, and any supplemental analysis relied upon as a basis for a safeguard measure, should be considered in the context of a particular dispute to the extent that such facts are relevant to the obligations contained in the covered agreements.

14. An unpublished report that otherwise meets the requirements of Articles 3.1 and 4.2(c) can serve as a basis for a panel's analysis of claims under the provisions of the SGA. The failure to publish a report would be inconsistent with these obligations, but in that situation, a reviewing panel would not be required to proceed as if the competent authorities undertook no analysis, which would effectively ensure consequential breaches of many substantive obligations. A fact-specific inquiry is required to determine whether a document genuinely served as a part of the report of the competent authorities.

15. There is no obligation under the SGA to continue to update information following the end of the period of investigation or more specifically following the conclusion of the investigation.

16. In the U.S. view, "promptly" in Article 4.2(c) is best understood as referring to the determination of whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the SGA. Whether publication is sufficiently prompt in any case is necessarily a fact-specific inquiry that must take account of the various circumstances of the dispute, including the potential need to undertake an analysis of whether a safeguard measure is necessary in conjunction with the serious injury determination.

17. The United States considers that figures that have been indexed to protect confidential information can be sufficient to meet the requirements of Articles 3.1 and 4.2(c).

18. A Member need not demonstrate that an increase in imports has resulted from an unforeseen development "modifying the competitive relationship between the imports and domestic products." Further, any corresponding decrease in domestic sales need not also have been caused by the change in the competitive relationship.

19. The requirement that the increased imports result from unforeseen developments stems from GATT Article XIX. Article XIX contains no requirement that the unforeseen developments modify the competitive relationship between the imports and domestic products. Because there is no requirement to demonstrate a change or modification in the competitive relationship as a separate element, there can be no requirement to demonstrate that "the decrease in domestic sales leading to injury also has been caused by the change in the competitive relationship." Indeed, there is not even a requirement in the SGA that there be a "decrease" in domestic sales.

20. "Unforeseen developments" must be unforeseen at the time the tariff concessions were made. Safeguard measures "are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."

21. Whether a POI was the recent past, and the implication of that inquiry for assessing an alleged breach under the covered agreements, depends on the facts and circumstances of a particular dispute. Any of the dates identified by the Panel—the date of the beginning of the investigation, the date of the completion of the investigation, the date of adoption of a safeguard measure, and the date of its entry into force—may be relevant to determining whether the POI was the recent past in a given dispute. The POI selected by the investigating authority must be sufficiently *recent* to provide a reasonable indication of *current* trends.

22. In the United States, after USITC makes a serious injury determination and, if the determination is in the affirmative, a recommendation regarding a remedy, the President decides whether a safeguard measure will be imposed. Under U.S. law, the safeguard measure generally shall take effect within 15 days after the President proclaims the action. However, where the President seeks to negotiate with foreign counterparts on limitations on exports from foreign countries of the subject product to the United States, the measure can take effect as much as 90 days after the President proclaims the action. Thus, under U.S. law, a safeguard measure would normally take effect between 15 and 90 days after the decision to impose the measure.

23. An increase in imports relative to consumption will not, alone, satisfy the increased imports condition in SGA Article 2.1. Rather, in the context of a determination on increased imports under Article 2.1, the competent authorities must find that imports have increased either in "absolute [terms] or relative to domestic production."

24. Separately, in the context of evaluating the relevant factors having a bearing on the situation of the industry, Article 4.2 contemplates evaluation, in particular, of *inter alia* "the share of the domestic market taken by increased imports." A change in domestic market share generally involves consideration of an increase in imports relative to domestic consumption. However, the United States allows for the possibility that a methodology could potentially exist in a given scenario that would allow for evaluation of the share of the domestic market taken by increased imports without considering an increase in imports relative to domestic consumption (*i.e.*, where the two are not one and the same). At the very least, because Article 4.2(a) requires competent authorities to evaluate "all relevant factors," it may be necessary to consider an increase in imports relative to domestic consumption where it is a relevant factor bearing on the situation of the industry.

25. The Panel's suspended application approach is a useful tool for assessing a scenario in which one year has elapsed between the taking of a decision to apply a safeguard measure and the effective date of the measure. However, the United States does not dismiss the possibility that the legal problems presented by these two scenarios may not be identical. For example, application of a safeguard measure following a suspension may be viewed as a *de facto* additional application of the measure. SGA Article 7 contains certain restrictions on re-applications of safeguard measures on the same products, including preclusion of application where a safeguard measure has been applied on the same product more than twice in the preceding five-year period.

