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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CIRCULAR WELDED CARBON QUALITY LINE PIPE FROM KOREA

Report of the Panel

The report of the Panel on United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 October 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

A. COMPLAINT OF KOREA

1.1 On 15 June 2000, Korea requested consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 14 of the Agreement on Safeguards[1] (also the "Safeguards Agreement", or "SA") with regard to a definitive safeguard measure imposed by the United States on imports of circular welded carbon quality line pipe (the "line pipe measure").[2]

1.2 On 28 July 2000, Korea and the United States held the requested consultations, but failed to resolve the dispute.

1.3 On 14 September 2000, Korea requested the establishment of a panel to examine the matter.[3]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 23 October 2000, the Dispute Settlement Body (the "DSB") established a Panel pursuant to the request made by Korea in document WT/DS202/4.[4]

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference, as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS202/4, the matter referred to the DSB by Korea in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 On 12 January 2001, Korea requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 22 January 2001, the Director-General composed the Panel as follows:

Chairman: Mr. Dariusz Rosati

Members: Mr. Roberto Azevedo
Mr. Eduardo Bianchi

1.7 Australia, Canada, the European Communities, Japan and Mexico, reserved their rights to participate in the panel proceedings as third parties.

II. FACTUAL ASPECTS

2.1 This dispute concerns a measure imposed by the United States on imports of circular welded carbon quality line pipe ("line pipe"). This measure was imposed following an investigation conducted by the United States International Trade Commission ("ITC") in response to a petition filed on 30 June 1999 and amended on 2 July 1999, alleging that imports of line pipe were causing serious injury to the US manufacturers of line pipe.

2.2 The ITC initiated the investigation on 4 August 1999.

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[1] Unless otherwise indicated, all references to Arabic numbered Articles are to the Agreement on Safeguards, and all references to Roman numeral Articles are to GATT 1994.

[2] WT/DS202/1.

[3] WT/DS202/4.

[4] *See*, WT/DSB/M/91 at para. 67.

2.3 The ITC held a public "voice" vote on the issue of serious injury on 28 October 1999. Commissioner Crawford voted "no serious injury" and "no threat of serious injury" while Commissioners Bragg and Askey found "threat of serious injury", but no "present serious injury". Three Commissioners found "present serious injury." On this basis the ITC determined that line pipe was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

2.4 On 8 December 1999, the ITC announced its remedy recommendation. Commissioner Crawford, who had voted that the industry was not seriously injured or threatened with serious injury by imports, recommended against the imposition of any remedy. Commissioner Askey and Commissioner Bragg recommended a four-year remedy with an *ad valorem* tariff of 12.5 per cent for the first year, 11 per cent for year two, 9.5 per cent for year three, and 8 per cent for year four. The remaining three Commissioners, Commissioners Miller, Koplan and Hillman, constituting the majority, recommended:

(1) That the President impose a tariff-rate quota for a 4-year period on imports of line pipe, with the in-quota amount set at 151,124 tons in the first year, and with that amount to be increased by 10 per cent in each of the second, third, and fourth years; with over-quota imports to be subject to a duty of 30 per cent *ad valorem* in addition to current US tariffs;

(2) That the President, if he determines to allocate the overall quota, recognize the disproportionate growth and impact of the imports from Korea;

(3) That the President initiate international negotiations with Korea to address the underlying cause of the import surge and the serious injury to the domestic industry;

(4) Having made negative findings with respect to imports of line pipe from Canada and Mexico under section 311(a) of the NAFTA Implementation Act, that such imports be excluded from the tariff-rate quota; and

(5) That the tariff-rate quota not apply to imports of line pipe from Israel, or to any imports of line pipe entered duty-free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act.

2.5 The President announced the measure on 11 February 2000. The action would take the form of a duty increase for three years and one day. The first 9,000 short tons of imports from each country were excluded each year, with annual reductions in the rate of duty in the second and third years. In the first year, imports above 9,000 short tons would be subject to a 19 per cent duty. In the second year, the duty would be reduced to 15 per cent and in the third year the duty would be 11 per cent. Mexico and Canada were excluded from the remedy. The United States notified the WTO of its action on 23 February 2000.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Korea requests the Panel to find that:

(1) The US measure does not comply with Article XIII or Article XIX of the GATT 1994 nor does it comply with the requirements of Article 5 of the Agreement on Safeguards;

(2) Regardless of the type of measure, the measure violates Article XIX:I of the GATT 1994 and Articles 5.1 and 7.1 of the Agreement on Safeguards because the measure

was not limited to the extent and the time necessary to remedy the injury and allow adjustment;

(3) The United States violated Article 2 of the Agreement on Safeguards, as well as Article I, Article XIII:1 and Article XIX of the GATT 1994 by exempting Mexico and Canada from the measure;

(4) The US measure did not respect the provisions of Article 9.1 of the Agreement on Safeguards regarding the exclusion of developing countries;

(5) The US measure is inconsistent with Article XIX of the GATT 1994 and Article 2 of the Agreement on Safeguards because imports did not increase suddenly, sharply and recently;

(6) The United States failed to demonstrate that the US line pipe industry was suffering serious injury as required by Article XIX of the GATT 1994 and Articles 3.1 and 4 of the Agreement on Safeguards;

(7) The United States failed to demonstrate a causal relationship between increased imports and serious injury in violation of Article XIX of the GATT 1994 and Article 4 of the Agreement on Safeguards;

(8) The ITC's threat of serious injury determination violated Articles 2 and 4 of the Agreement on Safeguards and Article XIX of the GATT 1994;

(9) The United States failed to demonstrate the unforeseen developments which led to the increased imports which caused serious injury;

(10) The US decision did not satisfy the requirements of emergency action of Article 11 of the Agreement on Safeguards or Article XIX of the GATT 1994;

(11) The United States violated the obligation in Article 12.3 of the Agreement on Safeguards to consult concerning the measure before the measure is imposed; and

(12) The United States violated the compensation provisions of Article 8.1 of the Agreement on Safeguards.

3.2 Therefore Korea requests that the Panel find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated.

3.3 The United States requests the Panel to reject Korea's claims.

IV. ARGUMENTS OF THE PARTIES

4.1 The main arguments, presented by the parties in their written submissions and oral statements, are summarized below.

A. FIRST WRITTEN SUBMISSION OF KOREA

4.2 The following is Korea's own executive summary of its first written submission:

1. Factual Background

4.3 Carbon steel line pipe is a tubular product used primarily in the gathering and transmission of oil and gas. The oil and gas industry is typically a "boom-or-bust" industry that experiences wide swings in prices and production. Consequently, demand and pricing for line pipe as well as certain other pipe products such as oil country tubular goods ("OCTG") are also subject to wide cyclical swings.

4.4 After mid-1998, oil prices declined and continued dropping precipitously through early 1999. Natural gas prices followed a similar but less volatile pattern. By April 1999, the number of active oil drilling rigs in the United States was at the lowest level ever recorded since tracking began in 1944. Predictably, the US line pipe industry's performance declined dramatically over the same period. In fact, the performance of the US line pipe industry almost perfectly tracks the performance of the oil and gas industry: both rose through the first half of 1998 (as did import levels) and then both fell dramatically in the second half of 1998 (imports declined with domestic shipments). US line pipe performance declined further still in the first quarter of 1999 as the oil and gas crisis continued. Notably, imports continued to decline.

4.5 Significantly, US line pipe industry performance began its recovery in the second quarter of 1999 (prior to the ITC's determination in this case) as oil and gas prices as well as drilling activity rose. Imports, however, continued to fall in the first half of 1999, a decline that had commenced in July of 1998.

4.6 At the time of the ITC's determination in October of 1999, the industry was well on its way up the cycle. For this reason, the ITC majority recommended a tariff-rate quota of 151,124 short tons at the normal rate of duty, a level that approximates the average import level for the most recent three-year period. Nevertheless, the US President ignored this recommendation and imposed a remedy which dramatically reduced imports below the level recommended by the ITC. Each potential supplier was allocated 9,000 short tons (there were seven principal suppliers other than Mexico and Canada) and a duty level of 19 per cent was imposed for over-quota imports with a phase-down only of the tariff level over the three-years-and-one-day period for the measure. The 19 per cent duty level has acted as a virtual ceiling on out-of-quota imports. Import levels dropped to 63,932 short tons in the period of March to December 2000, from 165,652 short tons in 1999 for the same period (based on US Census data).

4.7 Traditional trade patterns also were disrupted: Mexico and Canada were excluded from the safeguard measure and all other suppliers were given an identical quota of line pipe regardless of their historical trade to the US market.

2. Preliminary Legal Issues

(a) Confidential Information

4.8 While Korea takes note of the indexed data provided by the United States in its letter of 16 February 2001, which contains absolute import trends, the US response was deficient under Article 13.1 of the DSU. Korea is of the view that it did not include information regarding the relative trends of imports and domestic production. The Panel's need for this confidential data on relative import trends is confirmed by the indexed data provided for the absolute trends in imports; the 12-month decline at the end of the period in absolute import volumes is not shown in the public data.

4.9 Korea submits that the Panel should seek additional confidential information in order to conduct its Article 11 (DSU) review, including:

(1) generally, the full confidential record on which the ITC actually based its determination. The burden should be on the United States to demonstrate why the full deliberative record of the ITC should not be reviewed by the Panel; and

(2) specifically, information regarding pricing data (since declines in prices were a key element of the ITC majority's causation determination); and information regarding certain producers whose financial data negatively affected industry profitability for reasons not related to line pipe; and

(3) the ITC's Economic Analysis and Report to the President on the recommended remedy as well as any relevant deliberative documents by the Office of the President which bear directly on Korea's claims regarding the WTO inconsistency of the safeguard measure under Articles XIII and XIX and Article 5.

4.10 Such information can be protected within the Panel process in accordance with Articles 13.1 and 18.2 as well as Appendices 3.3 and 3.11 of the DSU. If the United States refuses to provide the data, the refusal would constitute a violation of the US obligation under Article 13.1 of the DSU and the Panel should use adverse inferences and/or should find that the United States has not met its burden of proof on the claims at issue.

(b) The Panel Should Avoid False Judicial Economy

4.11 Korea requests that the Panel reach both of the independent claims against the United States – the inconsistency of the ITC's investigation and the inconsistency of the US President's safeguard measure. The exercise of judicial economy in this case would not lead to dispute resolution but rather dispute prolongation since Korea otherwise would be required to bring successive Panels to reach both independent claims.

4.12 US law supports the conclusion that these are independent claims because the United States can implement an adverse Panel decision with respect to the investigation and still maintain the safeguard measure. Since the resolution of the WTO inconsistency of the investigation does not resolve the errors in the safeguard measure, full implementation by the United States of the Panel ruling can only be assured if both independent claims are addressed.

4.13 Korea requests that, regardless of the Panel's decision concerning the conformity of the ITC investigation with the WTO, the Panel should review the legal errors alleged with respect to the measure. An illegal measure should not be allowed to continue through the implementation process with the cost of the time and delay falling on Korea, the prevailing party.

3. The Safeguard Measure Is Inconsistent With the WTO

(a) Introduction

4.14 Korea argues that the United States is in violation of the interrelated obligations imposed by Articles XIII and XIX and Articles 5 and 7, which cumulatively require that all measures be limited to the extent "necessary" and that quantitative restraints in the form of tariff-rate quotas be established in a manner to assure that traditional trade patterns are preserved, that overall quotas are fixed, and that historical shares of principal suppliers are respected. Korea states that the United States also violated the provisions of Articles I, XIII and XIX and Article 2 by discriminatorily excluding Mexico and Canada from the safeguard measure.

(b) The safeguard measure does not comply with Articles XIII or XIX nor does it comply with the requirements of Article 5

(i) The safeguard measure is a quantitative restraint in the form of a tariff-rate quota

4.15 The plain meaning of a tariff-rate quota is that it consists of two elements – a quota and a tariff. The remedy ultimately imposed by the US President contained those two elements – a certain tariff-rate was imposed on in-quota imports of 9,000 short tons, and a higher tariff rate was imposed on out-quota imports above this in-quota amount. Thus, the Presidential measure is a quantitative restraint in the form of a tariff-rate quota.

4.16 Quantitative restraints in the form of tariff-rate quotas must comply with the cumulative requirements of Articles XIII and XIX as well as Article 5.

(ii) The United States failed to set an overall quota in violation of Article XIII and Article 5.1

4.17 As the first step to the proper administration of a tariff-rate quota, Article XIII:2(a) and Article 5.1 requires that the overall quota amounts be fixed. The establishment of this overall quota amount permits traditional suppliers to determine whether the imposing country has abided by the terms of Article XIII:2(d) and Article 5.2 regarding the proper country allocations of the overall quota. Since the United States did not fix an overall quota and no reliable basis exists to determine the overall quota, the measure is in violation of these provisions and the SA.

(iii) The United States did not base the total tariff-rate quota on a previous three year representative period

4.18 The tariff-rate quota imposed by the President, unlike the tariff-rate quota recommended by the ITC, was not limited to the level of the "last three representative years". (While the ITC base period is confidential, it can be inferred from the public data and the ITC's determination.) Therefore, the measure violated Article 5.1 because the baseline of the last three years was not applied and the "clear justification" required by Article 5.1 in cases of deviation from the baseline was not provided.

(iv) The United States failed to allocate the quotas among its Members on the basis of their proportional historical share in violation of Article XIII and Article XIX 1994, and Article 5.2

4.19 In violation of the cumulative requirements of Articles XIII:2 and XIX and Article 5.2, the President did not negotiate the quotas with all Members having a substantial interest in line pipe trade and did not allocate the quotas based on the suppliers' proportional market share during a representative period ("historical share").

4.20 Korea constituted 55 per cent of the total imports (excluding Mexico and Canada and based on the public data) during the period of 1996-98, which was the apparent base period of the ITC recommended measure. Nevertheless, the President's measure reduced Korea's imports to the same 9,000 short ton quota level as the smallest or even non-existent suppliers. This failure to respect historical suppliers is precisely the situation prohibited by Articles XIII:2 and XIX and Article 5.2.

(c) Regardless of the Type of the Safeguard Measure, the Measure Violates Article XIX:1 and Articles 5.1 and 7.1 Because the Measure Was Not Limited to the Extent and the Time Necessary to Remedy the Injury and Allow Adjustment

4.21 The US President, without any public explanation or justification, disregarded the safeguard remedy recommendation of the ITC and imposed a remedy which was far more severe than "necessary". While there is no way of determining exactly what overall import level is targeted by

the President's country allocations of 9,000 short tons, any reasonable calculation results in a total quota of significantly less than that recommended by the ITC – 151,124 short tons.

4.22 Furthermore, the ITC's economic analysis specifically rejected as "excessive" a limit of 105,000 short tons and that limit significantly exceeds the President's measure. Since there was no independent analytical basis for the Presidential measure, there was no means or method for the United States to ensure that the measure was limited "only to the extent necessary". The finding by the ITC and the absence of any analytical support for the President's measure constitute *prima facie* evidence that the measure was not "limited to the extent necessary" and consequently violates Article XIX:1 and Article 5.1.

4.23 In addition, Article 7.1 provides that a measure can only be applied for such a period of time as may be "necessary to prevent or remedy serious injury and to facilitate adjustment". Significant evidence in the ITC record confirmed that the temporary downturn in the line pipe industry produced by the crisis in oil and gas prices had reversed by the time of the ITC's determination in October of 1999. Therefore, no remedy, let alone a measure of three years, could be justified as necessary.

(d) The US Exemption of Mexico and Canada from the Safeguard Measure Violated the MFN Requirements Established in Articles I, XIII:1 and XIX and Article 2

4.24 The MFN requirement is a cornerstone of the GATT/WTO system. It is reflected in all the relevant articles of the GATT, including Articles I and XIX and it is specifically incorporated in Article XIII:1 and Article 2.2. All of these provisions require that the safeguard measure and quantitative restrictions be applied to all suppliers. In this case, the United States did not respect this principle or these provisions because it excluded Mexico and Canada from the safeguard measure.

4.25 The parallelism between Articles 2.1 and 2.2 also requires that the measure be applied to all suppliers since the United States could only conduct a legal safeguard investigation on the basis of all imports. Articles 2 and 4 as well as Article XIX speak only in terms of "imports" and, therefore, there is no legal basis for any exclusion of certain imports. Any other interpretation would not comport with the plain meaning of those provisions and could lead to a selective safeguard regime in which a WTO Member could exclude countries arbitrarily from the serious injury analysis so that they could be excluded from the safeguard measure imposed.

4.26 The exemption of Mexico was particularly egregious in this case since Mexico was the second largest supplier to the US market during the ITC's period of investigation. It was clear that Mexico would take market share from the restricted suppliers. In fact, Mexico and Canada together have significantly replaced historical suppliers such as Korea. Mexico is now the largest supplier to the US market and Canada is the number three supplier. Mexico and Canada's imports almost equal the imports from all other suppliers. Their imports clearly have occurred at the expense of the other historical suppliers who are now discriminatorily restricted from the US market.

(e) The United States Failed to Respect the Rights of Developing Countries to be Excluded from the Safeguard Measure if their Individual Imports Were Less Than 3 per cent and Cumulatively Less Than 9 per cent in Violation of Article 9.1

4.27 Article 9.1 provides a special preference for developing countries to allow them to be exempt from a safeguard measure when their imports are at the specified negligible level. In this case, the United States did not exempt the countries who qualified. The United States therefore failed to respect the developing country preference in Article 9.1.

4. The ITC Investigation Was Not in Compliance With WTO Requirements

(a) The US Measure Is Inconsistent with Article XIX and Article 2 Because Imports Did Not Increase Absolutely or Relative to Domestic Production

4.28 With respect to the issue of increased imports, the ITC methodology was inconsistent with Article XIX and Articles 2 and 4. The ITC applied a legal standard that was rejected by the Appellate Body in *Argentina – Footwear (AB)* – i.e., "increased imports" requires only a "simple increase" over the most recent five full years. The Appellate Body in *Argentina – Footwear (AB)* held that imports must have increased during "the recent past" and that the increase had to be "sudden and sharp," in order to meet the requirements of Article XIX and Article 2.1.

4.29 While the public data indicates that imports increased up until the end of 1998, the confidential data shows that, in fact, imports of subject merchandise began to decline in the second half of 1998 and continued to decline for the 12 months immediately preceding the ITC's determination. Moreover, imports did not increase relative to production but rather declined during the first six months of 1999. The ITC's determination does not address either of these fundamental facts because an erroneous legal standard was applied.

4.30 The correct legal finding, as enunciated by the Appellate Body in *Argentina – Footwear (AB)* is that "not just <u>any</u> increased quantities of imports will suffice ... [t]he 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'". Clearly, the ITC did not apply this standard, and just as clearly, the declining subject imports did not meet it.

4.31 The US line pipe industry was not suffering serious injury within the meaning of Article XIX and Articles 2.1 and 4 nor did the ITC satisfy the requirements of Articles 3.1 and 4.2(c) regarding the required findings of fact and conclusions of law

4.32 The case for serious injury was far from compelling – as half the Commissioners recognized. Only three out of the six ITC Commissioners determined that the industry was seriously injured. Two Commissioners determined that the industry had not been seriously injured, but it was threatened with serious injury. Finally, one Commissioner determined that the industry was neither seriously injured nor threatened with serious injury by imports.

4.33 The ITC could not agree that the requirement for safeguard relief had been met and there was no attempt at a reconciliation of the divergent opinions. Therefore, the ITC's findings and conclusions of fact and law fell short of the requirements of Articles 3.1 and 4.2(c), which require that the authorities set out in sufficient detail their findings and conclusions of law.

4.34 Moreover, in this case, the Panel's review of Korea's Article 3.1 and 4.2(c) claims is hampered by the fact that the Panel does not have access to the actual factual record on which these divergent conclusions were reached. The adequacy and reasonableness of the conclusions reached depend upon the facts.

4.35 These fundamental legal disagreements among Commissioners also make it clear that this is not a case of extraordinary circumstances which can justify emergency relief.

4.36 The ITC record confirms that the US line pipe industry was not "significantly impaired". Industry indicators had declined temporarily for 12 months (between July 1998 and June 1999) and that decline followed a peak performance sustained over the preceding 18 months. In fact, the industry had recorded its best performance ever in 1997 and the first half of 1998. Moreover, even during the brief period of the downturn, capital expenditures by the US industry continued to increase at substantial levels and two new producers began operations.

4.37 Even the declines in profitability in late 1998 and early 1999 were overstated because the ITC failed to isolate the effects on the line pipe industry caused by the collapse of the OCTG market. Although the problems with the industry data went beyond just certain producers, the profitability data was particularly affected by the circumstances of Lone Star Steel and Geneva Steel. Their problems were clearly due to causes other than imports of line pipe.

4.38 The ITC also improperly ignored the fact that no present serious injury existed at the time of the ITC's vote, if it ever had. The ITC explicitly noted that both domestic shipments and prices had recovered substantially at the end of the period when the ITC's determination was made. Those facts should have resulted in a "no serious injury" finding.

(b) No Causal Nexus Existed Between Increased Imports and Serious Injury as Required by Article XIX and Article 4

4.39 Article XIX and Article 4.2(b) mandates that an affirmative injury determination shall not be made, unless objective evidence demonstrates a "causal link between increased imports of the product concerned and serious injury". The Panel in *Argentina – Footwear (Panel)* (subsequently affirmed by the Appellate Body), enunciated an analytical framework for a causal analysis: (i) the coincidence of trends between imports and the performance of the domestic industry; (ii) the conditions of competition between imports and the domestic industry; and (iii) whether other factors were the cause of any injury.

4.40 Assuming *arguendo*, that serious injury existed, the evidence in this case demonstrates that there was no coincidence of trends between imports and the performance of the domestic industry. In fact, the decline in industry performance coincided with a decline in imports, not an increase. The evidence also established that the conditions of competition between imports and the domestic industry, specifically price effects, were the result primarily of a decline in line pipe demand; there was no demonstration that imports led or caused the decline in US prices. Therefore, the ITC majority should have concluded that no causal relationship existed between increased imports and any serious injury suffered by the industry. At a minimum, the ITC majority had to explain how a causal nexus could still exist in spite of the lack of coincidence in trends between increased imports and serious injury.