26. Article 4.2(a) requires the competent authorities to "evaluate all factors of an objective and quantifiable nature having a bearing on the situation of that industry." "[A]n end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors." End points must be understood in context, and without evaluating the intervening data, there is no way of understanding the proper context, and no way of establishing confidence in the accuracy of the meaning or importance ascribed to the end points. Where evaluation of intervening data suggests a different conclusion than the one reached by solely evaluating the endpoints, a "reasoned conclusion" within the meaning of Article 3.1 would need to address the intervening data.

27. Neither the SGA nor GATT Article XIX: 1(A) provide any particular methodology that competent authorities must use in examining factors other than increased imports. The Appellate Body has not found the SGA to require that a competent authority "quantify" the extent of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b). The Appellate Body has stated that it leaves "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)," and it has recognized that the SGA leaves the development of appropriate analytical methodologies under Article 4.2(b) to the discretion of the competent authorities.

28. Article 7.4 requires progressive liberalization but does not reference the initial decision to impose a safeguard measure. Therefore, nothing in Article 7.4 precludes liberalization through a decision post-dating the initial decision to impose a safeguard measure. Articles 7.4 and 12.2 contain distinct obligations, and a breach of Article 12.2 does not necessarily result in a consequential breach of Article 7.4.

29. SGA Article 12.1(b) requires a Member to notify the Committee on Safeguards immediately upon making a finding of serious injury or threat thereof caused by increased imports. The

determination referenced in SGA Article 2.1 as a condition for applying a safeguard measure and further elaborated upon in Article 4 serves as the "finding" that must be notified pursuant to Article 12.1(b).

30. Members must make a finding of serious injury or threat thereof caused by increased imports in order to apply a safeguard measure. If such a finding has been made, a Member must separately decide to apply (or extend) a safeguard measure, which necessarily must consider to what extent, if at all, a safeguard measure is necessary to prevent or remedy serious injury and to facilitate adjustment. However, nothing prevents a Member from rendering these decisions in the same document or at the same time. Similarly, the Article 12.1(b) obligation to notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports is distinct from the Article 12.1(c) notification obligation upon taking a decision to apply or extend a safeguard measure. However, nothing prevents a Member from complying with both obligations in a single notification if that notification can be characterized as immediate with respect to both occurrences under the particular circumstances of the case.

31. The DSU contains no mention of estoppel or harmless error. Alleged breaches of the covered agreements must be assessed based on their text, and application of a concept of estoppel or harmless error, to the extent it led to a different result, would add to or diminish the rights and obligations provided in the covered agreements, contrary to DSU Article 3.2. Thus, it is not surprising that neither the Appellate Body nor any panel has previously applied the concept of estoppel as advocated by Ukraine in this proceeding. Indeed, previous panels have expressed skepticism about whether estoppel is applicable in the WTO dispute settlement context, noting that "it is not mentioned in the DSU or anywhere in the *WTO Agreement*." The lack of any textual basis for importing the principle of estoppel is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past, including in *EEC – Bananas I (GATT)* and *EC – Asbestos* and *Guatemala – Cement II*. These inconsistencies illustrate the dangers of seeking to import legal concepts not contained in the text of the DSU, which reflects the principles agreed to by all Members.

32. Similarly, the United States is not aware of any application by a panel or the Appellate Body of the concept of harmless error as advocated by Ukraine in this proceeding. Indeed, previous panels have refused to apply a theory of harmless error. To the contrary, a panel has previously stated that, "if a Member has violated a WTO obligation which is phrased as a categorical rule, an assertion that the violation was merely a harmless error is irrelevant." Because these concepts are not provided for in the DSU or the covered agreements, they have no use with respect to this dispute, in particular.

33. Ukraine argues that, by virtue of having itself failed to comply with Article 12.5, Japan is estopped from claiming a violation on the part of Ukraine. Ukraine further argues that, because such notifications are meant for the non-consulting Members rather than the other consulting Member, who presumably is aware of the outcome of the consultations, a failure to notify the Committee constitutes harmless error with respect to Japan. There is no basis in the text of the DSU or the covered agreements for either argument.

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