4.41 The ITC's subsequent analysis of the other factors of serious injury – principally declines in demand for line pipe from the oil and gas industry – was also WTO inconsistent since the evidence established that "but for" the oil and gas crisis, the industry would not have been in a state of serious injury. The ITC's evaluation of the additional "other factors," including low capacity utilization and significant domestic competition among US producers, also failed to meet the standard set out by the Appellate Body in *US – Wheat Gluten (AB)*. The United States failed to establish that it did not "attribute the injury caused by these other factors to increased imports" since the ITC only weighed each individual other factor against increased imports. The required "examination" and "distinguishing" of the other factors was not performed. Thus, the ITC did not establish that the increase in imports had a "genuine and substantial" linkage with serious injury.

4.42 Finally, the US safeguard measure was designed to remedy, in part, serious injury from declining demand when the measure should only have addressed the serious injury caused by imports.

(c) There Was No Threat of Serious Injury from Imports in Accordance With The Requirements Of Article XIX nor Articles 2 and 4

4.43 Two Commissioners determined that although the industry had not been seriously injured, it was threatened with serious injury from increased imports. These Commissioners failed to reconcile their finding of threat with the fact that subject imports had declined over the most recent 12-month period (there was only a "threat" of increased imports), and that decline had actually accelerated

considerably over the final six months of the period. Finally, both domestic pricing and shipments had shown considerable improvement by mid-1999 with the recovery of the oil and gas sector. When the improvement in the industry is combined with the fact that imports continued to decline, it is clear that the affirmative threat determinations were based merely on "conjecture or remote probability," and not on injury that was clearly "imminent". Thus, the ITC's threat of injury determination violated Article XIX and Articles 2 and 4.

(d) No Unforeseen Developments Led to Increased Imports

4.44 Pursuant to the Appellate Body's Interpretation of Article XIX in *Korea – Dairy Safeguard* (*AB*) and *Argentina – Footwear* (*AB*), there must be unforeseen circumstances that led to the increase in imports that cause serious injury. No such unforeseen circumstances were identified by the United States nor do any such circumstances exist in the record of this case.

(e) The US Decision Did Not Satisfy the Requirements of Emergency Action As Specified by Article 11 or Article XIX

4.45 The US decision did not meet the fundamental conditions of safeguard relief. As the Appellate Body in *Argentina – Footwear (AB)* recognized, safeguard measures were intended to be measures "out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'".

4.46 Such an emergency situation did not exist here – a four-quarter decline in imports is hardly an "emergency" situation requiring "immediate relief". This is especially true when the decline in domestic industry performance coincides with a decline in imports and the industry is in the midst of an upswing when the ITC's determination was made. Thus, the US determination on serious injury and causation cannot support this or any other safeguard measure because the strict standards of the SA have not been met.

5. Procedural Legal Arguments

(a) The United States Violated Article 12.3

4.47 The United States did not disclose to Korea the measure the President intended to propose prior to or during the consultations as required under Article 12.3. Therefore, Korea was deprived of any meaningful consultations regarding the measure in violation of Article 12.3.

(b) The United States Violated the Compensation Provisions of Article 8.1

4.48 Article 8.1 provides that a Member imposing a measure shall endeavour to maintain a substantially equivalent level of concessions including trade compensation. Articles 8.1 and 12.3 are explicitly linked and require that there be an opportunity for prior consultation with full knowledge of the proposed measure. As the United States did not disclose the measure to Korea prior to the consultations, those consultations could not meet the objectives set out in Article 8.1.

6. Conclusion

4.49 The US safeguard measure as well as the ITC's safeguard investigation were not in conformity with the WTO. Korea respectfully requests that the Panel find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.50 The following is the United States' own executive summary of its first written submission:

1. Factual Background

4.51 The ITC determined that line pipe was being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*. Three of the ITC's six Commissioners found that the domestic industry was seriously injured, and two found that the domestic industry was threatened with serious injury. The votes of these five Commissioners constituted the determination of the ITC, which is the "competent authority" of the United States for purposes of the WTO Agreement on Safeguards. One Commissioner dissented from the determination. Under US law, that dissent does not form part of the determination of the ITC or the explanation of the basis of the determination.

4.52 Contrary to Korea's assertions, the ITC's determination is fully consistent with Articles 3 and 4. Korea has presented no grounds for the Panel to conclude that confidential information is necessary to its review of the ITC's findings and conclusions. Furthermore, the fact that the ITC Commissioners were not unanimous in their affirmative injury findings does not render that determination inconsistent with Articles 3.1 or 4.2(c). Articles 3 and 4 impose requirements on the "competent authorities of a Member." The Safeguards Agreement does not address the question of how the "competent authorities of a Member" reach their decisions. This is a matter left to the Member.

2. Substantive Argument

(a) Burdens of Proof

4.53 The United States complied with all its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") when it applied the safeguard measure on line pipe. That measure is presumed to be consistent with the WTO Agreement unless Korea, as the complainant, meets its burden of proof to demonstrate otherwise. It has failed in this task, as its claims are based primarily on unfounded assertions without supporting evidence or legal grounding. Korea attempts to excuse these shortcomings by claiming that it needs large volumes of "confidential information" to advance its claims. However, most of the data underlying the ITC finding of serious injury appear in the ITC Report.[5] Therefore, the deletion of confidential information from the published version of the report does not impair the Panel's ability to examine Korea's claims. Since Korea has failed to present a *prima facie* case on any of its claims, the Panel has no basis to request the United States to provide the confidential information.

(b) The Proper Application of the Standard of Review: Objective Assessment of Action by the Competent Authorities and Action by Members in Applying a Safeguard Measure

4.54 The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and past interpretations of the DSU establish that a panel must make an objective assessment of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, "the applicable standard is neither *de novo* review as such, nor 'total deference.' "[6] This inquiry may differ depending on the obligation under examination.

4.55 With regard to the ITC's findings, which address US obligations under Articles 2, 3, and 4 of the Safeguards Agreement, the Panel's review is limited to an objective assessment

[5] *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, ITC Pub. 3261 (December 1999) p. I-3, ("ITC Report").

[6] *European Communities – Measures Concerning Meat and Meat Products*, report of the Appellate Body, WT/DS26/AB/R, para. 117, adopted 13 February 1998 *("EC- Hormones (AB)").*

> of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with ... the Safeguards Agreement.[7]

4.56 In contrast, a panel's analysis of the Member's application of a safeguard measure is not confined to evidence gathered in the investigation or findings made in the report of the competent authorities. The panel may also consider a Member's *ex post* explanation of why the measure was permissible at the time of application. As the Appellate Body recognized in *Korea – Dairy Safeguard,* the recommendations or determinations in a safeguard proceeding *need not* justify the type or extent of the safeguard measure applied by the Member, except in the limited circumstance of a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years.[8]

(c) Korea Has Not Established Any Basis for the Panel to Conclude That the ITC's Determination of Increased Imports Is Inconsistent With Article 2

4.57 Article 2.1 requires increased imports on *either* an absolute basis *or* relative to domestic production. In this case there was a recent, sudden, sharp, and significant increase in imports in the recent past, on *both* an absolute basis *and* relative to domestic consumption.

4.58 In analyzing the import data, the ITC paid particular attention to the most recent part of the period of investigation, the full year 1998 and interim 1999. As the ITC found, after declining between 1994 and 1995, imports on an absolute basis increased each year thereafter, and rose sharply in 1998, the most recent calendar year of the period investigated. Imports rose from about 222,000 tons in 1997 to about 331,000 tons in 1998. Although absolute import levels in interim 1999 were slightly lower than those for interim 1998, they remained very high. Imports in interim 1999 exceeded in just six months the levels of full year 1995 and 1996 imports. Imports relative to domestic production rose each year after 1995. The ratio of imports to domestic production nearly doubled in 1998, and reached its highest level in interim 1999.

4.59 Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Article 2.1 did not occur. Korea attempts to refute the ITC's finding of increased imports by asking the Panel to focus exclusively on a comparison of the last six months of 1998 and the first six months of 1999, to the exclusion of all other data, including the most recent full-year data for 1998. Even the import data for this 12-month period used by Korea does not support its argument that imports declined steadily over this period. Rather, monthly import data show that imports actually increased toward the end of interim 1999.

4.60 The ITC customarily gathers and evaluates import data on a calendar year basis with additional data on interim periods, and not on the basis of arbitrarily defined snapshots of time. That the ITC followed its long-standing approach in examining increased imports demonstrates neutrality and lack of bias in its analysis. The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, not chosen to achieve a particular result.

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[7] *Argentina – Safeguard Measures on Imports of Footwear Safeguard*, WT/DS121/R, para. 8.124, adopted 25 June 1999 *("Argentina – Footwear Safeguard")*; Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R, para. 7.30, adopted 21 June 1999 *("Korea – Dairy Safeguard").*

[8] *Korea – Definitive Measure on Imports of Certain Dairy Safeguard Products*, Report of the Appellate Body, WT/DS98/AB/R, paras. 99 and 103, adopted 14 December 1999 ("*Korea – Dairy Safeguard (AB)").*

4.61 Nothing in the Safeguards Agreement compels the use of any particular period, let alone the arbitrarily-defined period advocated by Korea. Under the applicable standard of review pursuant to Article 11 DSU, the Panel should not re-weigh the evidence before the ITC, and should not disturb the ITC's findings so long as they are objective.

(d) The ITC's Determination of Serious Injury Caused by Increased Imports Is Consistent With Article 4

4.62 In determining that the domestic industry was seriously injured, the ITC evaluated all enumerated factors set out in Article 4.2(a) and "other" factors that it found to be relevant, including capacity, shipments, inventories, capital expenditures, research and development expenses, and prices. Virtually all of the factors demonstrated a significant overall impairment in the domestic industry's condition beginning in 1998 and continuing into interim 1999. Korea's submission completely disregards this overwhelming evidence of serious injury.

4.63 The ITC's methods of collecting and evaluating the injury data were reasonable. The ITC recognized that most of the producers of line pipe also made other types of pipe, including oil country tubular goods ("OCTG"). The ITC carefully evaluated company allocation methods in the course of tabulating questionnaire and other data, and it verified the allocations of two of the largest producers. Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not mean that a Member has failed to evaluate industry-specific factors "of an objective and quantifiable nature," as required by Article 4.2(a).

4.64 For the large majority of the factors considered by the ITC in its injury analysis, Korea has failed to provide any reason to believe that the production of other pipe products in the US producers' facilities affected the data. The only flaws that Korea alleges go to capacity utilization and profitability.

4.65 The ITC recognized that capacity utilization "may not be as certain a measure of injury in this industry as compared to others, given the ability of domestic producers to shift production among various pipe products." It concluded nevertheless, that "the sharp decline in capacity utilization is consistent with other indicators of poor domestic industry performance in 1998 and interim 1999 and supports an affirmative determination of serious injury."

4.66 The ITC adequately addressed Korea's arguments that declining OCTG sales distorted the profitability data for the line pipe industry because fixed costs were allocated by some domestic producers based on the relative levels of sales of different pipe products. The ITC concluded that increases in such costs, resulting from declines in the production of other pipe products such as OCTG, were not mistakenly or disproportionately attributed to line pipe.

4.67 Korea's argument rests entirely on the faulty premise that OCTG shipments declined much more severely than shipments of line pipe and other pipe products made by the US firms. Based on an examination of the objective evidence in the record, the ITC found that this was not the case. Line pipe shipments declined precipitously, at the same time and virtually to the same degree as OCTG shipments. There is no basis for Korea's argument that a disproportionate share of fixed costs were allocated to line pipe, thereby distorting the financial results of the line pipe industry.

4.68 Furthermore, Korea incorrectly assumes that the largest component of average unit costs consisted of fixed costs. The majority of average unit costs (raw material and direct labour) were, however, variable and therefore could not be directly influenced by changes in production volumes of different pipe products. Thus, even if there had been a disproportionately large decline in OCTG sales – and Korea has produced no record evidence of this – the effect that this could have had on average unit costs for line pipe was nominal.

4.69 Data for the entire US line pipe industry showed that its financial condition deteriorated sharply in 1998 and interim 1999, notwithstanding Korea's arguments concerning events at two firms. Article 4.2(a) requires an examination of the situation of the entire industry, and not of individual firms. Further, with respect to one of the firms singled out by Korea, the evidence of alleged problems presented by Korea rests on a distortion of the statements of the dissenting ITC Commissioner. With respect to the second firm, there was ample evidence in the record that the decline in its line pipe business played a major role in the difficulties that it faced.

4.70 Korea's argument that the industry was not seriously injured because capital expenditures increased is likewise unpersuasive. Virtually all other factors bearing on the state of the industry pointed decisively to serious injury. Also, there was evidence in the record that 1998 capital spending reflected analyses and decisions that preceded the surge in imports in 1998, and that some capital spending had been postponed or cancelled in 1998. Finally, the ITC noted that capital investment projects in the steel industry generally involve long lead times, suggesting that capital expenditure levels may not be a timely and accurate measure of industry conditions.

4.71 Korea's arguments that the domestic industry was not suffering serious injury because of an improvement at the end of the investigated period are also unpersuasive. Contrary to Korea's assertion, imports had actually begun to increase again at the very end of interim 1999. Moreover, Korea relies on announcements of price increases that mostly occurred well after the ITC's investigation was over.

4.72 In assessing causation, the ITC first ascertained the effects of the increased imports to determine whether they were causing serious injury or threat thereof. It separately identified and evaluated the effects of the other factors which could be having an injurious effect. In determining the effects of both increased imports on the one hand and other factors, the ITC properly distinguished the effects of imports from the effects of other factors. The ITC thereby ensured that the effects of other factors were not attributed to the imports, and it established that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury to the domestic industry. The ITC's application of the causation standard was consistent with the requirements of the SA as explained by the Appellate Body in *United States – Wheat Gluten*.[9]

4.73 The ITC found that increased imports of line pipe were "an important cause of serious injury." Imports had increased substantially every year since 1996, with the bulk of this increase occurring in 1997 and 1998. Imports' market share rose significantly, especially during 1998 and interim 1999, at the same time that the domestic industry's condition deteriorated. Based on its evaluation of the import levels and industry indicators, the ITC found that the surge in imports and consequent shift in market share from the domestic industry to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.

4.74 The ITC properly evaluated "relevant factors having a bearing on the situation of the domestic industry" and concluded that the sharp increase in imports in 1998 and interim 1999 led to losses in all key industry indicators. Through this analysis, the ITC found that increased imports were an important cause of serious injury and properly established the existence of the causal link between the increased imports and the serious injury, as required by Article 4.2(b).

4.75 Contrary to Korea's assertion, there is a coincidence of trends between imports and the performance of the domestic industry. The "negative correlation between import trends and the difficulties of the industry," which is the basis for so much of Korea's argument on causation, simply does not exist.

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[9] *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R, para. 160, adopted 22 December 2000 *("US – Wheat Gluten (AB)").*

4.76 The ITC considered Korea's argument that import levels were overstated because of dual stencilling of line pipe, but concluded that there was no evidence to support Korea's claim that a substantial portion of Korean imports were dual-stencilled but actually sold as standard pipe.

4.77 Korea's assertion that the ITC failed properly to consider whether declining line pipe prices were caused by imports does not withstand scrutiny. The ITC relied on three different types of evidence in analyzing whether imports depressed domestic prices: average unit values of imports, pricing data that it had collected, and questionnaire responses from a wide range of industry participants. Declining average unit values of imports indicated price depression by imports. The pricing data that the ITC collected showed that underselling by imports was pervasive. Finally, most of the questionnaire responses from industry participants identified import competition as an important cause of price declines and injury to the domestic industry.

4.78 The ITC examined six factors other than increased imports as possible other causes of serious injury. Korea focuses on two of these: a crisis in oil and gas exploration and development in 1998 and 1999, and competition within the domestic industry.

4.79 The ITC distinguished any injurious effects caused by increased imports from the effects of declining demand due to the oil and gas crisis by finding that the decline in demand for line pipe could not explain: (i) the level of financial losses experienced by the domestic industry; (ii) the domestic producers' loss of market share; or (iii) the across-the-board price declines affecting line pipe products not used in oil and gas gathering applications. The ITC also noted the consensus among industry participants that imports had played a major role in the decline of line pipe prices in 1998 and interim 1999. Therefore, the ITC did not improperly attribute to imports injury caused by the decline in oil and gas demand, and its findings demonstrated that the causal link between the increased imports and serious injury was undisturbed by any contribution to injury resulting from reduced oil and gas drilling and production activities.

4.80 Korea's argument with respect to the effects of reduced activity in the oil and gas industry rests in large part on its assertion that there was a coincidence in trends between declining demand due to the oil and gas crisis and the deteriorating condition of the domestic industry, and that there was no coincidence in trends between imports and the condition of the domestic industry. Korea is incorrect. Increased imports *did* coincide with the deteriorating condition of the domestic industry. Moreover, the ITC's analysis of the conditions of competition confirmed the causal link between imports and the injured condition of the domestic industry. The fact that the oil and gas crisis also coincided with the worsening condition of the domestic industry does not prove that the ITC attributed the effects of the oil and gas crisis to imports. The ITC clearly and extensively distinguished the effects of increased imports from those of the oil and gas crisis.

4.81 The ITC also considered competition among domestic producers but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments in 1998 and interim 1999. The ITC found the modest increase in domestic capacity over the period investigated (which was indicative of intra-industry competition) was considerably less than the growth in line pipe consumption. Thus, contrary to Korea's assertion, the ITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

4.82 In sum, the ITC properly distinguished the effects of other factors under Article 4.2(b), and properly established the causal link between increased imports and serious injury to the domestic industry, without attributing to imports injury caused by other factors.

(e) Korea Has Not Provided Any Basis for the Panel to Conclude That Chairman Bragg and Commissioners Askey's Findings Are Inconsistent With Articles 2 and 4

4.83 Contrary to Korea's assertion, the two ITC Commissioners who determined that increased imports threatened serious injury found both an increase in imports that had already occurred, and that subject imports were likely to increase in the future. Both of these findings are supported by the evidence before the ITC. These Commissioners supported their findings regarding likely increased imports in the future with the evidence regarding available capacity in foreign facilities. They also properly relied on objective evidence to find that increased imports contributed to the decline in US producers' prices for line pipe.

4.84 Noting the relatively high substitutability between imported line pipe and the domestic product, as well as the importance of maximizing production in a capital-intensive industry, these Commissioners concluded that domestic line pipe producers were constrained to lower prices in response to the availability of lower-priced imports. They found that domestic prices for line pipe had declined to the point where the domestic industry was clearly threatened with serious injury, and if the low pricing was sustained, would quickly result in serious injury. The two Commissioners made appropriate findings regarding threat of serious injury based on facts and not mere allegation, conjecture or remote possibility.

(f) Korea Has Not Established Any Basis for the Panel to Conclude That the Safeguard Measure Applied by the United States Was Inconsistent With the Safeguards Agreement or GATT 1994

(i) Korea has not met its burden to establish that the line pipe safeguard was applied beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment

4.85 Article 5.1, first sentence, requires that a safeguard measure be "commensurate" with the goals of remedying serious injury and facilitating adjustment.[10] Thus, the relevant inquiry involves a comparison of the safeguard measure with the serious injury and the need for adjustment. Korea does not even address this question. Instead, it compares the US safeguard measure, as applied, with the *ITC recommendation*.

4.86 In addition to being irrelevant, this comparison does not support Korea's claim that the ITC recommended measure would have restricted imports or assisted the domestic producers less that the measure that the United States actually applied. Korea simply ignores that the line pipe safeguard's three-year duration is a full year less than the ITC recommended. It provides no basis for contending that the 19 per cent duty under the line pipe safeguard would have "a similar effect" to the 30 per cent over-quota duty under the ITC's recommended tariff-rate quota ("TRQ"). But most importantly, Korea's analysis of the separate elements of the safeguard measure fails again to address the relevant question – whether the measure (and not its parts) is commensurate with the goals of Article 5.1, first sentence.

(ii) Korea has not met its burden of showing that Article 5.1, Second Sentence, Article 5.2(a), or Article XIII are applicable to the type of safeguard imposed on line pipe

4.87 The United States and Korea differ over whether to characterize the line pipe safeguard as a supplemental duty or a TRQ. This disagreement is, however, of little consequence, since the measure complies with the relevant WTO obligations in either case.

[10] *Korea – Dairy Safeguard (AB)* at para. 96.

4.88 If the measure is labelled a supplemental duty, Korea's arguments become irrelevant. The quota rules under Article 5 and Article XIII, which form the basis for Korea's arguments, plainly do not apply to a duty increase.

4.89 If the measure is labelled a TRQ, the analysis takes longer, but leads to the same result. First, Korea claims that the Article 5 prohibitions on the use of quotas and quantitative restrictions apply to the line pipe safeguard because a TRQ is a quota. It provides little support for this view other than to note that the "Q" in "TRQ" stands for "quota." However, panel reports under both GATT 1947 and the WTO Agreement confirm that a TRQ is not a "quota" or "quantitative restriction" for purposes of GATT 1947 and GATT 1994.[11] The text supports this view. Article XIII establishes rules on quotas and quantitative restrictions, which it follows with a statement stating that the rules also apply to TRQs. The addition of this clarification shows that the drafters did not understand TRQs to be "quotas" by their nature. Therefore, Korea fails to present a *prima facie* case that the line pipe safeguard was inconsistent with Article 5.

4.90 Second, Korea claims that Article XIII applies to the line pipe safeguard. However, the object and purpose of the Safeguards Agreement is to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX" by creating "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994."[12] One vital aspect of this clarification was the integration of Article XIII principles into the comprehensive framework of the Safeguards Agreement. Some principles were strengthened, some remained the same, and some were removed. The application to a safeguard measure of Article XIII rules that the drafters of the Safeguards Agreement omitted would do violence to their stated objective that the agreement be "comprehensive."

4.91 Moreover, it does not make sense to apply Article XIII rules to the line pipe safeguard. For example, if Article XIII:2(d) applied to safeguard measures, the identical language included in Article 5.2(a) would become superfluous, a result inconsistent with basic rules of treaty interpretation. The notice requirements under Article XIII:2(a) and XIII:3(b) are redundant of the notification requirements under the Safeguards Agreement. In any event, the Article XIII:2(a) requirement to establish an overall quota amount applies only were "practicable." As Korea itself notes, with an indeterminate number of parties subject to the 9000 ton exemption from the 19 per cent duty, it was not practicable to set an overall quantity of eligible imports.

(iii) Articles I and XIII:1 and Article 2 do not prohibit a member from excluding its free trade agreement partners from a safeguard measure

4.92 Article XXIV creates an exception to the MFN principle for Members of a free trade agreement. Footnote 1 of the Safeguards Agreement establishes that no provision of the Safeguards Agreement will nullify the effect of Article XXIV on the interpretation of Article XIX. Therefore, Articles I and XIII:1 and Article 2 do not prohibit the United States from excluding Canada and Mexico, its partners in the North American Free Trade Agreement ("NAFTA"), from a safeguard measure. It is noteworthy that the list of measures that Article XXIV:8 specifically authorizes FTA parties to maintain against each other does not include safeguards measures applied under Article XIX. By implication then, safeguard measures either may or must be made part of the general elimination of "restrictive regulations of commerce" under any FTA.

[11] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, para. 7.68, adopted 22 May 1997, *("EC – Bananas III")*; *EEC – Import Regime for Bananas*, DS38/R, adopted 11 February 1994.

[12] Safeguards Agreement, preamble.

(g) Miscellaneous Arguments Raised by Korea

4.93 Korea's first written submission contains several short arguments. All are invalid. (1) Korea's claims against the ITC's determination and the measure itself are plainly not independent of each other, which leaves the Panel the option of exercising judicial economy with respect to one if it finds the other to be inconsistent with the WTO Agreement. (2) The record establishes the existence of unforeseen developments, as required under Article XIX. (3) Article 11 does not impose a separate requirement to establish the existence of an "emergency situation." (4) The United States complied with Article 12.3 by giving Korea notice of the proposed safeguard measure and providing an adequate opportunity to consult.

3. Procedural Arguments

(a) Korea Provides No Basis for the Panel to Request Confidential Business Information from the United States.

4.94 Korea asks the Panel to request immense quantities of confidential information from the United States. However, it has nowhere established that any of the information meets the Article 13.1 DSU requirement of being "necessary and appropriate" to the Panel's evaluation of Korea's claims. In fact, previous panels have recognized the need to avoid the use of confidential information, where possible. In this dispute, the non-confidential information on the Panel record is sufficient. If the Panel considers that it needs anything more, the United States is willing to meet the need with summaries or indexed data.

4.95 Most importantly, Korea has failed to state a *prima facie* case on any of its claims. Therefore, any request for confidential information at this stage would put the United States in the position of proving its measure consistent with the WTO Agreement when Korea has not yet established the existence of an inconsistency. This would entirely reverse the established burden of proof.

(b) Request of the United States for a Preliminary Ruling That Evidence Not Submitted to the ITC or Addressing Events After the Decision to Take a Safeguard Measure Is Not Admissible in This Proceeding

4.96 The United States requests that the Panel issue a preliminary ruling that certain information included in Korea's first written submission is inadmissible. First, several pieces of information in Korea's submission were not submitted to the ITC. If the Panel were to consider that information in its evaluation of the ITC determination, it would be conducting the sort of *de novo* review that the Appellate Body has consistently rejected. Second, Korea submitted and cited to information pertaining to the period *after* the United States took the decision to apply a safeguard measure. Under the Safeguards Agreement, both the determination of serious injury and the decision to apply a safeguard measure must be based on information available to the competent authorities or the Member at the time of the determination or decision. Therefore, that information is irrelevant to any evaluation of the line pipe safeguard measure.

4.97 Accordingly, the United States requests that the Panel rule that the information described in the preceding paragraph is inadmissible, that it request the removal of that information and arguments based on that information from Korea's first written submission, and that the Panel disregard that information and any arguments based on it.

C. FIRST ORAL STATEMENT OF KOREA

4.98 The following is the Korea's own executive summary first oral statement:

1. Factual Background

4.99 The US line pipe industry, in the second half of 1998 and early 1999, faced a difficult situation. The industry had just enjoyed a peak demand period for 18 straight months; the industry built substantial new capacity to take advantage of that domestic increase in market demand; but demand plummeted when the oil and gas crisis hit. US line pipe industry performance began its recovery in the second quarter of 1999. Imports, however, continued to fall in the first half of 1999, a decline that had commenced in the second half of 1998.

2. Preliminary Issues

(a) Confidential Information

4.100 The 16 February letter of the United States confirms that Korea was absolutely correct that the public data regarding absolute import trends does not accurately reflect the trends of the confidential data. This is the reason that the Panel also needs the other confidential data identified in Korea's First Written Submission. The Panel is not obliged to frame its review and decision on the basis of the information the United States may choose to provide. The Panel should either apply adverse inferences to complete its review or find that the United States has failed to meet its burden of proof, depending on the issue.

(b) Judicial Economy

4.101 Korea urges the Panel to reach the issues of the safeguard measure even after the Panel finds errors in the ITC investigation. Otherwise, it would lead to dispute prolongation rather than dispute resolution. This authority is within the Panel's discretion.

3. Legal Arguments

(a) The Safeguard Measure

4.102 For reasons never made publicly available, the US President completely ignored the ITC's recommendations and imposed a remedy which was far more restrictive and in clear violation of many of the basic principles for safeguard remedies. The ITC had recommended a tariff-rate quota of 151,124 short tons with a 30 per cent tariff for over-quota imports. The President imposed a tariff-rate quota of 9,000 short tons per supplying country with a tariff of 19 per cent for over-quota entries. The President's measure was excessive.

4.103 The US measure, a tariff-rate quota, violates Articles XIII and XIX and Article 5. The US claim that Article XIII does not apply to a safeguard measure under the SA must be rejected. The WTO is a single treaty. As such, all provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expresses the intention of the Uruguay Round negotiators that the provisions of the agreements included in Annexes 1, 2 and 3 must be read as a whole. The General Interpretative Note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement, the provisions of the other agreement shall prevail *to the extent of the conflict*" (emphasis added). Certainly, no conflict exists between the SA and Articles XI and XIII.

4.104 The United States maintains that only the provisions of Article XIII which are specifically incorporated in the SA continue in force and effect and cites for its conclusion that the SA is a "comprehensive" agreement. But "comprehensive" does not mean "exclusive." In *Argentina – Footwear*, the Appellate Body specifically rejected the argument that since the SA did not contain the "unforeseen development" language found in Article XIX, this was an "express omission" from the

SA. The same reasoning applies here. The preamble of the SA states that the object and purpose of the SA is to "clarify and reinforce the disciplines of *GATT 1994*" (emphasis added). While Article XIX is specifically mentioned in the SA, it is not exclusively mentioned – *all* the disciplines of the GATT 1994 are referenced. The object and purpose of the SA, set forth in the preamble, is to "re-establish multilateral control over safeguards and eliminate measures that escape such control." Yet the United States maintains that the Article XIII requirements regarding tariff-rate quotas were eliminated. If we were to follow the US argument, only tariff-rate quotas have escaped multilateral disciplines.

4.105 In any event, regardless of what form a safeguard measure takes, it must be "necessary to prevent or remedy serious injury and to facilitate adjustment" in accordance with Article 5.1 and Article XIX of the GATT 1994. In *Korea – Dairy Safeguard*, the Appellate Body upheld the Panel's conclusion that the first sentence of Article 5.1 imposes such a very specific "obligation."

4.106 The Majority of the ITC explicitly concluded that the Petitioners' quota recommendation of 105,849 short tons "would exceed the amount necessary to prevent or remedy the serious injury ... . Our economic analysis indicates that such restrictions would be excessive." The President's safeguard remedy, under any reasonable calculation, is below that level of restriction and therefore, "excessive."

4.107 The US position that they do not need to justify the measure *before* it is imposed nor can the import performance be evaluated *after* it is imposed, renders Article 5.1 meaningless.

4.108 No document exists in the record of the ITC investigation or the establishment of the safeguard remedy, which demonstrates that the measure imposed by the US President was "necessary." To the contrary, the evidence is that the measure imposed is, in the words of the ITC Majority, "excessive." The United States still has not attempted to point to any evidence to the contrary.

(b) The United States Impermissibly Excluded Mexico and Canada From the Safeguard Measure

4.109 Article 2.2 provides that safeguard measures "shall be applied to a product being imported irrespective of its source." Footnote 1, which addresses the term "Member," is a footnote to the text of Article 2.1. It is not a footnote to Article 2.2, which provides for MFN application of the measure. The Appellate Body in *Argentina – Footwear* concluded that, by its very terms, Footnote 1 only applies to (i) a "customs union" (ii) that is acting "as a single unit or on behalf of a Member state." Korea sees no basis for concluding that Footnote 1 can be read as two separate provisions. In fact, the only logical reading from the text and its context is that this is a self-contained provision, which applies to a customs union.

(c) The ITC Investigation of Increased Imports, Serious Injury and Causation

(i) Introduction

4.110 Safeguard relief is an extraordinary remedy that must be justified by extraordinary circumstances. Another clear lesson from the jurisprudence is that the safeguard measure is an action against fairly traded imports. Therefore, only strict compliance with the requirements of each and every requirement of the SA can justify a safeguard measure. The emergency and extraordinary nature of the remedy must inform the proper analysis and interpretation of all the requirements of the SA and the GATT 1994. The US argument that the emergency nature is limited to the "measure" and does not apply to the situation investigated is inconsistent with the Appellate Body ruling in *Argentina – Footwear*.

(ii) Increased imports

4.111 With respect to the increased import requirement in Article 2.1, the Appellate Body in *Argentina – Footwear* articulated that "not just any increased quantities of imports will suffice." The Appellate Body based its reasoning on the plain meaning of "is being imported," which, being in the present tense, requires that the increase in imports be "present," not "past." It follows directly from this language that the most recent period for which data is available must be examined.

4.112 The United States does not argue that the import data of the last 12 months is not meaningful or that it is not available (after all, the confidential data summarized in the February 16 letter reveals almost a 20 per cent decline over two six-month periods). Rather, the US asserts that US practice is to look at "full years." Korea submits that US practice must be in accord with the SA, not *vice versa*. Article 4.2(a) provides that "authorities shall evaluate *all relevant factors* of an objective and quantifiable nature." Clearly, data concerning whether imports increased or declined over the last 12 months of the period is both relevant and quantifiable. Imports had decreased by almost 20 per cent in the most recent 12-month period prior to the ITC determination according to the United States letter of February 16. Relative import trends also *declined* during the first half of 1999.

(iii) Serious injury

4.113 The fundamental inconsistencies and contradictions among the Commissioners, in the absence of an adequate explanation and reconciliation in the opinions, undermine the adequacy of the ITC Majority's determination in terms of Articles 3 and 4.

4.114 Those disagreements about data were so fundamental that only three Commissioners concluded that serious injury occurred by reason of imports. Three concluded otherwise. There must be an adequate explanation of why and how the Commissioners came to these contradictory conclusions. This is all the more true if the ITC relies on confidential data which the United States does not provide to the Panel.

(iv) Inclusion of data relating to other industries

4.115 The United States argues that there is no evidence in the record that OCTG declines were more severe. While Korea agrees with the United States that both OCTG and line pipe demonstrate the same downward trends, because both are being pulled down by the decline in oil and gas rigs, OCTG dropped much more dramatically. Exhibit 48C tracks the *per centage relationship* between net shipments of OCTG and net shipments of line pipe. This graph confirms that in 1998 and 1999, OCTG's share of total shipments (of line pipe plus OCTG) drops more dramatically relative to line pipe. This had a great impact on the profitability of the producers which the ITC did not properly separate and consider.

4.116 The ITC's own Staff Report recognizes there was a "collective operating leverage effect." The fact is that the effect does exist and it was documented by the ITC itself.

(v) The industry only experienced a one-year downturn

4.117 This industry had a record industry performance in 1997, continuing into the first half of 1998. A temporary downturn from a peak performance period does not demonstrate that the industry is in a state of "significant overall impairment," particularly in an industry that experiences wide swings in demand and profitability. This industry also kept investing throughout 1998/1999 because it recognized the ebbs and flows of its business and was investing for the next upturn (which had already commenced).

(vi) The ITC should not have found that the industry is being seriously injured when the industry no longer was suffering injury at the end of the period

4.118 What is most relevant is that the line pipe industry was fast recovering. As the Panel held in *US – Wheat Gluten*, "we consider it essential that *current* serious injury be found to exist, up to and including the *very end of the period of investigation*." Korea prepared Exhibit 48D which demonstrates, based on the observations and conclusions of the ITC, the US domestic industry, and industry experts, the strong condition of the US line pipe industry.

(vii) There was no causal relationship

(1) Coincidence of trends

4.119 In *Argentina – Footwear (AB)*, the Appellate Body sustained the Panel's analysis of the causation requirement under Article 4.2(b) "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."

4.120 The situation in line pipe presents a case of inconsistent trends – imports began to decline at the same time as domestic industry indicators declined. 1998 was composed of a very strong first half during which the domestic industry indicators maintained their peak performance, and a very weak second half during which indicators declined significantly: As all the Commissioners recognized, the industry's poor health began "in the second half of 1998." This two-period analysis by all six Commissioners contradicts the statement by the United States that "the ITC did not compare data for the first half and second half of 1998."

(2) Other Factors

4.121 The US causation decision did not comply with the standard set forth in the AB report on *US – Wheat Gluten*. The United States considered only each individual factor of injury because US law provides that the cumulative effect of *all* the "other" factors or causes of injury cannot be considered.

4.122 This methodology obviously conflicts with Article 4.2(b) because the United States did not consider whether the sum of all the other causes of injury (*inter alia* (1) the oil and gas crisis which caused consumption to drop dramatically from its high in 1997; (2) the build up of significant excess capacity by the domestic industry (on an annualized basis, domestic capacity increased by 25 per cent in 1999 compared to 1998); and (3) the elimination of export markets and consequent ferocious domestic competition) was so great that the effect of imports was diminished to a level that imports had less than a "substantial" effect. Exhibit 48A illustrates the point.

4.123 The United States improperly attributed injury caused by other factors to increased imports in the remedy recommendation as well. The ITC admits that it was the combined effects of both imports and the oil and gas crisis which caused serious injury and that the remedy recommended was also intended to address the effects of both. Therefore, the remedy is not confined to addressing only the injurious effect of imports.

(viii) Threat of injury

4.124 The Commissioners who found only threat of injury erred principally because they *assumed* that imports would increase. Since imports had declined for 12 months, such a counterintuitive conclusion had to be substantiated by more than mere "conjecture or remote possibility."

(ix) The United States has not demonstrated "unforeseen developments"

4.125 The ITC was under an obligation to demonstrate in its investigation that the increased imports in this case occurred "as a result of unforeseen developments "and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... ."

4.126 The ITC Report contains no reference to a determination of the "unforeseen developments" which caused the surge in imports of line pipe. The United States cannot, in the course of a Panel proceeding, rehabilitate a finding that was never made.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

4.127 The following is the United States' own executive summary of first oral statement:

1. Increased imports

4.128 There was an increase in imports in this case that was "sudden and recent." Imports of line pipe increased on *both* an absolute *and* a relative basis. On an absolute basis, imports of line pipe increased in each of the last three years of the period investigated. Imports declined somewhat in interim 1999 (the first six months of 1999), as compared with interim 1998 (the first six months of 1998), but only on an absolute basis. Moreover, imports remained at such high levels in interim 1999 that they exceeded whole-year imports in both 1995 and 1996.

4.129 Imports relative to domestic production followed a similar pattern to absolute import levels, except that there was no decline over the interim periods. On a relative basis imports reached their highest level in interim 1999, when they accounted for 46 per cent of the US line pipe industry's production.

4.130 Korea tries to avoid this clear evidence of a sudden and recent increase in imports by devising its own limited period for measuring imports. By asking the Panel to focus only on the last six months of 1998 and the first six months of 1999, Korea would have the Panel examine a small portion of the import data in a certain way, and ignore the rest of it. Korea can only show a decline in imports in the last six months of 1998 and first six months of 1999 if it examines this period in six-month increments. If the import data for these 12 months are examined in different increments – for example, on a monthly basis – there is no steady decline in imports.

4.131 The facts here are much different from those in *Argentina- Footwear*. The ITC's decision is consistent with the approach of the Appellate Body in that case. The ITC clearly paid special attention to the most recent import levels and trends, those in 1997, 1998 and interim 1999.

4.132 Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Articles 2.1 and 4.2 did not occur.

2. Serious Injury

4.133 The evidence of a significant overall impairment in the US line pipe industry's condition beginning in 1998 was overwhelming. Serious injury to the industry was clear from an examination of: domestic production, capacity utilization, sales, market share, financial indicators, employment-related indicators, the ratio of inventories to domestic production, and research and development. Korea ignores most of these indicators of serious injury.

4.134 Korea's claims that the line pipe industry's performance indicators were affected by declining OCTG sales does not hold up to scrutiny. Korea's argument rests on two false assumptions: (1) that the largest component of average unit costs for line pipe consists of fixed costs; and (2) that these

costs were disproportionately allocated to line pipe because OCTG sales fell to a much greater extent than line pipe sales. Both of these assumptions are unsupported by the evidence in the record before the ITC.

4.135 Korea tries to evade the overwhelming evidence of serious injury by arguing that the US line pipe industry was improving at the end of the period examined. Korea is wrong as a factual matter. It mischaracterizes the import data by claiming that there was "a continuing decline in imports" at the very end of the period. This was not so. Imports in May and June 1999 had risen again to the very high monthly levels of 1998. Korea also relies on announcements of price increases that were mostly made in "late 1999 and early 2000" after the ITC injury investigation was finished, and which are not part of the record before the ITC or this Panel.

4.136 The evidence of serious injury was extensive and Korea has failed to make a *prima facie* case that the US line pipe industry was not seriously injured.

3. Causation

4.137 The ITC's causation analysis was fully consistent with Art. 4.2 and the Appellate Body's decision in *Wheat Gluten*. The ITC examined the effects of the increased imports, and the effects of other relevant factors, on the domestic industry. By examining and then weighing these effects separately, the ITC distinguished between the effects of increased imports and the effects of other factors, thus ensuring that the effects of other factors were not attributed to the imports.

4.138 The ITC found that the surge in imports and consequent shift in market share from the domestic product to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.

4.139 The ITC found that increased imports, together with the import-led price declines, caused domestic producers to lose significant sales, market share, and revenue. This led to declines in other key indicators, such as production, shipments, employment, and operating income.

4.140 Through this analysis, the ITC found that increased imports were an important cause of serious injury and properly established the existence of the causal link between the increased imports and the serious injury, as required by Art. 4.2.

4.141 Korea is wrong in asserting that there was no coincidence in trends between imports and the downturn in the line pipe industry's performance.

4.142 The ITC found that the evidence developed in its investigation suggested that imports had significantly depressed domestic prices. The ITC had three different types of evidence for this: (i) average unit values of imports; (ii) quarterly pricing data which it collected, and (iii) questionnaire responses from a wide range of industry participants. All three of these categories of evidence pointed to the same result. Korea's critique of this evidence of price depression is unpersuasive.

4.143 The ITC examined the effects of six factors, other than increased imports, as possible other causes of serious injury. In examining these other causal factors, the ITC distinguished the injurious effects of increased imports from the effects caused by these other factors. It examined whether increased imports were a "substantial cause" of serious injury. A "substantial cause" under US law is "a cause which is important and not less than any other cause." This approach ensures consistency with the guidance on causation provided by the Appellate Body in *Wheat Gluten*. By examining all of the other factors in this way, the ITC identified the effects of these factors alone, therefore distinguishing those effects from the effects of imports, which were separately considered. Thus, the ITC ensured that it did not improperly attribute to imports any injurious effects caused by other causal

factors. Through this process, the ITC also established that the causal link between the increased imports and the serious injury was genuine and substantial.

4. Threat

4.144 Korea's arguments challenging the determination of the two ITC Commissioners who found a threat of serious injury are based on a misstatement of the facts. The determination of the two Commissioners finding threat was based on facts in the record before the ITC, not on mere allegation or conjecture, as Korea claims.

5. Putting the Safeguard Measure in Context

4.145 The United States has already described the domestic industry's decline into uniformly poor financial performance. Some additional facts serve to put the line pipe safeguard into perspective. Korea accounted for 70 per cent of the total increase in imports in 1998. Imports from Korea also increased in the first half of 1999, as compared with the same period of 1998, in spite of declining demand in the US market. Korean line pipe was imported at exceptionally low prices – much lower than those charged by US producers and most other import sources.

4.146 These facts demonstrate that the United States complied with Article 5 in that it did not apply the safeguard measure "beyond the extent necessary." It guaranteed imports a presence in the US market, since the 9000 ton exemption for each country would allow the import of a substantial quantity of line pipe with no supplemental duty. The 19 per cent supplemental duty was at a level commensurate with the decline in US producers' prices in the first six months of 1999. Moreover, even with the addition of the duty, 1999 unit values for imports would not rise to pre-1999 levels.

6. Korea has Failed to Establish that the Measure was Applied Beyond the Extent Necessary

4.147 Korea has not presented any evidence relevant to determining whether the line pipe safeguard is "commensurate" with the goals of Article 5.1 – remedying serious injury and facilitating adjustment. This text establishes that the condition of *the domestic industry* is the benchmark for the application of a safeguard measure. It is also significant that this limit affects the extent to which a Member may "apply safeguard measures." Since Article 5.1 applies to "measures," and not the separate components of a measure, consistency with Article 5.1 can only be analyzed with reference to the measure as a whole.

4.148 Korea compares the line pipe safeguard chosen by the United States with a TRQ recommended by three ITC Commissioners. However, the fact that one potential safeguard measure falls within the Article 5.1 limit does not mean that changing one aspect of the measure would push it beyond the limit. For example, suppose a four-year tariff of 30 per cent was found to be commensurate with the goals of Article 5.1. A 40 per cent tariff might be able to achieve the same goal in three years. Both would be permissible under Article 5.1, first sentence.

4.149 Finally, Korea simply ignores certain aspects of the line pipe safeguard, such as its duration and the size of the supplemental duty. In so doing, it has failed to demonstrate anything about the measure as a whole and, thus, provides no basis to even apply the relevant standard.

7. Korea has Failed to Justify Application of Quota Disciplines to the Line Pipe Safeguard

4.150 The principles of Article XIII that are incorporated into the Safeguards Agreement are the only provisions that are applicable to safeguard measures. The object and purpose of the Safeguards Agreement is to create a "comprehensive agreement." In so doing, it incorporates principles – and even one entire block of text – from GATT Article XIII. It omits the provisions of Article XIII that

Korea now relies upon. To conclude now that Article XIII applies to safeguard measures would be to reverse the Members' decision to include only some of those provisions in the Safeguards Agreement. The Panel simply does not have the mandate to do this.

8. Exclusion of Canada and Mexico from the Line Pipe Safeguard

4.151 Korea argues that footnote 1 of the Safeguards Agreement applies only to customs unions. If the drafters had intended this result, the footnote would have cited only to subparagraph 8(a) of Article XXIV. Paragraph 8, covers customs unions under subparagraph (a) and free trade agreements under subparagraph (b). Therefore, it is logical to conclude that the citation to Article XXIV:8 in the last sentence of footnote 1 means that provision applies to both customs unions and FTAs.

4.152 Korea argues that the location of the sentence does not make sense if it applies to free trade areas. The United States disagrees. The first three sentences of footnote 1 deal with the basic question of the relationship between Article XXIV and the Safeguards Agreement, as applied to customs unions. When the drafters chose to address Article XXIV as it affects both customs unions and free trade areas, it made sense to put it with other provisions dealing with that topic.

9. Korea's Request for Confidential Information

4.153 Upon further review of Korea's arguments, it is apparent to the United States that Korea has not shown any need for the Panel to examine additional pricing data to determine the consistency of the ITC's determination with the Safeguards Agreement. To the extent that any comments in the United States' first submission suggest otherwise, the United States wishes to correct the record as to the its view.

4.154 Korea's contention that the Panel needs to examine additional price information is mainly predicated on an isolated statement made in the dissenting views of Commissioner Crawford that underselling was not any more prevalent during 1998 and interim 1999 than in earlier periods. (ITC Report at I-71.) But, regarding the fact upon which the ITC actually relied with respect to prices – even Commissioner Crawford specifically acknowledged that there was persistent and widespread underselling. She simply placed less emphasis on that fact.

4.155 A careful reading of the exact passages in Korea's brief which form the basis for its request for additional pricing data shows that Korea is actually asking the Panel to draw different factual conclusions from those drawn by the ITC. Korea has no basis other than conjecture to assert that the Panel needs to conduct a review of information in the confidential record to ascertain whether Korea's unsupported allegations possess any merit. The complete version of the US oral statement for the second session of the first panel meeting contains a point-by-point refutation of Korea's basis for urging that pricing data from the confidential record is necessary.

4.156 In a final effort to convince the Panel of the need to obtain confidential pricing data, Korea quotes a statement in the post-hearing brief it submitted to the ITC. The statement addresses a disagreement among the interested parties in the administrative proceeding as to whether the size of the margins by which imports undersold domestic products increased during 1998. Korea has not disputed the prevalence of underselling – the specific fact about prices that is relevant to the Commission's findings. The Commission did not mention or rely on any increases in the size of underselling margins as a basis for its finding that imports depressed domestic prices. Thus, Korea has failed to show that the Panel needs to see confidential data to review Korea's challenge to the Commission's findings and conclusions relating to pricing.

E. SECOND WRITTEN SUBMISSION OF KOREA

4.157 The following is Korea's own executive summary of its second written submission:

1. Preliminary Legal Issues

(a) Confidential Information.

4.158 Korea and the Panel still lack fundamental information that has been withheld by the United States for reasons of confidentiality.

4.159 The United States consistently has dismissed Korea's requests as unnecessary. However, the fragmentary data actually produced by the United States has confirmed just the opposite:

(1) The non-confidential summary of imports in the ITC Determination does not accurately reflect the actual import levels in 1998 and 1999, as demonstrated by the US 16 February letter.

(2) The information provided by the United States concerning Geneva Steel is incomplete and thereby misleading.

(3) The information provided by the United States in its 23 April letter concerning Lone Star similarly confirms a far different situation than previously described by the United States.

4.160 Finally, the pricing data provided by the United States in its 23 April letter remains fragmentary due to the confidentiality rules employed by the United States. Nonetheless, the data still confirm, that underselling was a market condition.

4.161 The data available confirms the need for the following additional information:

(1) The confidential Economic Memoranda used to evaluate the remedy proposals and the impact of various alternatives on the *US* industry. (See below).

(2) The papers used in the deliberative process by the President in reaching the determination regarding the safeguard measure.

(3) The confidential version of the ITC Staff Report, providing fuller explanations for the condition of the industry.

(b) The Panel Should Reach the Issues Raised by Korea With Respect to Both the US Investigation as Well as the Safeguard Measure

4.162 With respect to issue judicial economy, Korea urges the Panel to exercise its discretion to reach the issues raised regarding the safeguard measure even after finding errors in the ITC investigation, due to a considerable on-going impact of the US measure on trade.

(c) Standard of Review

4.163 Korea is requesting that the Panel, pursuant to Article 11 of the DSU, and the Appellate Body decision in *US – Lamb Meat*, conduct an "objective assessment of the facts."

(d) The Panel Should Reject the US Objections to Extra-Record Information Based on the Decision of the Appellate Body in *US – Lamb Meat*

4.164 Korea would like to supplement its earlier arguments on this issue with the recent holding of the Appellate Body in *US – Lamb Meat*, recognizing that a "*WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities ... ."

2. Legal Arguments

(a) The Safeguard Measure

(i) The US measure does not comply with Articles XIII or XIX nor does it comply with the requirements of Article 5

(1) The requirements of Article XIII and Article 5 must be read as a whole

4.165 The proper interpretation of the Agreement on Safeguards and Article XIII must proceed from the fact that the WTO is a single treaty. As such, all of the provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreements and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. Moreover, as the Appellate Body properly notes in *Argentina – Footwear*, the General Interpretative Note to Annex IA provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A ... the provision of the other agreement shall prevail *to the extent of the conflict*." In this case, the United States has not alleged, nor does there exist, a conflict between any of the provisions of Article XIII, which regulates tariff-rate quotas ("TRQs"), and the provisions of Article 5. The Preamble to the SA states that the object and purpose of the SA is to "clarify and reinforce the disciplines of GATT 1994." While Article XIX is specifically mentioned, it is not exclusively mentioned – all of the disciplines of GATT 1994 are incorporated.

4.166 The United States seeks to make much of the fact that Article 5 does not include each concept contained in Article XIII and essentially argues that the "intent" of the negotiators was to "exclude" certain obligations and rights contained in Article XIII. Korea submits that, the determination of the "intent" of the negotiators is unknowable and equivocal except as to the extent that the negotiators did know, based on the Note to Annex 1A, that the GATT Agreements and GATT 1994 would be read together except in the case of a conflict.

(2) Article 5.1: TRQs are quantitative restrictions

4.167 Korea observes that the US position has been to rely on one Article of the GATT 1994, Article XI, to define a quantitative restriction, and to dismiss another Article of the GATT 1994, Article XIII, on the grounds that Article XIII has, in essence, been superseded by Article 5. The United States, however, never clarifies why only one Article of the GATT 1994 was superseded, rather than both Articles or neither.

(3) The US measure is a TRQ: The overall limit should have been set in accordance with Article 5.1 and Article XIII

4.168 It is absurd to suggest, as the United States does, that the determination of whether a measure is a TRQ depends upon whether it has been legally and properly constructed by a Member. This reasoning is circular and would allow a Member to evade all of the requirements of Article XIII by circumventing certain requirements of Article XIII. Moreover, not all TRQs must have a fixed overall amount. Article XIII.2(a) provides for fixing the overall amount of the quota "wherever practicable."

For example, import licenses are contemplated as an alternative to an overall quota. The United States has not given an adequate justification of why the President concluded it was impracticable when the ITC Majority found it "practicable" to fix an overall limit of the quota element of the TRQ.

(4) Article 5.2(a): TRQs are "quotas" within the meaning of 5.2(a)

4.169 The plain meaning of "quota" applies to both "straight" quotas and tariff quotas.

4.170 When only tariffs are imposed, Article I requires that they be applied on an MFN basis, at the same level for all suppliers. However, when "quotas" are applied, Article XIII.2(d) requires that they be allocated in accordance with a Member's proportional share during a representative period. In other words, the same quotas cannot be given to each supplier regardless of their historical share. The reason is that "discrimination" takes on a different meaning for quotas than it does for tariffs. For this reason, Article XIII.2 requires that historical trade patterns should not be disrupted.

4.171 Similarly, a tariff combined with a quota does not have the same impact on trade as a straight tariff: the set quantity can enter at the bound rate, which impacts the degree to which trade will be affected by the tariff. There is an implicit cost preference for imports under the "quota" at the bound rates.

(ii) Regardless of the type of measure, the measure violates Article XIX:I and Articles 5.1 and 7.1 because the measure was not limited to the extent and the time necessary to remedy the injury and allow adjustment

(1) What the United States really means by *ex post facto* reasoning

4.172 The United States maintains that the Appellate Body decision in *Korea – Dairy Safeguard* permits them to provide: "*ex post* justification of why the measure was permissible at the time of application." (Korea does not agree with this interpretation. Moreover, Korea submits that the United States has not even provided an "*ex post*" explanation of its remedy.) The absurdity of US speculation about what "might" have justified a 19 per cent TRQ highlights the dangers of a standard which allows Members to "make it up as they go along." A "requirement" which can be so easily sidestepped is no requirement at all and reads the prescriptions of Article 5.1 ("to the extent necessary"). As discussed below, the US argument hinges on an overly broad reading of *Korea – Dairy Safeguard*.

(2) The meaning of *Korea – Dairy Safeguard* and the obligations of Article 5.1

4.173 Korea believes that the decision of the Appellate Body in *Korea – Dairy Safeguard* should be considered in its proper legal context. The issue before the Appellate Body was whether Article 5.1, by its terms, required a specific finding that the measure, in that case a quantitative restriction, was "necessary." While the Appellate Body rejected the broad language of the Panel with respect to the obligations of Article 5.1, the holding did not extend past the question presented: the extent of the obligation to justify a quantitative restriction <u>if</u> the relief imposed is consistent or inconsistent with the import average during the representative three years.

4.174 Korea reiterates that the holding in *Korea – Dairy Safeguard* applies to this case because the US measure is a quantitative restriction in the form of a TRQ. Therefore, the United States must demonstrate either that the measure did not reduce imports below the last three representative years <u>or</u> should have demonstrated that such additional import restriction was "necessary."

(3) Article 5.1 imposes an obligation even if the measure is not a TRQ

4.175 Significantly, the Appellate Body also observed that Article 5.1 imposed an obligation that applies regardless of the particular form of the safeguard measure.

(i) An explicit justification in the determination itself was required in this case

4.176 When the competent authorities make explicit findings that certain levels of relief are "sufficient" and others are "excessive," the Member has an affirmative obligation to explain why a distinctly harsher measure is "necessary."

(ii) Korea's *prima facie* case that the safeguard measure exceeded what was "necessary"

4.177 Even if this obligation is read narrowly – not requiring a separate and explicit justification – the justification nonetheless must be found in the decision-making. Korea sees none. Korea's inferential evidence of the intended impact of the President's measure is as follows:

(1) Total "in-quota" imports were projected to be approximately 63,000 short tons (based on seven significant suppliers). (Current data shows total "in-quota" imports of 64,067 tons.)

(2) Very limited "out-of-quota" imports could be expected at the 19 per cent tariff level:

(i) The duty imposed was 6 to 10 times the level of the bound rate.

(ii) Each supplying country could supply 9,000 short tons at bound rates.

(iii) Two very significant suppliers (Canada and Mexico) were not controlled.

(iv) Imported and domestic line pipe were highly substitutable.

(v) The US industry had substantial unused capacity and US capacity exceeded consumption.

(3) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.

(4) The only economic analysis undertaken for the purpose of meeting obligations under Article 5.1 were the Economic Memoranda.

4.178 All of these facts demonstrate that the very significant level of import restriction should have been anticipated and that the President's measure exceeded what the ITC identified as "necessary."

4.179 If the United States has confidential data to demonstrate that the President's measure would not have reduced imports below the 151,124-ton level defined by the ITC as "necessary," the United States should provide it. Korea submits that in the absence of an affirmative demonstration by the United States of its "intended level," or a US denial accompanied by evidence that the restricted level was below that intended by the measure, the actual level of imports is the best evidence of the import target level of the measure.

(iii) Burden of proof on the issue of whether the measure was in conformity with the requirements of Article 5.1

4.180 First, Korea believes that it is the obligation of the United States, in accordance with Article 5.1 and read together with Articles 3.1 and 4.2(c), to demonstrate, in its published report, that the measure was necessary. The US obligation in this respect is freestanding and the US failure to meet it is a violation in itself.

4.181 Neither the Proclamation nor supporting memorandum provide any analysis or justification for the measure. Korea notes, however, that in its letter of 23 April, the United States has conceded that there are additional memoranda and documents of both a confidential and non-confidential nature, which accompanied the President's decision. However, according to the United States, those documents are either "redundant" or can, at the whim of the United States, be withheld on the grounds that they are inconsistent with the President's final decision.

4.182 Based on the inferential evidence discussed above, Korea believes that it has met its burden establishing a *prima facie* case that the President's measure was excessive and in violation of Article 5.1. The United States has not demonstrated (or even attempted to demonstrate) that the measure was necessary, or that the level of import restriction which resulted from the measure was the level intended.

(iv) Article 5.1 imposes a continuing obligation

4.183 The obligation only to apply safeguard measures to the extent necessary is an ongoing obligation. This is confirmed by the language of Article 5.1: "shall apply." In this case, actual import data confirm that the measure as imposed is "excessive" since it is far below the level of 151,124 short tons found to be "necessary" by the ITC Majority. Given that the measure <u>as applied</u> exceeds "the extent necessary," it must be withdrawn or liberalized in accordance with Article 7.4. The United States is currently conducting a "mid-term" review in this case under Section 204 of the 1974 Trade Act, which allows the President to "reduce, modify, or terminate" the measure. Korea urges the Panel to provide guidance and instruction to the United States regarding necessary modification or termination.

(v) The obligations of Article 5.1 have to be read together with the obligations imposed by Articles 3.1 and 4.2(c)

4.184 Article 3.1 imposes an independent obligation requiring that the investigation, findings, and conclusions of the competent authorities must demonstrate the legal and factual basis for the measure. Also, Article 5.1 is textually related to Article 4.2(c) since the "necessary" level must be to alleviate the serious injury contained in the "detailed analysis."

(vi) The United States violated Article 2 and provisions of Articles I, XIII:1 and XIX by exempting Canada and Mexico from the measure

(1) The proper interpretation of Footnote 1: The Appellate Body in *Argentina – Footwear*

4.185 Korea's position is that it is impossible to read the Appellate Body opinion as providing that the last sentence of Footnote 1 is separate from the rest of Footnote, as the United States appears to argue. Footnote 1 does not apply to actions by a single country, such as the United States, rather than a customs union.

4.186 Korea does not understand the US argument to be that Article XXIV, standing alone, provides the United States with a "defense" to the violation of Article 2.2. In any event, this position is not supportable because the "defense" would be "invoked" only on a case-by-case basis under the

structure of NAFTA. Moreover, the United States would have to overcome the hurdles to such a defense presented by the General Interpretive Note to Annex 1A of the GATT 1994: that Article 2.2 prevails over Article XXIV to the extent of any conflict.

(b) The ITC Investigation of Increased Imports, Serious Injury, and Causation

(i) The US measure is inconsistent with Article XIX and Article 2 because imports did not increase suddenly, sharply and recently

4.187 The United States maintains that the two six-month periods (the last 12 months) analysis is "arbitrary," "crafted," and "contrived." Further, the United States argues that the ITC did not collect or assess data on a six-month basis in 1998. The US argument fails since the data was available for imports as well as for injury indicators and the legitimacy of such a "two-period" analysis has already been demonstrated by the ITC itself. The most recent data, by definition, are the most relevant data. The US position that "a one year period would hardly suffice" is incorrect and specifically contradicted by the Appellate Body admonition in *Argentina – Footwear* against the use of "any other period of several years." The "recent period" is the last one-year period of the investigation and a decline in the interim six-month period would constitute the most relevant evidence in the recent period.

4.188 The need for such a precise legal standard was justified by the Appellate Body on the grounds that Article XIX is an extraordinary remedy dealing with fair trade: "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account." This is not to say that only one year of data should be collected. Rather, in analyzing the data received, the focus of the investigation for purposes of assessing whether imports of subject merchandise entered "in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury," must be the most recent one-year period.

(1) Absolute increase

4.189 The United States can no longer dispute that absolute import trends showed a decline for 12 months beginning in the second half of 1998. The US 16 February Letter clearly demonstrates that the public data (which includes Arctic and alloy products) does not accurately represent the imports of subject merchandise in the first and second halves of 1998 and 1999.

(2) Relative increase

4.190 The United States repeatedly asserts – incorrectly – that imports relative to production were at their highest in the first half of 1999. Having said this, the United States has not directly disputed that imports relative to production declined in the first half of 1999 relative to the second half of 1998. Indeed, this is an incontrovertible fact.

(ii) The United States failed to demonstrate that the US line pipe industry was suffering serious injury as required by Article XIX and Articles 3.1, 4.1 and 4.2

(1) The United States did not satisfy the requirements of Articles 3.1 and 4.2(c)

4.191 The Appellate Body in *Argentina – Footwear* read Articles 3.1 and 4.2(c) to require that the authorities adequately explain how they came to the conclusions that they did and to specify the data relied on to reach those conclusions of fact and law. The Appellate Body in *US – Lamb Meat* confirmed this. Korea is not arguing that the decisions of the ITC must be unanimous, but rather that the data relied on and the conclusions reached were inconsistent and, therefore, had to be reconciled.

4.192 In Korea's view, the US position that the difference between "threat" and current injury is merely a question of "degree" and "timing" is surprising. The industry is either seriously injured and significantly impaired or it is not, as the Appellate Body recognized in *US – Lamb Meat*. The United States simply retorts that "the Commissioners did not reach contrary findings of fact." But the data relied on and the conclusions reached were inconsistent. As these contrary findings were not reconciled, the requirements of Articles 3.1, 4.1 and 4.2 are not met.

(2) The data is flawed since it includes data from other industries

(i) "The line pipe industry"

4.193 Articles 2.1 and 4.1(c) provide that the industry should be defined as the producers of the like or directly competitive products. The ITC's failure to ensure that the effects from the downturns in the OCTG market did not infect the data regarding line pipe made the relied on data unusable for purposes of Article 4.2(a) injury factors.

(ii) Geneva and Lone Star

4.194 In Korea's view, the US statement regarding Geneva is not responsive to the question posed by the Panel for the very reasons observed by Commissioner Crawford. Specifically:

(1) The reference used by the United States that "Geneva did not produce other products in the facilities where line pipe was made" is a reference to the Staff Report in which they are referring to production of <u>other pipe</u> products.

(2) The problem was that Geneva shut down one of its blast furnaces and attributed the shutdown to the line pipe market. That shutdown, however, was driven by circumstances in its principal markets: hot-rolled coil and plate.

4.195 The ITC improperly accepted mere assertions by the domestic industry witnesses regarding Geneva. In the case of dual-stencilled line pipe from Korea, however, the ITC insisted that the <u>precise</u> <u>quantity</u> had to be established. The ITC considered that the less exact data was unusable. Such a difference in standards on two similar issues cannot be justified.

4.196 Moreover, with respect to Lone Star, it turns out that Commissioner Crawford was correct: the result of Lone Star's allocation of SG&A was to "substantially reduce" the operating income of both Lone Star and the industry as a whole.

4.197 Finally, Korea notes that the United States essentially admits that the other Commissioners did <u>not</u> address Geneva or Lone Star issues.

(iii) The cost allocations artificially lowered the profitability of the line pipe industry

4.198 The data for Lone Star confirms Korea's position that the data, if properly analyzed for line pipe alone, reveals significantly different financial results for the industry. This issue was not sufficiently investigated and resolved as required by Article 3.1 and 4.2.

4.199 With respect to the question of whether shipments of OCTG fell disproportionately to shipments of line pipe in the period from late-1998 to late-1999, Exhibit 48C presented by Korea at the First Substantive Meeting demonstrates that the US statement is incorrect. With respect to the US position that fixed costs, such as overhead and SG&A, are relatively insignificant, one adjustment by one producer alone – Lone Star – increases <u>industry</u> profitability by as much as 33 per cent according to the United States. The potential impact of "over"-allocated SG&A and fixed overhead for every producer which produced OCTG and line pipe can safely be assumed to be significant.

(c) The Downturn in the Industry's Condition Was Temporary and Improving at the End of the Period

4.200 The United States insists that injury occurred in 1998 and interim 1999. However, Korea notes that the ITC Majority Opinion and Separate Views on Injury relied on the second half of 1998 and the first half of 1999 as the period of injury. Korea believes that the Panel should clarify this point with the United States. In addition, the United States has not responded to Korea's point about the significance of the fact that two new producers entered the line pipe industry. Korea believes that this evidence, together with the evidence on overall industry capital expenditures, confirms that the US industry also understood that the "downturn" was isolated and temporary.

4.201 The United States maintains that the improvement of the industry at the end of the period, does not prevent a finding of serious injury. Korea recalls the decision of the Panel in *US – Wheat Gluten* to the effect that the most relevant period is the end of the period because Article 2.1 requires that the industry must be suffering serious injury when the measure is imposed. The United States maintains that the evidence concerning the upturn in the industry is "only anecdotal." The United States ignores the fact that evidence of this upturn was specifically cited by the ITC Commissioners and formed the basis for the remedy recommendation of both the Majority Opinion and Separate Views on Injury.

4.202 The United States also argues that the price increase data is "extra-record" information. Korea has demonstrated in its written submission in response to the US request to exclude certain data that this information was on the ITC record at the injury stage. The United States is also contradicted by record information with respect to the $25-$30 price increase. The price increase was not due to rising raw material prices. Finally, as noted in Korea's First Written Submission, announced price increases totaled $80/ton by the time of the ITC decision (as noted by Respondents and Commissioner Crawford). This evidence indicates that the industry was no longer suffering injury as required by Articles 2.1 and 4.1(b).

(d) The United States Failed to Demonstrate a Causal Relationship Between Increased Imports and Serious Injury in Violation of Article XIX and Article 4

(i) There was no coincidence of trends between imports and the performance of the domestic industry

4.203 The United States argues that a coincidence of trends is not required for a finding of causation. Yet, the Panel and the Appellate Body in *Argentina – Footwear* were quite clear on this point.

4.204 The United States now argues to the Panel that the facts explain why the trends did not coincide, but they get the facts wrong:

(1) The information on lag-times contradicts the US position. In fact, most of the merchandise is sold before the merchandise enters the United States.

(2) The United States is incorrect that the ITC did not compare first half and second half 1998 data.

(3) The difference in trends between imports and the condition of the domestic industry is not minor.

(ii) Conditions of competition did not demonstrate that there was a causal relationship between increased imports and the performance of the industry

(1) Dual-stencilled line pipe

4.205 The ITC did not properly consider the market effect of dual-stencilled line pipe: that such pipe was actually sold as standard pipe and thus did not compete with line pipe. The fact that there had been several years of litigation over the proper classification of such pipe strongly supported the conclusion that the effect might be very significant.

(2) Imports did not lead down prices

4.206 The United States did not address Korea's argument that the data confirms that declines in the line pipe industry's profitability were caused principally by the increase in unit costs rather than a decline in prices for line pipe.

4.207 The United States defence of the ITC's finding relies on three levels of proof to demonstrate that imports drove down prices and thereby profitability:

(1) **Statements in questionnaire responses.** However, reliance on such statements cannot take the place of an analysis of the actual pricing data.

(2) **Declines in average unit value ("AUV") data.** Average unit import price data is not reliable because it is based on public data, which includes products other than the "like product" under investigation.

(3) **The ITC's pricing data.** This data did not demonstrate that imports led down prices.

(iii) The pricing data submitted by the United States

4.208 As the United States explained at the First Substantive Meeting, the ITC Majority did not evaluate the trends in underselling. The pricing data submitted by the United States confirms that imports did not lead down prices:

(1) Underselling was generally a condition of competition.

(2) In no case did the margin of underselling expand in the period of July 1998 through June 1999 compared to the strongest period of industry health (January 1997 through June 1998).

(3) In the case of Product 5, the data confirms that imports <u>oversold</u> domestic prices, while in the case of Product 6, domestic prices declined even in the absence of import competition.

(e) Other Factors Were the Cause of Any Injury

(i) The US methodology conflicts with Article 4.2(b)

4.209 Korea's view is that the focus and sequence of the US evaluation of "other factors" in this case is inconsistent with Article 4.2(b). The ITC begins with an analysis of the combined effects of other factors plus imports and determines whether, all together, they cause "injury." The ITC does not independently evaluate whether increased imports bear a "substantial and genuine" relationship to serious injury. The fact that imports may be a greater cause of injury than a single other factor cannot establish that increased imports <u>caused</u> serious injury.

4.210 The ITC Majority principally relied on a two-period analysis to evaluate causation. They compared the period of 1994-1996 with the period of 1998 and the first half 1999. However, imports did not demonstrate greater growth. Also, the ITC improperly assumed that the effects of the oil and gas crisis could be measured in their totality by reference to the level of apparent consumption in 1999. This analysis ignored the very significant fact that there was a 30 per cent decline in apparent consumption from the first half of 1998 to the first half of 1999. Furthermore, that decline coincided with a 25 per cent increase in domestic capacity (on an annualized basis) due to significant new capacity coming onstream.

4.211 Thus, the ITC failed to properly identify and isolate the effects of all other "differences" between those two periods, *inter alia* increased capacity, declining export markets, and decreasing domestic consumption.

(ii) The United States does not consider the cumulative effect of all other factors

4.212 Korea notes that the US defense of its causation decision proceeds from a faulty premise: "the ITC ensures that injury caused by any, or all other factors together is not sufficient to sever the causal link." The United States, in fact, does not do this because it is statutorily prevented from doing so. The only means to assure that injury from other factors (individually or cumulatively) is not attributed to imports in accordance with Article 4.2(a) is to "cumulatively" consider all other factors. In this case, the overwhelming effect of the oil and gas crisis which caused consumption to drop dramatically from its high in 1997, and the build up of significant "over" capacity by the domestic industry with the addition of two new producers, the elimination of export markets, and consequent ferocious domestic competition were all factors that combined to "so dilute the effects" of imports that imports were no longer a substantial cause of injury.

(iii) The ITC should have investigated the shift from OCTG to line pipe as an "other factor"

4.213 With respect to the shift from OCTG to line pipe, the United States has not properly investigated the issue in accordance with its obligations under Articles 3 and 4.2(a).

(iv) The safeguard measure was intended to remedy injury caused by other factors

4.214 When several causes result in injury, each factor is only responsible for the actual injury caused. Therefore, injury must be apportioned between each of the causes to assure that the injury from other factors is not improperly "attributed" to imports in violation of Article 4.2. The United States improperly attributed injury caused by other factors to increased imports in the remedy recommendation.

(f) The ITC's Threat of Injury Determination Violated Articles 2 and 4 and Article XIX

4.215 Korea reiterates its argument from its First Written Submission.

(g) The United States Failed to Demonstrate the Unforeseen Developments Which Lead to the Increased Imports Which Caused Serious Injury

4.216 There is no indication in the ITC's determination that the ITC addressed the issue of unforeseen developments. Therefore, the ITC determination does not demonstrate unforeseen developments.

(h) The US Decision Did Not Satisfy the Requirements of Emergency Action of Article 11 or Article XIX

4.217 The United States seeks to draw an impossible distinction between the legal basis for a remedy and the remedy itself. Obviously, emergency actions require emergency circumstances.

3. Procedural Legal Arguments

(a) The United States Violated the Obligation in Articles 8.1 and 12.3 to Consult Concerning the Measure Before the Measure Is Imposed

4.218 The Press Release relied on by the United States as "notice" preceded the actual imposition of the measure by only a few days. The United States cannot seriously maintain that the Press Release provided Korea with "adequate opportunity" for prior consultation, as stipulated in Article 12.3 and interpreted by the Appellate Body. In Korea's view, this is an absurd shifting of a US obligation.

4. Conclusion

4.219 The Appellate Body on 1 May 2001 in *US – Lamb Meat* reaffirmed the central tenet of *Argentina – Footwear*: "import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account." The United States has not satisfied that standard in this case for the reasons that have been fully developed in this Panel proceeding.

4.220 Moreover, given the breadth and scope of the errors in the ITC serious injury investigation (as well as the safeguard measure), Korea requests that the Panel "suggest[ ] ways in which the Member concerned could implement recommendations." Specifically, Korea requests that the Panel suggest that the United States comply with its WTO obligations by terminating its safeguard measure.

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.221 The following is the United States' own executive summary of its second written submission:

1. Introduction

4.222 It is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement. Korea has not met this burden with respect to either the ITC's serious injury determination or the President of the United States' decision to apply the line pipe safeguard measure.

4.223 In challenging the ITC's serious injury determination, Korea and the third parties disregard the standard of review applicable to disputes concerning competent authorities' determinations under the Safeguards Agreement. In particular, they ignore the Appellate Body's repeated statements that review of competent authorities' determinations is not to be *de novo* and that panels are not to substitute an alternative view for that of the competent authorities.

2. The Increased Imports Requirements of Articles 2.1 and 4.2(a) Were Satisfied

4.224 Neither the SA nor the panel and Appellate Body decisions in *Argentina-Footwear* specify the precise period that should be examined to determine whether there have been imports "in such increased quantities" as to cause or threaten serious injury. In *Argentina-Footwear* the AB did not view the examination of data for two to three years before imposition of the safeguard measure to be inconsistent with its admonition that the investigation period be "the recent past."

4.225 The ITC's examination of the sharp and significant increase in imports (on both absolute and relative levels) during the last two full years of the period investigated is entirely consistent with the Safeguards Agreement and with Appellate Body Reports in *Argentina – Footwear* and *United States – Lamb Meat*. Nothing in Korea's arguments negates the fact that there was a recent, sudden, sharp, and significant increase in imports, both in absolute and relative terms. The only way that Korea can possibly claim a decline in imports is by manipulating the comparative time segments and then urging that the comparison most favorable to it is the only permissible approach. There is nothing in the Safeguards Agreement, however, that requires competent authorities to examine exclusively the comparative developments between the two halves of the last twelve months for which data were collected.

4.226 Korea's arguments that it was mandatory for the ITC to evaluate only developments in the June 1998-June 1999 period, to the exclusion of all other import data and time periods, is contradicted by, not consistent with, the Safeguards Agreement. The ITC followed its long-standing methodology of examining imports on a calendar year basis with additional data collected for interim periods (in this case the first six months of 1999 and, for comparison purposes, the first six months of 1998). By using the same neutral methodology it routinely uses in its investigations, the ITC ensured that its serious injury determination was based on an objective evaluation, as required by Article 4.2(a) of the Safeguards Agreement. Korea's argument that the ITC should have prejudged the data and manipulated its methodology to reach the result Korea prefers would require the United States to act inconsistently with the objectivity requirement of Article 4.2.

4.227 Examined on the objective basis routinely employed by the United States, imports increased, on an absolute basis, by 67 per cent from 1996 to1997, and by an additional 44 per cent from 1997 to 1998. Imports relative to US production showed the same sharp increase towards the end of the period of investigation, rising from more than 17.2 per cent in 1996, to more than 23.2 per cent in 1997, to more than 42 per cent in 1998. Relative import levels continued to rise over the interim periods, increasing from more than 36.1 per cent in interim 1998 to more than 43.5 per cent in interim 1999.

3. The ITC's Serious Injury Finding Fully Complies with Articles 3 and 4 of the Safeguards Agreement

4.228 Korea's argument that the ITC determination fails to comply with Articles 3 and 4 because of "fundamental inconsistencies and contradictions" among the Commissioners misconstrues the requirements of the SA and exaggerates the extent of any disagreement among the ITC Commissioners. The Safeguards Agreement does not require unanimity when the determination of a competent authority is made by members of a Commission or other body. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination carry no evidentiary weight and certainly cannot be considered to bolster whatever argument Korea may otherwise make based on record data.

4.229 Korea greatly exaggerates the extent of any disagreement between the three Commissioners who found serious injury and the two Commissioners who found a threat thereof. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination should be disregarded by the Panel not only because they are not part of that determination, but because they simply represent an alternative view of the evidence and, therefore, are not entitled to any evidentiary weight.

4.230 Korea has failed to make a *prima facie* case that the ITC's serious injury determination was in any way distorted by the inclusion of data relating to oil country tubular good ("OCTG") production. First, Korea's contention that the decline in OCTG shipments in 1998 was much more severe than the decline in line pipe shipments is simply not correct. The shipment declines for the two types of pipe in 1998 were almost identical. Second, Korea incorrectly assumes that the largest share of average

unit costs consists of fixed costs. Third, the data in the ITC record contradict Korea's assertion that the line pipe industry's performance was affected by disproportionate declines in the production and sale of OCTG in early 1999. Sales of both line pipe and OCTG were in fact flat or rising in this period.

4.231 Korea has not demonstrated any inconsistency between the ITC's finding of serious injury and the Safeguard Agreement's definition of "serious injury" as a "significant overall impairment." Korea incorrectly states that the US line pipe industry experienced only a "one-year downturn." The evidence in the record before the ITC showed that the condition of the line pipe industry deteriorated greatly in 1998 and interim 1999. In addition, this "significant impairment" was widespread and comprehensive.

4.232 There is no merit to Korea's argument that the industry's performance was improving at the end of the period of investigation. The objective and quantifiable data in the ITC record showed a significant deterioration in the condition of the industry from1997 through June 1999 as well as in interim 1999 as compared with interim 1998. Notwithstanding this, Korea presented a collection of fragmentary statements, often taken out of context, designed to show that the industry was improving at the end of the period of investigation, or at later points. In comparison with the actual "hard data" showing a significant overall impairment in the industry, the collection of self-serving fragmentary statements advanced by Korea is unpersuasive.

4.233 In addition, Korea's characterization of the evidence upon which it relies to argue that the industry was improving at the end of the period is flawed. For example, Korea claimed that imports were falling at the end of the period investigated, whereas they were actually increasing in May and June of 1999.

4.234 The price increase announcements on which Korea relies also do not prove that the industry was no longer in a state of significant overall impairment, for several reasons. There is no evidence in the record that these anticipated price increases by a small number of firms in the industry were actually successful. Moreover, the ITC reasonably found that any such price increases were most likely attributable to an increase in raw material costs due to the imposition of antidumping measures on hot-rolled steel.

4. The ITC's Causation Finding Fully Complied with Article 4 of the Safeguards Agreement

4.235 Korea incorrectly asserts that there was no coincidence in trends of imports and domestic industry indicators. The SA does not require an exact and overlapping coincidence between imports trends and serious injury to the domestic industry. It is not necessary for increased imports and a deterioration in the industry's condition to occur simultaneously; in fact, some lag between cause and effect is to be expected.

4.236 Korea's effort to show that there was no coincidence in trends depends on its result-oriented approach of dividing 1998 into six-month increments. Nothing in the SA compels or provides for examining data on imports and injury in half-yearly, quarter-yearly or any other increment of time. Instead, Article 4.2 requires that the competent authority reach its determination based on an evaluation of objective evidence. The ITC approach, of adhering to its longstanding practice of making year-to-year comparisons and comparing interim data for the unfinished year to comparable interim data for the previous year, comports with these objectivity requirements. Korea's preferred approach, which would require the ITC to evaluate the evidence based on Korea's results-oriented comparison does not meet these objectivity requirements.

4.237 Korea's contention would mean that competent authorities can stray, after they have received and examined the relevant data, from their usual procedures and practices to perform prejudged

comparisons of part-year data. If that were so, the ITC could just as easily have divided 1998 into quarterly time periods. A comparison by quarters again shows that there is a coincidence between increased imports and the deterioration of the industry. Imports during the third quarter of 1998 were higher than in any other quarter in the entire five-and-a-half year period for which the ITC collected data.

4.238 Korea is wrong in asserting that the Safeguards Agreement requires competent authorities to consider the impact of other causes in the aggregate. The Safeguards Agreement contains no such requirement, and the Appellate Body has recognized this. Korea's contention that the ITC should have considered all other causes of injury in the aggregate is tantamount to the *Wheat Gluten* panel's insistence that increased imports "alone" must be capable of causing serious injury. That is essentially the analysis of the panel that was rejected by the Appellate Body in its reports in both *Wheat Gluten* and *Lamb Meat*.

4.239 Korea and the EC have not shown that the impact of "other factors" severed the causal link between increased imports and serious injury, or that the effects of these "other factors" -- insofar as they produced any injurious effects at all -- were attributed to imports.

4.240 The ITC first found that imports were an important cause of serious injury. It did so by considering the size of the increase in imports (both in actual and relative terms), and the timing of this increase. It also considered the market share held by imports, and information on the pricing of imports and domestic line pipe. It identified imports as a cause of declining prices and concluded that the import-induced price declines resulted in a significant loss of sales, market share and revenues on the part of the domestic industry, as well as declines in other key indicators of industry health such as capacity utilization and employment. In sum, the ITC found that there was a direct, *i.e.*, a "genuine and substantial," causal link between the significant increase in imports and the deterioration of the domestic industry's condition.

4.241 The ITC then analyzed each "other cause" of injury, both to assess its importance and to consider whether it detracted from the importance of increased imports as a cause of serious injury. By examining the "other causes" in this manner, the ITC ensured that it did not improperly attribute to imports injurious effects, if any, caused by the other causal factors. The ITC stated that it was not attributing injury caused by other factors to the imports.

4.242 The ITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors in several ways. First, the ITC noted that the domestic industry had operated at lower levels of demand in the past without experiencing the severe financial losses the industry experienced in 1998/1999. Second, the ITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors by recognizing the dramatic shift in market share from domestic suppliers to imports. The ITC further distinguished the effects of increased imports from those of the oil and gas crisis by noting the across-the-board price declines in 1998 and interim 1999, even in line pipe grades not sensitive to demand related to the oil and gas industries. Finally, the ITC pointed to a consensus among producers, importers and purchasers that imports played a major role in the decline in US line pipe prices in 1998 and interim 1999. By separately identifying injurious effects of increased imports that were wholly unrelated to the oil and gas market, the ITC ensured that it was not attributing to imports injury caused by the decline in oil and gas demand.

4.243 The ITC considered competition among domestic producers as another factor potentially causing injury, but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments. The ITC also noted that two firms began production of line pipe in 1998. It acknowledged that industry capacity increased, but it found the increase in the 1994 -1998 period

(less than 8 per cent) to have been considerably less than the growth in consumption (more than 22 per cent).

4.244 Korea's claim that there was a build up of "significant excess capacity" is both exaggerated and unconvincing. Korea focuses on the excess capacity in interim 1999, and claims that it was attributable to a build up in capacity. In fact, excess capacity in interim 1999 was largely due to a sharp drop in consumption, and not to any significant build up of new capacity. Thus, the ITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

4.245 The ITC found that, while there was some evidence of domestic producers shifting away from OCTG production to other types of pipe, it did not appear that they switched into line pipe production. Citing to the Appellate Body's decision in *Wheat Gluten*, the EC argues in its third party submission that the ITC should have investigated this factor further, and that it could not have avoided attribution of the effects of this factor without quantifying its exact impact. The EC misconstrues the Appellate Body's analysis in *Wheat Gluten*. While the AB ruled that competent authorities may not limit their examination of "'other factors' to those clearly raised before them as relevant by interested parties," it also rejected "the European Communities' argument [in that case] that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."

4.246 All of the record evidence before the ITC indicated that there was no substantial switch from OCTG to line pipe production. The petitioners stated at the ITC injury hearing that any diversion of production would have been relatively small. They noted that line pipe production declined at the same time as OCTG production. There was no contrary evidence in the record. The ITC Report shows that production of line pipe declined substantially in 1998 and in interim 1999 (as compared with interim 1998), making it implausible that serious injury was caused by overproduction of line pipe resulting from any shift from OCTG production. Under these circumstances, the ITC properly evaluated this factor, and explained its reasonable conclusion that declines in OCTG production were not substantially responsible for the serious injury experienced by the line pipe industry.

4.247 The ITC also considered allegations that declines in the domestic industry's exports were a more important cause of serious injury than increased imports. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have affected the producers' bottom line, those effects were not attributed to imports because the impact of the increased imports dwarfed the decline in exports.

4.248 Contrary to the EC's assertions, the ITC did not "mis-attribute" injurious effects to imports of specialty products. During the ITC's injury investigation, a German line pipe producer argued that there was no domestic production of high frequency induction ("HFI") line pipe over 6 inches in diameter, or any domestically-produced substitute for use of this product in deepwater applications, and asked that HFI line pipe be excluded from the scope of the investigation. The ITC recognized that there was some evidence of customers preferring HFI line pipe, but it was not persuaded that the HFI line pipe was sufficiently different from the domestic product to warrant its exclusion from the domestic like product.

4.249 Once the ITC properly determined that HFI pipe was part of the domestic like product, imports of HFI pipe were reasonably included in the subject imports considered by the ITC in its analysis of the impact of increased imports on the condition of the domestic industry. Moreover, it should be noted that even if the ITC had excluded HFI imports from its analysis, the ultimate conclusion regarding the impact of increased imports on the US industry would have been no different. Imports from Germany did not represent a significant proportion of total imports, and there is no suggestion that all, or even most, German imports consisted of HFI line pipe.

5. The United States Applied the Safeguard Measure on Terms Consistent with Articles 5 and 9 of the Safeguards Agreement and Articles I, XIII, and XIX

(a) A TRQ is Not A Quantitative Restriction or Quota Within the Meaning of Article 5 of the Safeguards Agreement or Articles XI and XIII

4.250 Every relevant authority supports the conclusion that tariff rate quotas ("TRQs") are not quantitative restrictions or quotas. The text of Article XI necessitates this conclusion. If TRQs were quantitative restrictions or quotas, they would be prohibited. They plainly are not. Many Members – including Korea – apply TRQs. The implementation of TRQs was for many Members the basis for complying with the commitment under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative restrictions into "ordinary customs duties." In addition, Article XIII:5, which specifies that the Article XIII disciplines on quantitative restrictions and quotas apply to TRQs, would not make sense if TRQs were, by their nature, quantitative restrictions or quotas.

4.251 The same conclusion holds true with regard to Article 5. Nothing in that provision gives its terms a meaning different than they have elsewhere in the WTO Agreement. Indeed, Article 5.2(a) duplicates the text of Article XIII:2(d), which indicates that the terms have the same meaning as used in both articles.

(b) The Line Pipe Safeguard Complied With All of the Requirements of Article 5

4.252 Under Article 5.1, a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment. The Appellate Body has interpreted this text to require that a safeguard measure be "commensurate" with the goals of Article 5.1. Both of these goals relate to the condition of the domestic industry, since the nature and magnitude of serious injury will determine both the need for adjustment and the extent to which it is necessary to apply a safeguard measure. In short, the condition of the domestic industry sets the benchmark for application of any safeguard measure.

4.253 This standard applies regardless of whether the competent authorities characterize the domestic industry as subject to serious injury or the threat of serious injury. The factors listed in Article 4.2(a), which the competent authorities consider in evaluating the condition of the domestic industry, are the same for both serious injury and threat of serious injury. Since these factors delineate the condition of the domestic industry, which in turn forms the benchmark for application of a safeguard measure, the application of the safeguard measure will not depend on whether serious injury is current or threatened.

4.254 Therefore, to ensure that a safeguard measure meets the requirements of Article 5.1, a Member will consider the competent authorities' determination regarding serious injury, the industry's plans and efforts to adjust to import competition, and other factors that it considers relevant.[13]

4.255 The Safeguards Agreement contains no requirement that a Member explain or "justify" the application of a safeguard measure at the time of application, except in the case of a quantitative restriction described in the second sentence of Article 5.1.[14] Since the US safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the US safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment." It has in no sense met this burden.

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[13] Paragraph 10 of the US responses to questions from the Panel indicates the factors considered by the President.

[14] *Korea –Dairy Safeguard (AB)*, at para. 100.

4.256 However, if the Panel were to consider whether the line pipe safeguard complied with the requirements of Article 5, the considerations outlined above suggest a multiple step inquiry along the following lines:

(1) a review of the evidence of serious injury or threat of serious injury identified by the competent authorities;

(2) an examination of the nature of the safeguard measure, including its product coverage, form, duration, and level;

(3) an analysis of how the application of the measure addresses the serious injury or threat of serious injury identified by the competent authorities; and

(4) in light of the first three steps, an assessment of whether application of the measure, in its totality, goes beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

4.257 The US analysis showed that the 19 per cent tariff would result, at most, in an increase of $62-64 per short ton in the average unit value of imported line pipe. If domestic producers increased their prices by the same amount, their operating profit margin would increase to $15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent.[15] That would represent between 3 and 4 per cent of total revenues, a level closer, but not equal to, the industry's profitable years before the import surge.[16] However, this scenario would likely leave domestic producers' market share – an important aspect of serious injury – unchanged. Moreover, it is questionable whether the US producers *could* increase their prices by such an amount. Thus, it cannot be said that the United States applied the line pipe safeguard beyond the extent necessary as the measure alone would not be likely to reverse the volume and price effects of increased imports.

(c) Article XIII Obligations Regarding Quantitative Restrictions Do Not Apply to TRQs Imposed as Safeguard Measures

4.258 In previous submissions, the United States demonstrated that, under customary rules for the interpretation of treaties, Article XIII cannot be interpreted as applicable to safeguard measures taken pursuant to the Safeguards Agreement and Article XIX. Korea has argued that this interpretation deprives Article XIII of its "full force and effect." However, it fails to recognize that it is the customary rules of treaty interpretation, which support the US interpretation, that determine the "full force and effect" of any treaty. As the United States has explained, it is precisely those rules that compel the conclusion that safeguard measures taken pursuant to the Safeguards Agreement and Article XIX need not satisfy the requirements of Article XIII.

4.259 Finally, Korea claims that if Article XIII does not apply to safeguard measures, "tariff-rate quotas have escaped multilateral control." This is plainly untrue. The prerequisite that the competent authorities first make a determination of serious injury or threat of serious injury places a significant limitation on the availability of a safeguard TRQ. In addition, the first and last sentences of Article 5.1 apply to safeguard TRQs, as do Articles 7, 8, 9, 11, and 12.

(d) Nothing in the Safeguards Agreement Disturbs FTA Parties' Authority Under Article XXIV to Exclude Each Other From the Application of Safeguard Measures

4.260 Article XXIV allows FTA parties to decide whether to exclude each other from safeguard measures all of the time, some of the time, or not at all. Under Article XXIV:8, an FTA must

[15] ITC Report, p. II-28, Table 10.
[16] ITC Report, p. II-27, Table 9.

eliminate restrictive regulations of commerce – like safeguard measures – on substantially all trade among the parties. Thus, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering "substantially all trade"), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may* also eliminate safeguard measures.

4.261 Article 802 of the North American Free Trade Agreement ("NAFTA") requires the parties to exempt each other from safeguard measures under certain circumstances. The Panel asked whether the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce this safeguards exemption. It linked this question to the decision of the Appellate Body in *Turkey – Textiles* that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions ... only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[17]

4.262 However, the *Turkey – Textiles* reasoning applied to a measure affecting *external* trade with non-Members of the customs union. Thus, it does not apply to the safeguard exemption, which affects *internal* trade among the parties to the NAFTA, and formed part of the package of trade liberalization that created the FTA.

4.263 In any event, the *Turkey – Textiles* reasoning demonstrates that Article XXIV invalidates Korea's claims that the NAFTA safeguard exemption was inconsistent with Articles I, XIII, and XIX. Compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated. The safeguard exemption formed part of that package for the formation of the NAFTA. If the GATT 1994 were interpreted to prohibit the NAFTA parties from accepting that obligation, it would prevent adoption of the liberalization package necessary to form an FTA. Thus, by operation of Article XXIV, the safeguard exemption is not inconsistent with Articles I, XIII, and XIX.

G. SECOND ORAL STATEMENT OF KOREA

4.264 The following is Korea's own executive summary of its second oral statement:

1. Introduction

(a) Appellate Body Precedents

4.265 The Appellate Body in *US – Lamb Meat* reaffirmed the overriding principle that safeguard measures are extraordinary actions and strict adherence to each and every requirement of the SA is essential. Specifically, the Appellate Body reaffirmed the very high standard of injury imposed by the SA. It also reaffirmed the importance of a full and complete analysis of all other factors, as well as the importance of a reasoned and adequate explanation, to ensure that the serious injury attributed to imports was actually caused by imports.

4.266 The US position on most of the issues raised by Korea in this proceeding is exactly the opposite of the body of jurisprudence established by the Appellate Body. The United States seeks to limit the review of the Panel and increase the discretion of the Members in applying safeguards. If the Panel does not address the issue of the measure, the US position will be sustained.

[17] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, paras. 46-47, adopted 22 October 1999 *("Turkey – Textiles (AB)").*

(b) General Objection to the US Failure to Address the Issue of Subject Imports in the US Second Written Submission

4.267 The United States continues to rely on public import data for many of its arguments despite the fact that such data (1) does not match the like-product in this case and, (2) during the period of investigation, the public data trends do not accurately track the confidential data trends. All arguments based on such data should be rejected by this Panel as unrepresentative of the like-product.

(c) Burden of Proof

4.268 The failure by the competent authorities to conduct a full investigation and publish a decision on all pertinent issues in violation of Articles 3.1 and 4.2(b) and 4.2(c) cannot become the basis for an objection by the Member in violation that the complaining party has insufficient record support for the claims and legal arguments made before the Panel. The Appellate Body appropriately gave no significance to these so-called "burden of proof" arguments by the United States in *US – Lamb Meat*.

2. The Safeguard Measure

(a) The Safeguard Measure Was Not Imposed Only to the "Extent Necessary"

(i) The US justification for the measure should have been contained in the findings and conclusions required by Article 3.1

4.269 While the United States appears to be offering its new "ex post" theory about why the US measure was imposed "only to the extent necessary," the Appellate Body in *US – Lamb Meat* confirmed that such an explanation should have been made prior to the imposition of the measure. Thus, in the case of a quantitative restriction adopted as a safeguard measure, which reduced imports below the level of the last 3 representative years, the authorities must justify the level of the measure as necessary in accordance with the requirements of Articles 5.1 and 3.1 inasmuch as this is a "pertinent issue" which must be addressed.

(ii) The newest ex post reasoning by the United States should be rejected

4.270 The latest ex post explanation for the measure by the United States that, if a 19 per cent tariff were fully translated into increases in the average unit price of line pipe, the impact on operating profits would be an increase that was close to but not equal to operating profit levels before the import surge has no more validity than its predecessors. This ex post justification ignores the combined improvements on the company's operating leverage of both price and volume increases and the improving demand situation. Also, the United States ignores the fact that virtually no (14,000 tons) imports entered at the 19 per cent tariff in the first year of the TRQ. In the absence of reasoned and adequate economic analysis, the United States can make no claims as to the estimated impact of the US measure or whether or not they are less than or greater than the extent necessary.

(b) The Safeguard Measure Was Not Confined to Addressing Only the Serious Injury Caused by Imports

4.271 The SA requires that a safeguard measure be confined to address the injurious effect of imports. In the ordinary interpretation of treaty language, "serious injury" in Article 4 and "serious injury" in Article 5 cannot mean two different things. The United States has offered no evidence that the measure was designed only to address the injurious effect of imports.

(c) Exemption of NAFTA Suppliers Was Improper

(i) Footnote 1 does not apply to the US safeguard action

4.272 Footnote 1 to Article 2.1 does not apply to the US safeguard measure because the United States is not acting as a customs union but simply in its capacity as a FTA Member State applying national safeguards. In the absence of Footnote 1, Article 2.2 requires MFN treatment, and Article XXIV does not provide a defence for a violation of the SA.

(ii) Article XXIV does not provide a defence to the US violation of Article 2.2

4.273 As the Appellate Body ruled in *Turkey – Textiles*, the Article XXIV defence is available only when the Member meets both the definition for an FTA and economic tests required under Article XXIV. Since NAFTA qualifies as an FTA even if safeguards were applied in some cases or even in all cases, the elimination of safeguard measures was not a prerequisite to the formation of NAFTA as an FTA. Moreover, the economic test in the instant case shows that the exemption of NAFTA members from the safeguard measure results in more restrictive regulations of commerce for non-members.

4.274 Finally, the attempt by the United States to escape Panel's review of its actions by subsuming the NAFTA exemption applied in this case within the overall obligations of the NAFTA should be rejected because the two conditions which must be met under Article XXIV should be examined with respect to the particular measure at issue, not the Agreement in its entirety. The Untied States has presented no evidence or even arguments that the NAFTA would have been prevented if the Untied States applied the measure on line pipe to Mexico and Canada.

3. The ITC Serious Injury Investigation

(a) The ITC's Investigation and Analysis Failed to Satisfy the Obligations of Articles 3.1 and 4.2

4.275 The ITC failed to satisfy the obligations of Articles 3.1 and 4.2 because it did not reconcile specific findings of the ITC which are in conflict among the ITC Commissioners, nor did it address the issues raised by parties in the ITC proceeding.

(b) No Increased Imports Were Demonstrated

(i) Imports declined

4.276 The requirement for increased imports is definitive and requires authorities to look at the last year of the period since the SA uses the present tense – "is being imported" – and the Appellate Body prohibited the use of any period of several years. Moreover, in terms of "context," import trends followed developments in the demand of the oil and gas sector and the drilling activities. Thus, imports commenced their decline at the same time as domestic industry factors and would continue to decline until drilling activity recovered.

(ii) The ITC did not adequately examine these significant import declines in its investigation and determination

4.277 The US failure to examine declining import trends for late 1998 and early 1999 violates the requirements of Articles 2.1 and 4.2(b). The internal practice of the United States cannot justify its failure to perform a treaty obligation.

(c) There Was No Serious Injury in the Line Pipe Industry

(i) Other Commissioners' opinions provide alternative plausible explanations of the data

4.278 Observations made in the dissenting views or separate views within the competent authorities are highly relevant and must be considered by the Panel because they call into question the "reasoned and adequate explanations" given by the authorities and present an alternative reading of the record data. The problems presented by the ITC Commissioners' disagreements over certain fundamental issues in their decisions are significant and cannot be remedied by mere observations which basically constitute a "checklist" of the relevant factors.

(ii) Some of the data the ITC majority and separate views relied on was fatally flawed

4.279 Contrary to the characterization made by the United States with respect to Exhibit KOR-48C as a manipulation, it correctly demonstrates that any allocation of costs based on relative sales value of line pipe to total domestic shipments will be distorted because OCTG declined more severely than line pipe in the months between 1998 and 1999. The ITC's reference to the "collective operating leverage" confirmed this conclusion.

4.280 As the Appellate Body observed in US – Lamb Meat, it would be a violation if a safeguard measure could be imposed based on data from domestic producers of products that are not like and directly competitive products in relation to the increased imports. The ITC did not sufficiently isolated the effects of these OCTG declines as well as the financial data for Lone-Star and Geneva Steel from the data before it evaluated injury to the line pipe industry.

(iii) The Industry Had a One-Year Downturn and Was Already Rebounding

4.281 Both the ITC Majority "Findings" and the separate view of threat were premised on an analysis of the domestic industry's downturn beginning in the second half of 1998. In that context, a one-year decline and subsequent recovery are significant evidence that the industry was not seriously injured since the industry must be in a state of serious injury when the decision of the authorities is made in accordance with Articles 2 and 4.2(b). Also, the one-year downturn in the industry had to be viewed in the context of a peak in 1997. Moreover, this was an industry that was accustomed to these wide swings in profitability and understood that their recovery would come with the recovery in oil and gas prices. Actually, the condition of the domestic industry was improving due to the improvement in oil and gas prices since early 1999, as was recognized in the ITC report.

4.282 In addition, the US Industry continued to invest because it made economic sense to plan for the recovery of the market. However, the United States argues against the significance of increased capital expenditures on the ground that such decisions predated the industry's difficulties. Without the confidential data on the industry as a whole, the Panel cannot conclude that the ITC sufficiently evaluated the industry as a whole or that the experience of the two producers selected by the Petitioners was representative of the industry as a whole.

4.283 Furthermore, the announcements of price increases by prominent US producers indicated their assessment of the future market at the time the ITC took its decision. The United States arguments on the issues of the relevance of price increases are ex post reasoning which are not found in the ITC determinations. To conclude, the ITC's analysis of injury factors failed to provide a reasoned and adequate explanation of how the facts as a whole support ITC's serious injury determination.

(d) The US Causation Decision Neither Properly Analyzed the Effects of Imports nor Sufficiently Isolated the Effects of Other Factors

(i) There was no coincidence of trends

4.284 The US causation decision fails because it ignores very significant inconsistencies between the trends of imports and the health of the US industry when half year 1998 and 1999 data are evaluated.

(ii) The ITC did not properly analyse the effects of imports

4.285 The US assumptions about the effects of imports were incorrect: (1) the per centage increase in imports was not "significantly different" between 1997 and 1998 compared to 1996 and 1997; and (2) price declines were not caused by import.

(iii) The ITC's analysis of "other factors" of injury was inadequate

4.286 Instead of assessing the nature and extent of the injurious effects of all other factors, and separating such the injurious effects of these other factors in accordance with Article 4.2(b), the ITC simply compared the injurious effect of each individual factor and determined each was not more important than the increase in imports.

4.287 Also, the ITC did not adequately investigate the other factors of injury in violation of Articles 4.2(a) and (b). As the Appellate Body admonished in *US – Wheat Gluten*, competent authorities have an independent duty of investigation and they cannot "remain passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties." Although the issues such as the shift from domestic production of OCTG to line pipe, the effects of dual-stencilled line pipe, or increased competition among domestic producers had been brought to the ITC's attention from the beginning of the proceeding, the ITC did not investigate such factors.

4.288 Finally, the United States should have cumulatively analyzed all the other factors of injury to determine that each factor, alone counting for some injury, would not cumulatively account for all injury and thus, demonstrate that increased imports did not bear a substantial and genuine relationship to serious injury. The United States cannot now assert that it is unnecessary to evaluate "all other factors together," when they have already asserted to this Panel – incorrectly – that they had indeed performed just such an analysis.

H. SECOND ORAL STATEMENT OF THE UNITED STATES

4.289 The following is the United States' own executive summary second oral statement:

1. Burden of Proof and Standard of Review

4.290 There is no question that the burden of proof in a WTO dispute lies with the complaining party. This burden is part and parcel of the assumption that Members act in good faith to conform with their obligations under the WTO Agreement. Contrary to Korea's arguments, the actions of the responding party do not lower that hurdle.

4.291 The standard of review should also not be in doubt. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") covers all obligations under the WTO Agreement, and requires an objective assessment of the matter before the Panel. In *Lamb Meat*, the Appellate Body enunciated a legal test for *applying* that standard to the obligations under Article 4. By its terms, this test applies only to Article 4 and not to other provisions of the Safeguards

Agreement, such as Article 5. Any application of DSU Article 11 to claims under Article 5 must proceed in accordance with the terms of that Article.

2. Increased Imports

4.292 There can be no question that the increased imports requirement was met in this investigation. Imports nearly tripled in the last two full years of the period of investigation. Korea claims erroneously that the Appellate Body in *Argentina – Footwear* established a legal standard requiring an examination of import data only for the last 12 months of the period of investigation. In fact, the Appellate Body's decisions in *Argentina – Footwear* and *United States – Lamb Meat* make clear that there is no such rule.

4.293 Korea attempts to justify its reliance on a comparison of the last six months of 1998 with the first six months of 1999 by claiming that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury determination." Korea's characterization of the ITC's analysis is simply untrue. The fact that the ITC collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998 – is clear from a review of the discussion of the serious injury factors in the ITC Report and of virtually every table with numerical data in the entire report. The ITC acted consistently with the "objectivity" requirement of Article 4.2 of the Safeguards Agreement by evaluating the data in this case in the same neutral and unbiased manner that it conducts all of its safeguards investigations.

4.294 Even if the Safeguards Agreement required that the period for analyzing imports be limited to the last 12 months of the period investigated – and clearly it does not – Korea's theory that imports declined does not hold up. There was a sharp increase in imports in May and June of 1999.

3. Serious Injury

4.295 Commissioner Crawford's views are not part of the determination of the ITC. The Safeguards Agreement does not require competent authorities to respond to the views of a particular Commissioner who is not a part of the competent authorities for purposes of the serious injury determination.

4.296 Korea's assertion that Geneva's decision to close a blast furnace was entirely due to conditions in the hot-rolled sheet and plate markets, and had nothing to do with line pipe conditions, is clearly at odds with the evidence in the record that Geneva lost half of its line pipe volume, and that line pipe production was essential to running the second blast furnace.

4.297 Korea builds its entire argument concerning Lone Star on an unfounded assumption that Lone Star "mis-allocated" part of a SG&A expense to line pipe operations. There is no evidence to support this assumption. ITC accountants conducted a verification of Lone Star's data, which included the partial SG&A allocation to line pipe operations.

4.298 The United States has shown that Korea's theory that the financial performance of the line pipe industry was affected by declining OCTG production is unsupportable. Korea's contention that the decline in OCTG shipments in 1998 was much more severe than for line pipe is simply not correct. In addition, the United States has shown that the effect that this could have had on average unit costs for line pipe would have been nominal because the majority of average unit costs were variable. The United States notes that Korea keeps shifting the time period when this alleged effect of declining OCTG sales occurred.

4.299 None of Korea's arguments concerning alleged financial improvements at the end of the period investigated detract from the hard evidence showing a significant overall impairment in the US line pipe industry in 1998 and interim 1999. The ITC recognized that capital investment projects in

this industry have long lead times. Decisions by two firms to begin producing line pipe were likely to have been made years before the 1998 and interim 1999 downturn in the industry. Nor do the statements by ITC Commissioners in their views on remedy detract from the serious injury finding. The Commissioners simply noted, when writing these views in December 1999, that oil and gas prices had increased since early 1999. Announcements by three producers of intended price increases are of little probative value. As two of the three producers explicitly stated in their price increase announcements, these were due to increases in raw material costs.

4. Causation

4.300 Korea's attempts to discredit the evidence of adverse price effects by imports are unpersuasive. Korea is incorrect in claiming that the average import unit values on which the ITC relied are inaccurate because they are based on "public data." Korea's argument that the quarterly pricing data do not prove that imports "led prices down" in the second half of 1998 and the first half of 1999 is irrelevant because the ITC did not make any finding that "imports led prices down" only in this period. Questionnaire responses from industry participants stated that imports played a "very important" or "important" role in causing price declines. There is no support for Korea's suggestion that the observations of those with intimate knowledge of the industry are not objective.

4.301 Korea argues that the "only" means to ensure that injury from other factors is not attributed to imports is to "*cumulatively*" consider all of the other factors. There is absolutely no such requirement in the Safeguards Agreement. The Appellate Body's report in *Lamb Meat* contradicts Korea's argument that the Safeguards Agreement requires a *cumulative* causation analysis. In that report the Appellate Body accepted the ITC's separate identification of individual causal factors, but suggested that to meet the requirements of Article 4.2(b) the ITC should have explained the nature of the injurious effects of each of these other factors.

4.302 Korea is also incorrect in asserting that the Agreement requires a finding that the domestic industry would still have suffered serious injury irrespective of the crisis in oil and gas. In *Wheat Gluten*, the Appellate Body stated that, under the Safeguards Agreement, competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, causes serious injury. In its *Lamb Meat* report, the Appellate Body again confirmed that Article 4.2 of the Safeguards Agreement does not require that increased imports "alone", "in and of themselves" or "per se" must be capable of causing serious injury. Rather, the Agreement contemplates that other factors may be contributing at the same time to the situation in the domestic industry. Where there are several causal factors, the Agreement, as interpreted by the Appellate Body, requires competent authorities to identify and distinguish the effects of the different causal factors by whatever reasonable methodology the Member chooses.

4.303 Distinguishing the effects of the various causal factors is not the same as finding that the imports by themselves would have caused serious injury irrespective of the presence of other causes. The question for the competent authorities is not whether the increased imports would have caused serious injury absent those other factors, but whether there is a "substantial and genuine" causal link between the increased imports and serious injury that occurs as a result of the entry of those imports into the market as it exists.

4.304 In addressing whether each other alleged cause was a greater cause of injury to the domestic line pipe industry than the increased imports, the ITC provided the type of analysis outlined by the Appellate Body in *Lamb Meat*, and thus ensured that there was a "*genuine and substantial relationship of cause and effect*" between increased imports and serious injury. The ITC explained the injurious effects of all other causal factors.

4.305 The ITC determined that there were mainly two circumstances responsible for the decline in the domestic industry – the increased imports and the decline in oil and natural gas prices. The ITC

carefully identified, distinguished and explained the effects of each of those two causes. After distinguishing the effects of the oil and gas declines from those of the increased imports and then examining the effects of each of these two principal causes, the ITC found that the increased imports were the predominant cause of the declining condition of the domestic industry. The ITC then also examined the minor causes of injury, and found either that any injury caused by these other factors was too small to account for the injurious effects attributed to the increased imports, or that the nature of the other cause was such that it had always been a factor in the market in good times as well as bad, and therefore could not be linked to the declines attributed to the increased imports.

5. There is no Requirement to Explain how Application of a Safeguard Measure Satisfies the Requirements of Article 5.1

4.306 Korea claims that the United States violated the Safeguards Agreement by failing to explain in 2000 how it complied with the Article 5.1 requirement to apply the line pipe safeguard only to the extent necessary to remedy serious injury and facilitate adjustment. However, the Appellate Body already considered exactly this argument and rejected it in *Korea – Dairy Safeguard*.[18]

4.307 Korea contends that Articles 3.1 and 4.2(c) independently oblige a Member to explain at the time it takes a safeguard measure how that measure is consistent with Article 5.1. However, Articles 3.1 and 4.2(c) require the *competent authorities* to publish a report on "all pertinent issues of law and fact." In those same Articles, the competent authorities are charged solely with the investigation and determination of serious injury. Neither Articles 3.1 and 4.2(c) nor Article 5.1 give the competent authorities a role in the decision whether and to what extent to apply a safeguard measure. Thus, there is no basis to conclude that there report need explain how the measure complies with Article 5.1.

4.308 Korea's argument is also inconsistent with the framework established by the Safeguards Agreement. Under Article 2.1, a Member may apply a safeguard measure only after the determination of serious injury. Under Articles 3.1 and 4.2(a), the competent authorities make that determination only after conducting an investigation. They are also charged with issuing a report containing "findings and conclusions on all pertinent issues of fact and law" and "a detailed analysis of the case under investigation. Article 5 establishes the condition of the domestic industry, as revealed in that investigation, as the benchmark for a Member's application of the safeguard measure. Since the investigation, determination, and report are a necessary precursor to a Member's decision under Article 5 on the extent to which it applies a safeguard measure, they cannot themselves explain how the measure complies with Article 5.

4.309 This approach does not prevent review by a panel. As with any other measure taken by a Member, another Member may claim in a dispute that application of a safeguard measure is inconsistent with the WTO Agreement. It then bears the burden of presenting a *prima facie* case of inconsistency. That is only appropriate since in a safeguard measure, as with any other measure, the imposing Member is presumed to have complied in good faith with its obligations.

6. Korea's Claim that the Line Pipe Safeguard Itself Does not Comply with Article 5.1

4.310 Throughout this dispute, Korea has based its claims of inconsistency with Article 5.1 on allegations that the US line pipe safeguard was somehow more restrictive than recommended measures that the ITC had identified. In its rebuttal submission, for the first time, it attempted to analyze whether the United States actually applied its safeguard measure beyond the extent necessary.

4.311 Its analysis was deeply flawed. The record indicated that up to 19 customs territories would enjoy access at MFN rates, rather than just the seven identified by Korea. The ratio of the

[18] *Korea - Dairy Safeguard (AB)* at para. 98.

supplemental tariff to the MFN rate is irrelevant, and is high simply because the MFN rate is so low. Finally, data on actual line pipe imports does not demonstrate the "result of the measure." The panel has no information on market conditions after imposition of the line pipe safeguard, and the observed import patterns could result from a number of factors unrelated to the safeguard. Therefore, Korea has presented no basis for the Panel to conclude that the United States applied the line pipe safeguard beyond the extent necessary.

4.312 Korea has also failed to identify any flaw in the US explanation of how the line pipe safeguard was consistent with Article 5.1. Korea assumes that US producers would be able to increase their prices by the full extent of the 19 per cent duty *and* increase their volume of sales at the same time. This is obviously impossible. If the relative price difference between domestic and imported line pipe remains unchanged, there is no reason to expect the volume of domestic products to increase. Korea also assumes that demand was improving rapidly, but the information before the ITC does not support this conclusion. Therefore, Korea provides no basis for the Panel to conclude that the line pipe safeguard was inconsistent with the requirements of Article 5.1.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Canada, the European Community, Japan, and Mexico are set out in their submissions to the Panel, as attached to this Report in Annex A (see List of Annexes, page iv). Australia did not make a written submission or an oral statement.

VI. INTERIM REVIEW

6.1 Our interim report was sent to the parties on 31 August 2001. On 14 September 2001, the parties requested review of precise aspects of the interim report, in accordance with DSU Article 15.3. On 21 September 2001, in accordance with paragraph 17 of the Working Procedures of this Panel, we received written comments from the United States on some sections of Korea's request for interim review. Korea did not submit any comments on the US request for interim review. The various issues raised by the parties are addressed below.

A. THE UNITED STATES' REQUESTS FOR INTERIM REVIEW

6.2 The United States requested us to delete paragraphs 7.15 through 7.17 of the interim report. Since these paragraphs addressed a procedural issue of limited significance, we see no reason not to delete them.

6.3 The United States requested the Panel to delete paragraph 7.59 of the interim report, in which some comments were made regarding the US position on Article XIII:2 as reflected in a "US General Counsel Memorandum" submitted by Korea. We have accepted the US request to delete that paragraph.

6.4 The United States asked the Panel to delete footnote 217 of the interim report, on the basis that it took a US comment out of context. We have deleted the relevant footnote.

6.5 The United States directed our attention to an error in paragraph 8.1 of the report, which we have corrected.

B. KOREA'S REQUESTS FOR INTERIM REVIEW

6.6 Korea requests a technical correction to what is now paragraph 7.166 of the report, which we have made.

6.7 Korea asks the Panel to delete the US argument set forth in what is now paragraph 7.167 of the report. Korea asserts that this argument was not made in writing by the United States, and therefore does not constitute part of the record of the dispute. To the extent that the United States made this argument orally, Korea asserts that no written version of that oral argument was provided, contrary to paragraph 9 of the Panel's Working Procedures. In addressing Korea's request, we note that the US argument at issue was made orally, in response to an oral question from the Panel. Paragraph 9 of the Panel Working Procedures provides in relevant part that "[T]he parties to the dispute shall make available to the Panel and the other party a written version of their oral statements not later than the day after the oral statement is presented". Paragraph 9 does not refer in any way to a party's oral answer to an oral question from the Panel. In our view, therefore, paragraph 9 does not require that a party's oral response to an oral question from the Panel can only form part of the record of the Panel proceedings if it has been reduced in writing. Accordingly, we reject Korea's request to delete the US argument set forth in paragraph 7.167 of the report.

6.8 Korea asserts that the Panel's finding on parallelism (set forth in what is now paragraphs7.164 - 7.171– of the interim report) is flawed. Korea asserts that the Panel neglected its duty of making an objective assessment of facts and assessing the applicability of and conformity with the relevant covered agreements with respect to Korea's claim. Korea also submits that the Panel imposed an exorbitant burden of proof on the party making the claim, while it completely ignored the fact that the other party did not make any efforts to refute the claim. According to Korea, it made sufficient arguments to establish a prima facie case in support of its parallelism claim, especially in light of the fact that the United States did not defend that claim.

6.9 Korea focuses on the Panel's treatment of note 168 of the ITC report. Korea asserts that it "does not understand why the establishment of *prima facie* case can be done only through the refutation of the footnote 168, which is a conditional statement. Korea's confusion grows even deeper given the fact that Korea's assessment of the footnote, to the effect that it does not have legal significance, was not challenged by any party, including the Panel, throughout the whole proceedings. … In the absence of any refutation from the U.S. and in the absence of any related query from the Panel on the issue, in fact against total silence on the footnote 168 other than Korea's assessment that it does not have any legal significance, it is surprising for the Panel report to take one footnote out of the voluminous final report of the ITC and state that the Panel fails to see why the footnote has no legal significance."

6.10 As Korea itself explains, its parallelism claim is based on the argument that "there is a gap in the scope of the investigation and the scope of the measure". In examining Korea's claim, we considered note 168 because it is relevant to the alleged "gap" identified by Korea. Indeed, it is arguably the only part of the ITC report that addresses this issue. During the proceedings, Korea asserted that note 168 "has no legal significance", without explaining why. At the interim review stage, Korea asserted that note 168 has no legal significance "because of the contents of the footnote", and because the first sentence of note 168 "begins with a conditional statement". In our view, however, it is precisely because of the contents of note 168 that it is relevant to the "gap" issue identified by Korea. We do not consider that note 168 is any less relevant in this regard simply because it is allegedly conditional in nature. Whether conditional or not, it addresses the "gap" issue at the heart of Korea's parallelism claim.[19] We fail to see how Korea can establish a prima facie case that there is a "gap" between the scope of the ITC investigation and the scope of the line pipe measure without addressing the very part of the ITC report that addresses that issue.

6.11 Regarding the alleged absence of any refutation by the United States of Korea's claim, we refer to paragraph 6.7 above. Regarding the fact that the Panel failed to "challenge[]" Korea's assessment of the footnote, we consider that it was Korea's burden as a complainant to establish a

[19] As we explained in note 149 of the report, this does not necessarily mean that note 168 is sufficient for the purposes of Articles 2.1 and 4.1.

prima facie case of violation.[20] We note that in the case of *Japan – Measures Affecting Agricultural Products* the Appellate Body further elaborated that:

> Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.[21]

Thus, the onus was clearly on Korea to make its own case in support of its parallelism claim. It would appear that Korea may have chosen not to do so because "it d[id] not consider that 'parallelism' resolves the issue in this case given the interpretation by the USITC in its implementation of *US–Wheat Gluten*, that it can exclude NAFTA members from the serious injury determination and then exclude them from the measure."[22]

6.12 We therefore reject Korea's request to review our findings regarding its parallelism claim.

6.13 Korea requests us to make a technical change to what is now paragraph 7.116 of the report, which we have done.

6.14 Korea requests us to clarify what is now paragraph 7.124 of the report. In this regard, we would note that we do not refer to the Appellate Body report in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*[23] in support of our statement that "there is no question of whether or not the legal basis of the claim, or the claim itself, was set forth with sufficient clarity in the Request for Establishment".

6.15 Korea requests a minor change in the last sentence of what is now paragraph 7.136 of the report, in order to better reflect Korea's argument. We have made the change requested by Korea.

6.16 Korea requests that the Panel identify the evidence referred to in the second sentence of what is now paragraph 7.145 of the report. We have included a cross-reference accordingly.

6.17 Korea asks the Panel to clarify certain aspects of what is now paragraph 7.148 of the report. We confirm that this paragraph refers to the nature of the line pipe measure (compared to the nature of the measure at issue in *Turkey – Textiles*), and not the US justification for that measure.

6.18 Korea argues that the Panel was incorrect to state in paragraph 7.157 of the interim report that in *Argentina – Footwear Safeguard*[24] the Appellate Body "was not required to consider the last sentence of footnote" 1 of the Safeguards Agreement. As a result, we have amended the relevant part of what is now paragraph 7.153 of the report.

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[20] The issue of burden of proof has been amply addressed in panel and Appellate Body reports, where it has been established that the initial burden lies on the complaining party which must establish a prima facie case of inconsistency. See, for example, *EC – Hormones (AB)* at para. 98.

[21] *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129, adopted 19 March 1999.

[22] Note at end of Korea's answers to questions from the Panel, dated 15 June 2001.

[23] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, report of the Appellate Body, WT/DS122/AB/R, adopted 5 April 2001.

[24] *Argentina – Safeguard Measures on Imports of Footwear*, report of the Appellate Body, WT/DS121/AB/R, adopted 25 June 1999 *("Argentina – Footwear Safeguard (AB)")*.

6.19 Korea asserts that the Panel mischaracterized its arguments in what is now paragraph 7.202 of the report. We have changed the last sentence of paragraph 7.202 accordingly.

6.20 Korea takes issue with the Panel's observation in what are now footnotes 164 and 184 of the report that Korea failed to argue that the ITC could not properly have found that the increase in imports was sudden and sharp enough. In support Korea cites to paragraph 205 of its first submission. We believe that the paragraph cited by Korea confirms our view that the focus of Korea's argument is on the fact that there was no increase at all, and not on the sharpness or suddenness of the increase found by the ITC. We therefore make no changes to footnotes 164 and 184.

6.21 Korea disagrees with the Panel's characterization of Korea's argument on the issue of cost allocation in what is now paragraph 7.228 of the report. In order to better present Korea's argument, we have made a minor amendment in the fourth sentence of that paragraph.

6.22 Korea argues that, contrary to what is expressed by the Panel in what is now footnote 203 of the report, Commissioner Crawford did not rely on testimony by the Geneva Steel executive but rather refuted it. We believe that Korea is not correct in its view that Commissioner Crawford did not rely on testimony by the Geneva Steel executive. In our view, Commissioner Crawford clearly was citing to that testimony to substantiate her statement regarding Geneva Steel. We see no other reason why Commissioner Crawford would have referred to that testimony. We therefore leave footnote 203 unchanged.

VII. FINDINGS

A. PRELIMINARY ISSUES

7.1 In the course of our proceedings both parties raised certain preliminary issues and requested preliminary rulings by the Panel on those issues. The issues raised concerned:

(1) The release of confidential record information to the Panel;

(2) The admissibility of evidence not submitted to the ITC, or addressing events after the decision to take a safeguard measure; and

(3) Information submitted in footnotes to the written version of Korea's second oral statement and not read out loud during the meeting with the parties.

1. Release of confidential record information to the Panel

7.2 On 30 January 2001 we received a letter from Korea requesting the Panel to seek from the United States certain confidential information.[25] Korea claimed that this information was necessary in

[25] The parties presented various arguments in connection with the issue of confidential information. Those arguments were summarized in the parties' executive summaries of their submissions and oral statements and have been included in sections IV.A.2(a), IV.B.3(a), IV.C.2(a), IV.D.9 and IV.E.1(a) of this report.

Korea (in its comments to the descriptive part of the report) requested the Panel to include as an annex to the Panel report a copy of their non-summarized closing oral statement made at the second substantive meeting, addressing the issue of confidential information and use of judicial economy. We note that, regarding the issue of submissions and oral statements and executive summaries thereof, paragraph 16 of the Working Procedures of the Panel provides:

> The parties shall provide the Panel with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Panel only for the purpose of assisting the Panel in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of

order for Korea to prepare its first written submission. Korea requested the Panel to seek the following information:

- The confidential version of the complete ITC decision;
- The Addendum to the dissenting views of Commissioners Crawford's opinion on injury;
- The data concerning imports of subject merchandise, as defined by the ITC, by each country supplier;
- The confidential economic memorandum on which the ITC based its remedy recommendation;
- Any other economic memoranda or other written analysis by the US President to support the President's remedy recommendation; and
- The record of the confidential proceeding before the ITC.

7.3 The Panel provided the United States with an opportunity to respond to Korea's request. On 1 February 2001, we received a letter from the United States commenting on Korea's letter. In short, the US position is that it is neither necessary nor appropriate for the Panel to obtain the information requested by Korea.

7.4 On 8 February 2001, we sent the following letter to the parties:

> We are mindful that, in order to make an objective assessment of the matter before us, we may need to view certain confidential information not in the public record of the ITC. However, we are equally aware that the protection of confidential information is an important systemic consideration recognised by Article 3.2 of the Safeguards Agreement. Given these considerations, we consider that a panel should show appropriate restraint in the exercise of its authority under Article 13.1 of the *DSU* to seek confidential information from a party.

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the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties.

Korea's closing statement forms part of their oral statement at the second substantive meeting. Accordingly, any arguments presented therein should have been included in its executive summary of that oral statement. Korea argues in a letter dated 16 July 2001 that they submitted their closing statements pursuant to paragraph 9 of the Working Procedures. Paragraph 9 of the Working Procedures provides:

> The parties to the dispute shall make available to the Panel and the other party a written version of their oral statements not later than the day after the oral statement is presented. Any third party invited to present its views shall also make available to the Panel, the parties and third parties a written version of their oral statements not later than the day after the oral statement is presented.

Nothing in the paragraph cited above suggests that the submissions and communications provided to the Panel and the parties pursuant to that paragraph necessarily have to be included in the Panel report. Except for replies to questions and comments thereof, and submissions by third parties (which are not covered by the obligation to provide executive summaries in paragraph 16), none of the submissions of the parties have been annexed to the report. We do not see why we should accord different treatment to Korea's closing statement. Accordingly, we decline Korea's request that the closing statement made at the second substantive meeting be annexed to the report. Nevertheless, we wish to clarify that all the communications and submissions of the parties form part of the record of this proceeding, and were duly considered by the Panel.

In our view, Korea's request that we seek from the United States the full confidential record of the investigation is unduly broad and could encompass confidential information that is without relevance to the claims advanced by Korea in this dispute and which is not necessary in order for us to perform an objective assessment of the matter before us. Thus, we decline Korea's request in this regard. For the same reasons, we decline to seek from the United States the confidential version of the complete ITC decision.

Regarding Korea's requests that we seek (a) the confidential economic memoranda on which the ITC based its remedy recommendation and (b) any economic memoranda or other written analysis by the US President to support the President's remedy recommendation, we are not in a position at this time to assess the need for access to this information. Accordingly, we will give further consideration to this request at the first meeting of the Panel.

We do, however, grant Korea's request that we seek from the United States (a) the Addendum to the dissenting views of Commissioner Crawford's opinion on injury; and (b) data concerning imports of subject merchandise, as defined by the ITC, by each country supplier. Korea has established to our satisfaction that these more targeted requests involve information which is relevant to the claims advanced by Korea and which may prove necessary in order for us to perform an objective assessment of the matter. We request that the United States provide this information to the Panel and to Korea not later than close of business on 16 February.

Our ruling is without prejudice to any further specific requests from Korea that we seek confidential information from the United States. Any such requests should be supported by an explanation as to why the information sought is relevant to Korea's claims and is necessary in order for the Panel to perform an objective assessment of the matter. Moreover, this ruling is also without prejudice to the Panel's establishment of the facts which will be relied upon for purposes of its findings.

7.5 In a letter dated 16 February 2001, the United States responded to our ruling and request for information. In that letter the United States provided us with a table containing indexed figures for the Addendum to Commissioner's Crawford dissenting opinion. It also provided the Panel with indexed data regarding imports of subject merchandise from Japan.[26]

7.6 In its first written submission Korea reiterated its request for certain confidential information, including:

- The confidential staff report;
- Information regarding the relative import trends;
- Price data trends between imports and domestic prices for each quarter;
- Financial information on a per producer basis;
- The ITC's recommendation on remedy, the supporting economic memorandum, and the confidential report sent to the President;

[26] The United States explains that during the period of investigation the only country that shipped non-subject merchandise, classified under the same tariff heading as line pipe, was Japan.

- All papers used in the deliberative process by the President regarding the safeguard measure imposed; and

- Other confidential information which may bear on arguments subsequently raised by the United States.

7.7 The United States responded to Korea's further request for information in its first written submission. In its submission the United States agreed that additional data on prices of imported and domestic line pipe may be necessary and appropriate to the Panel's consideration of the dispute. Therefore, the United States offered to explore ways in which such data could be summarized for use by the Panel.

7.8 At the first meeting of the Panel with the parties, we consulted extensively with Korea and the United States on which information was still considered necessary for a proper evaluation of the issues before us, and ways in which this information could be provided. In a letter dated 19 April 2001, we requested further information as follows:

> In order to assist the Panel in making an objective assessment of the matter before it, the Panel considers that it is necessary and appropriate for the United States to provide aggregate weighted average price data for all imports and domestic products covered by the ITC's *Line Pipe* investigation. This data must be broken down product-by-product, and quarter-by-quarter. The Panel is not requesting confidential data at this stage. Thus, the United States may use asterisks when there was only one supplying company for a given product in a given quarter. The information requested should be made available to the Panel by close of business Monday, 23 April 2001. In order to assist the Panel in determining whether it is necessary and appropriate to request additional data from the United States, the Panel asks that the United States also reply to questions 6, 7 and 8 from the Panel by close of business on Monday, 23 April 2001.
>
> Furthermore, at the first substantive meeting of the Panel with the parties, the United States tentatively proposed that it provide the Panel with two outputs of a computerized model used by the ITC to evaluate the impact of imports on the domestic industry. One output would include imports from Japan, while the other output would exclude imports from Japan. The United States indicated that these outputs would demonstrate that there is very little difference in results, whether imports from Japan are included or not. The Panel looks forward to receiving these outputs by close of business on Monday, 23 April 2001.
>
> The United States also tentatively proposed that it provide the Panel with an output of the aforementioned computerized model based on the measure implemented by the President (using the data before the ITC). The Panel looks forward to receiving this additional output by close of business on Monday, 23 April 2001.

7.9 The United States replied to our request in its letter of 23 April 2001. In that communication the United States provided us with a table containing imports of the subject merchandise both in absolute and in relative terms excluding all imports from Japan. It also provided tables containing quarterly pricing information for imports and domestic production for all types of line pipe covered by the investigation. However, the United States did not provide the computerized models it had tentatively proposed to provide to the Panel. The United States asserted that, with respect to the computerized models evaluating the impact of the ITC proposed measure, the ITC did not rely on, consider nor have available any output from such computerized model. With respect to the computerized models evaluating the impact of the measure implemented by the President, the United States concluded that it could not provide such information.

7.10 In its second written submission Korea reacted to the US letter and stated that it considered that the following additional information was needed:

- The confidential economic memoranda used to evaluate the remedy proposals and the impact of the various alternatives on the US industry;
- The papers used in the deliberative process by the President in reaching the determination regarding the safeguard; and
- The confidential version of the ITC staff report.

7.11 After reviewing the information provided to us in the parties' submissions and communications, we did not consider that it was necessary and/or appropriate to issue further requests for information in response to Korea's second written submission. We are of the view that the information before the Panel allows an objective assessment of the matter before us.

2. The admissibility of evidence not submitted to the ITC, or addressing events after the decision to take a safeguard measure

7.12 The United States requested that the Panel issue a preliminary ruling that certain information included or referenced in Korea's first written submission is inadmissible. The US request relates to information not on the ITC record, and information concerning events that took place after the decision to apply the line pipe measure. The United Sates considers that this information is irrelevant to the Panel's deliberative process. The United States requested that the Panel: declare the new information to be inadmissible; request Korea to remove the new information from its first written submission and to delete any arguments based on that information; and instruct the parties that the new information, and any arguments based on that information, will not be considered by the Panel.

7.13 Korea requested the Panel to reject the US request for a preliminary ruling that certain information included or referenced in Korea's first written submission is inadmissible. Korea argues that the US request, if granted, would unduly limit the Panel's ability to collect and assess facts and diminish the rights conferred on Members by the WTO Agreement. Furthermore, the US request, if granted, would serve as an ominous precedent for the effective functioning of the WTO dispute settlement system.

7.14 At the first meeting of the Panel with the parties, the Chairman of the Panel issued the following ruling concerning the US request that certain evidence be declared inadmissible:

> The United States has asked the Panel to issue a preliminary ruling on the admissibility of certain information submitted by Korea. The relevant information is identified in para. 279 of the US first written submission.
>
> The Panel has decided not to exclude from the Panel's record any information submitted by Korea on the grounds that it is inadmissible. Our decision not to exclude the information does not prejudge in any way the issue of whether the Panel will use the information, nor whether the information is relevant to the matter at hand.

B. CLAIMS RELATING TO THE LINE PIPE MEASURE

7.15 We will begin our review of the substantive issues in this case by examining Korea's claims regarding the conformity of the line pipe measure with GATT 1994 and the Safeguards Agreement. We will then address Korea's claims regarding the ITC investigation leading to the imposition of that measure. We shall begin our examination of the line pipe measure by addressing Korea's claims

under Article XIII. In order to determine the extent, if any, to which the line pipe measure is subject to the disciplines of Article XIII, we must first rule on the nature of the line pipe measure.

1. The nature of the measure

(a) Arguments of the parties

(i) Arguments by Korea

7.16 Korea asserts that the line pipe measure is a quantitative restriction in the form of a tariff quota. The measure is a tariff quota because it consists of two elements: a quota and a tariff. Normal duties are assessed on in-quota imports, and a higher tariff is imposed on over-quota imports. Korea argues that the measure is a tariff quota because one tariff rate is applied on in-quota imports of 9,000 short tons, while a higher tariff rate is imposed on out-quota imports (once the 9,000 short ton quota is exhausted). Korea notes that the measure is described as a tariff quota in the ITC recommendation, and in US Customs documentation.

(ii) Arguments by the United States

7.17 The United States argues that the measure is not a tariff quota, but rather a tariff surcharge with a 9,000 short ton exemption for each WTO Member. According to the United States, a tariff quota involves the "[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate".[27] The United States also refers to a finding by the *EC Bananas III - Article 21.5* panel that "a tariff quota is a quantitative limit on the availability of a specific tariff rate".[28] On the basis of these definitions, the United States asserts that a measure is only a tariff quota if it provides for an overall limit on eligibility for the lower tariff rate. The United States asserts that the line pipe measure imposes no overall limit on the volume of imports that may be free of the supplemental duty. According to the United States, the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of customs territories which choose to take advantage of the 9,000 short ton exemption. Since there is no overall limit on eligibility, the measure is not a tariff quota.

(b) Evaluation by the Panel

7.18 We see no reason to disagree with the United States that a tariff quota involves the "[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate".[29] Nor do we disagree with the *EC Bananas III – Article 21.5* panel that "a tariff quota is a quantitative limit on the availability of a specific tariff rate".[30] However, we do disagree with the United States' argument that the existence of a tariff quota is dependent on the existence of an overall limit on eligibility for the lower tariff.

7.19 The two definitions advanced by the United States focus on the application, or availability, of a specified, and lower, tariff rate. In certain cases, the applicable tariff rate under a tariff quota will depend on whether or not the overall limit on the availability of the lower tariff rate has been met. This will be the case when an overall limit is fixed, without any additional allocation of that limit amongst exporting countries. In other cases, however, the application, or availability, of a lower tariff rate will in no way depend on whether or not any overall limit has been met. In cases in which the overall limit is allocated among exporting countries, the application, or availability, of a lower tariff

[27] *Dictionary of International Trade Terms*, p. 157 (William S. Hein & Co., Inc. 1996).

[28] *See European Communities - Regime for the Importation, Sale and Distribution of Bananas-Recourse to Article 21.5 by Ecuador* - report of the Panel, WT/DS27/RW/ECU, para. 6.20, adopted 6 May 1999 *("EC Bananas III – Article 21.5").*

[29] *See* note 27 above.

[30] *See* note 28 above.

rate will become dependent on whether or not a given exporting country has filled its allocation, irrespective of whether or not any overall limit has been filled. If a given country fills its allocation, imports from that country will become subject to a higher rate of duty, even if the overall limit remains unfilled. In our view, it makes little sense to establish definitions of tariff quotas that depend on the existence of an overall limit on the application, or availability, of a lower tariff rate, if in certain circumstances the existence of an overall limit will have no bearing on the applicability, or availability, of the lower tariff rate for imports from a specific country.

7.20 Our view that a measure may constitute a tariff quota even if it does not provide for an overall limit on the availability of the lower tariff rate is confirmed by Article XIII:2(a), read in conjunction with Article XIII:5. Article XIII:2(a) provides:

> Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3*(b)* of this Article.

7.21 Article XIII:5 provides:

> The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

7.22 By virtue of Article XIII:5, Article XIII:2(a) applies to tariff quotas. Thus, in respect of tariff quotas, a quota representing the total amount of permitted imports shall be fixed, wherever practicable. These provisions at least acknowledge the possibility, therefore, that there may be situations in which it is not practicable to fix an overall limit, or quota, for a tariff quota. In other words, these provisions confirm that a tariff quota may exist, even though no overall limit is provided for.[31]

7.23 Without setting forth an exhaustive definition of tariff quotas, we consider that an accurate definition must include measures which place a quantitative limit on the application, or availability, of a lower tariff rate (and a higher tariff rate applicable once that quantitative limit has been exceeded), irrespective of whether that quantitative limit is (a) "overall", (b) "overall" and further allocated among exporting countries, or (c) country-specific, with no "overall" limit. Such an approach is entirely consistent with the two definitions relied on by the United States. In other words, the

[31] The United States argues that if a quota is not "practicable", the logical implication is that any measure that is practicable is not a quota. The United States asserts that this conclusion is confirmed by Article XIII:2(b), which provides that "[i]n cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota". According to the United States, therefore, any measure that is not "practicable" under Article XIII:2(a) is not a quota (since it will be an import licence or permit without a quota). In our view, the reference to "quotas" in Article XIII:2(b) should be read in light of Article XIII:2(a). This is because Article XIII:2(a) introduces a possible factual scenario (when it is not "practicable" to fix quotas representing the total amount of permitted imports), and Article XIII:2(b) informs Members what alternative action they may take in that scenario (restrictions may be applied by means of import licences or permits without a quota). We therefore consider that the reference in Article XIII:2(b) to "quotas" should be read to mean "quotas representing the total amount of permitted imports", as envisaged in Article XIII:2(a). Accordingly, the measures referred to in Article XIII:2(b) remain quotas, albeit without overall limits on the total amount of permitted imports having been fixed. In other words, Article XIII:2(b) does not draw a distinction between quotas and "import licences or permits without a quota". Rather, Article XIII:2(b) distinguishes between quotas with overall limits, and quotas without overall limits. We see no reason why a similar approach should not apply in respect of tariff quotas, especially as, consistent with Article XIII:5, the same provisions apply to both quotas and tariff quotas. Thus, failure to fix overall limits on the total amount of permitted imports – whether in respect of quotas or tariff quotas - does not change the nature of the measure. A tariff quota remains a tariff quota even without an overall limit on the availability of the lower tariff rate, if there is some form of limit on the availability of the lower tariff rate.

"specified quantity", or "quantitative limit", referred to in the definitions advanced by the United States, could be overall, overall and further allocated among exporting countries, or simply country-specific. On this basis, we conclude that the line pipe measure at issue is a tariff quota, since there are country-specific limits (9000 short tons) placed on the application, or availability, of the lower tariff rate, and it is these country-specific limits that determine whether or not line pipe from specific countries enters the United States at the lower or higher rate of duty.

7.24 We note that our conclusion as to the nature of the line pipe measure is consistent with the treatment of that measure by the United States' own Customs Service. In particular, the US Customs Service Quota Headquarters sent a memo to all Port Directors on 29 February 2000, referring to the implementation of "*tariff quotas* on certain circular welded carbon-quality line pipe." [32]

2. Claims under Article XIII

(a) The applicability of Article XIII

(i) Arguments of the parties

(1) Arguments by Korea

7.25 According to Korea, the provisions of Articles XIII and XIX, and Article 5 provide rules for the imposition of quantitative restrictions on imports and thus are directly applicable in this case. The requirements of Article XIII and Article XIX, and Article 5 must therefore be read together to determine the full set of obligations and responsibilities for imposing quantitative restraints including tariff quotas. Article XIII, entitled "Non-discriminatory Administration of Quantitative Restrictions," explicitly states at paragraph 5 that the provisions of Article XIII are applicable to tariff quotas.

7.26 Korea submits that the proper interpretation of the Agreement on Safeguards and Article XIII must proceed from the fact that the WTO is a single treaty. As such, all the provisions of the treaty must apply with full force and effect. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreements and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. The text of the SA also confirms that it must be read together with Article XIII as well as Article XIX. The Preamble of the SA states that the object and purpose of the SA was to "clarify and reinforce the disciplines of GATT 1994" (emphasis added). While Article XIX is specifically mentioned, it is not exclusively mentioned – all of the disciplines of GATT 1994 are incorporated. It is also logical given, as the United States concedes referring to the GATT Panel Report on *Norway – Restrictions on Imports of Certain Textile Products*,[33] that Article XIII applied to the imposition of safeguard measures under Article XIX.[34] Since they all relate to the same thing, they must "*a fortiori* be read as representing an '*inseparable package*' of rights and disciplines which have to be considered in conjunction ... and read ... in a way that gives meaning to *all* of them harmoniously."[35]

7.27 Korea notes the US argument that Article 5 does not include each concept contained in Article XIII and that the United States essentially argues that the "intent" of the negotiators was to "exclude" certain obligations and rights contained in Article XIII.[36] Korea submits that the

[32] Memorandum From US Customs Service Quota Headquarters Director, Trade Programs, to All Port Directors, Regarding QBT-2000-508: Presidential Proclamation 7274 – Tariff quota on Certain Circular Welded Carbon-Quality Line Pipe (29 February 2000) ("Customs Memo") at 1 (emphasis supplied).

[33] *Norway - Restrictions on Imports of Certain Textile Products*, report of the panel, C/M/141, adopted 18 June 1980.

[34] *See* US first written submission, para. 197, n.236.

[35] *Argentina – Footwear Safeguard (AB)* at para. 81 (emphasis in original).

[36] *See* US first written submission at paras. 196-213; s*ee also EC – Bananas III (AB)*, at para. 157 where the Appellate Body rejected the concept of "implied exclusions". According to Korea, the issue in that

determination of the "intent" of the negotiators is unknowable and equivocal except to the extent that the negotiators did know, based on Note to Annex 1A, that the WTO Agreements and GATT 1994 would be read together except in the case of a conflict. Such knowledge can safely be assumed from the text of the Agreement itself. Therefore, there was no need for the negotiators to spell out each and every general concept which has been established by GATT. To the contrary, it was only necessary to establish such additional requirements and departures to be specifically applied to WTO safeguard actions.[37]

(2) Arguments by the United States

7.28 The United States asserts that, despite the express language of Article XIII:5, the provisions of Article XIII do not apply to tariff quota safeguard measures. According to the US, safeguard measures are governed exclusively by Article XIX and the Safeguards Agreement. The United States notes that the GATT panel in *Norway – Restrictions on Imports of Certain Textile Products*[38] found that GATT 1947 Article XIII applied to GATT 1947 Article XIX safeguard measures. However, the United States argues that "[t]he addition of the Safeguards Agreement to the GATT text under the WTO Agreement broke any link that may have existed between Articles XIII and XIX under GATT 1947."[39]

7.29 According to the United States, the Safeguards Agreement creates a "comprehensive agreement" regulating the application of safeguard measures. The explicit references to Article XIX make its provisions part of the Safeguards Agreement, forming an "inseparable package of rights and obligations." This is because, in the words of the Appellate Body in *Argentina – Footwear Safeguard*, they "relate to the same thing, namely the application by Members of safeguard measures". That "inseparable package of rights and obligations" contains procedural requirements, a non-discrimination obligation, and a variety of limitations on the application of safeguard restrictions, including provisions that duplicate some of the requirements of Article XIII. Therefore, as a legal matter, the WTO Agreement cannot be interpreted to apply the omitted provisions of Article XIII to measures authorized under the Safeguards Agreement.

(ii) Evaluation by the Panel

7.30 We are required to determine whether or not Article XIII applies to the line pipe safeguard measure. In addressing this issue, we note that the line pipe measure is a tariff quota, and that the provisions of Article XIII are expressly applied to tariff quotas by virtue of Article XIII:5.

7.31 The United States relies heavily on the findings of the Appellate Body in *Argentina – Footwear Safeguard* to argue that Article XIII should not apply in the context of safeguard measures. The Appellate Body's findings in *Argentina – Footwear Safeguard* concerned the application of Article XIX to safeguard measures. In considering this matter, the Appellate Body began its analysis by referring to Article II:2 of the *WTO Agreement*, which provides that:

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case was whether Articles 4.1 or 4.2 of the Agreement on Agriculture permitted "Members to act inconsistently with Article XIII of the GATT 1994". The Appellate Body concluded that if such an intent had been intended, "they would have said so explicitly". *See id.*

[37] *See Argentina – Footwear Safeguard* (*AB*) at para. 88: ("if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards.* They did not.") (emphasis in original); s*ee also id*. at para. 81.

[38] See footnote 33.

[39] US first written submission at para. 197.

> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.[40]

7.32 The Appellate Body then stated that:

> [t]he GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'.[41] (emphasis in original)

7.33 Concerning Article XIX in particular, the Appellate Body found that:

> the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members.[42] (emphasis in original)

7.34 The Appellate Body added that:

> as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that 'Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction.' [43] (emphasis in original)

7.35 The United States does not deny that Article XIII is generally binding on WTO Members. Rather, the United States asserts that Article XIII does not form part of the "inseparable package of rights and disciplines" governing the application of safeguard measures in particular. The United States argues that the Appellate Body's conclusion that Article XIX and the Safeguards Agreement form an 'inseparable package of rights and disciplines' was "based … on the fact that they 'relate to the same thing, namely the application by Members of safeguard measures'".[44] According to the United States, the Appellate Body based this conclusion on the numerous references to Article XIX in the Safeguards Agreement. Moreover, the United States notes that the Safeguards Agreement adopts certain provisions of Article XIII, but not the others, and asserts therefore that the remaining provisions of Article XIII do not "relate to" the application of a safeguard measure.[45]

7.36 We note that the Appellate Body in *Argentina – Footwear* did indeed refer to certain provisions of the Safeguards Agreement that contain references to Article XIX. In particular, the Appellate Body referred to Articles 1 and 11.1(a):

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[40] *See Argentina – Footwear Safeguard* (*AB*) at para. 79.
[41] Id. at para. 81.
[42] Id.
[43] Id.
[44] US first written submission para. 204.
[45] US response to Question 11 from the Panel at the second substantive meeting (*see* Annex B-8).

Article 1

General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

Article 11

Prohibition and Elimination of Certain Measures

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

7.37 The Appellate Body found that:

> the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.[46] (footnote omitted)

7.38 There is, however, nothing in Articles 1 and 11.1(a), nor in the Appellate Body's reasoning, to suggest that Article XIX applies in the context of safeguard measures to the exclusion of other GATT provisions.[47] The mere fact that Article XIX applies does not prejudge the applicability of other GATT provisions. The starting-point for the Appellate Body's analysis regarding the application of Article XIX was the fact that "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*".[48] Only after this observation did the Appellate Body consider Articles 1 and 11 of the Safeguards Agreement. Furthermore, in *United States – Lamb Meat* the Appellate Body suggests that its analysis of Articles 1 and 11 merely lent support for its interpretation based on the fact that Article XIX and the provisions of the Safeguards Agreement are all provisions of the same WTO Agreement:

> We observed in those two appeals that 'the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*', and we said that these two texts must be read 'harmoniously' and as 'an inseparable package of rights and disciplines'. We **derived support** for this interpretation from Articles 1 and 11.1(a) of the *Agreement on Safeguards*.[49] (bold emphasis supplied)

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[46] *See Argentina – Footwear Safeguard* (*AB*) at para. 89.

[47] The exclusive application of Article XIX to safeguard measures appears to be precluded by the preamble to the Safeguards Agreement, which recognizes "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX …" (emphasis supplied). Thus, although Article XIX is singled out for special mention, reference is made to the "disciplines of GATT 1994" more generally. There is no reason why such "disciplines" should not include those contained in Article XIII.

[48] *See Argentina – Footwear Safeguard* (*AB*) at para. 81.

[49] *See United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, para. 69, adopted 16 May 2001 *("US – Lamb Meat (AB)")*

7.39 In our view, the Appellate Body's finding that Article XIX applies in the context of safeguard measures was based primarily on the fact that Article XIX and the provisions of the Safeguards Agreement are all provisions of the same treaty, namely the WTO Agreement. The Appellate Body merely derived support for this interpretation from Articles 1 and 11.1(a).

7.40 WTO Members have contracted a package of rights and obligations, including those set forth in the GATT 1994 and the Safeguards Agreement. A Member may only depart from the provisions of either the GATT 1994 or the Safeguards Agreement if such departure is expressly authorised. In this regard, we note the Appellate Body's finding in *EC- Bananas III (AB)* that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994 [by virtue of the provisions of the Agreement on Agriculture], they would have said so explicitly."[50] We see nothing in the Safeguards Agreement that expressly authorises a Member to act inconsistently with Article XIII. The fact that the Safeguards Agreement does not contain any express reference to Article XIII certainly does not amount to an express authorisation to depart from the provisions of that Article.

7.41 The United States further asserts that the drafters of the Safeguards Agreement incorporated into that Agreement those provisions of Article XIII that they wanted to, and that the remaining provisions of Article XIII should not apply because they were deliberately omitted. In particular, the United States argues that the Safeguards Agreement "incorporates principles – and even one entire block of text – from Article XIII. It omits the provisions of Article XIII that Korea now relies upon. To conclude now that Article XIII applies to safeguard measures would be to reverse the Members' decision to include only some of those provisions in the Safeguards Agreement."[51]

7.42 This argument is very similar to that advanced by the *Argentina – Footwear Safeguard* panel regarding the "unforeseen developments" criterion set forth in Article XIX:1. The panel found that WTO safeguard measures are governed by the Safeguards Agreement, to the exclusion of the unforeseen developments criterion contained in Article XIX. The *Argentina – Footwear Safeguard* panel found that:

> "the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning".[52]

7.43 The Appellate Body rejected the panel's reasoning in the following terms:

> 87. In comparing the language of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, we observe that although much of the language in the two provisions is very similar, and, in fact, identical, the initial clause in Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – does not appear in Article 2.1 of the *Agreement on Safeguards*. After making this same observation, the Panel concluded that the "unforeseen developments" clause was "expressly omitted" by the Uruguay Round negotiators. And, although the Panel conceded at one point in its reasoning that Article XIX and the *Agreement on Safeguards* "legally co-exist" as part of the *WTO Agreement*, the Panel concluded from this supposedly "*express omission*" that the "omitted" phrase has no meaning.
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> 88. We believe that, with this conclusion, the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle

[50] *EC- Bananas III (AB)* at para. 157.
[51] US oral statement at the first substantive meeting, para. 40.
[52] *Argentina - Footwear Safeguard* at para. 8.58.

> of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of treaties. The Panel states that the "*express omission* of the criterion of unforeseen developments" in Article XIX:1(a) from the *Agreement on Safeguards* "must, in our view, have meaning." On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.[53] (footnotes omitted)

7.44 In light of these findings by the Appellate Body, we see no basis for drawing any conclusions from the supposed "express omission" of certain provisions of Article XIII from the Safeguards Agreement. Just because some provisions of Article XIII are replicated in the Safeguards Agreement, that alone does not mean that the remaining provisions cease to be binding on Members.[54] We therefore decline to draw any conclusions from the fact that certain Article XIII provisions are not replicated in the Safeguards Agreement. Like the Appellate Body, we consider that if the Uruguay Round negotiators had intended to expressly omit Article XIII from the safeguards context, "they would and could have said so in the *Agreement on Safeguards*. They did not".[55]

7.45 The United States also argues that Article XIII:2(d) is "identical" to Article 5.2(a) of the Safeguards Agreement.[56] According to the United States, "if Article XIII:2(d) applied independently to a safeguard measure, the inclusion of the same language in Article 5.2(a) becomes superfluous, which would violate the principle of effectiveness in interpretation of treaties".[57] In our view, this argument misrepresents the principle of effectiveness in treaty interpretation. As noted by the panel in *Turkey – Textiles*, "the principle of effective interpretation or 'l'effet utile' or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty."[58] An interpretation of Article XIII that applies that provision in the context of safeguard measures does not, in our view, nullify any of the provisions of the Safeguards Agreement. All of the provisions of the Safeguards Agreement remain fully applicable. Although there may be some duplication between Article XIII:2(d) and Article 5.2 of the Safeguards Agreement, duplication is not the same as nullification. Furthermore, we note that the US approach to the principle of effective treaty interpretation would have precluded the Appellate Body from applying Article XIX, as a whole, in the context of safeguard measures, since certain provisions of Article XIX are duplicated by certain provisions of the Safeguards Agreement. The fact that the Appellate Body found that Article XIX, in its entirety, applies to safeguard measures, despite the resultant duplication, confirms our rejection of the United States' argument regarding the principle of effective treaty interpretation.

7.46 In any event, we note that Article XIII:2(d) is not "identical" to Article 5.2(a) of the Safeguards Agreement. In particular, Article 5.2(a) omits the last sentence of Article XIII:2(d), whereby:

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[53] *Argentina – Footwear Safeguard (AB)* at paras. 87-88.

[54] There may be good reasons for replicating only certain Article XIII disciplines in the Safeguards Agreement. For example, only certain Article XIII:2(d) disciplines may have been replicated in Article 5.2(a) because of the introduction through the Safeguards Agreement of quota modulation, which negotiators apparently did not want to apply in respect of all Article XIII:2(d) disciplines. The fact that Article XIII:2(d) is not replicated in its entirety in Article 5.2(a) does not necessarily mean that the non-replicated disciplines no longer apply; on the contrary, it may mean that Article 5.2(b) quota modulation does not allow Members to depart from those non-replicated Article XIII:2(d) disciplines. In other words, since quota modulation may not have been intended to apply in respect of all Article XIII:2(d) disciplines, it may have been necessary to specify in Article 5.2(a) precisely which Article XIII:2(d) disciplines it does apply to.

[55] *Argentina – Footwear Safeguard (AB)* at para. 88.

[56] US first written submission, para. 206.

[57] Id.

[58] *Turkey – Textiles* at footnote 327.

> No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

In response to a question from the Panel at the second substantive meeting, the United States asserted:

> In accordance with our analysis of the other provisions of Article XIII, the fact that the Safeguards Agreement incorporates the first two sentences of Article XIII:2(d), but not the last sentence, indicates that the last sentence does not apply to safeguard measures. However, the omission of that sentence does not leave Members free to prevent other Members from fully using their share of a safeguard quota. If a Member imposes a safeguard quota and applies it at a level necessary to prevent or remedy serious injury and to facilitate adjustment, any additional conditions or formalities it applies to limit the use of the quota would **likely** result in application of the measure beyond the extent necessary. Therefore, a measure prohibited by the last sentence of Article XIII:2(d) would **likely** also be prohibited by Article 5.1.
>
> Although it is always hazardous to attempt to ascertain the intent of the negotiators from the written text, this analysis suggests that the last sentence of Article XIII:2(d) **may** have been excluded from Article 5.2(a) because it was redundant. With Article 5.1 already prohibiting application of a safeguard measure beyond the extent necessary, there is no need for an additional prohibition on the application of conditions or formalities that would prevent full use of the quota.[59] (bold emphasis supplied)

7.47 We recall our earlier finding regarding the "express omission" of Article XIII provisions from the Safeguards Agreement. We see no reason to adopt a different approach with regard to the last sentence of Article XIII:2(d), especially not on the basis that a violation of the last sentence would also "likely" constitute a violation of Article 5.1, first sentence, or on the basis of speculation as to what "may" have caused negotiators not to expressly include this provision in the Safeguards Agreement. If the Uruguay Round negotiators had intended to expressly omit the last sentence of Article XIII:2(d) from the safeguards context, "they would and could have said so in the *Agreement on Safeguards*. They did not".[60]

7.48 The United States also argues that the public international law presumption against conflicts militates against an interpretation that applies Article XIII:2(d) to safeguard measures, since Article XIII:2(d) would not be subject to the exception created by Article 5.2(b). In our view, however, the issue of conflict between these provisions does not arise in this case, since the implication of our findings on Article 5.2(a) is that Article 5.2(b) quota modulation would not be available for tariff quotas (see below at para.7.75).

7.49 Furthermore, the United States argues that the non-application of Article XIII in the context of safeguard measures "also makes sense as a matter of policy". In particular, the United States asserts that "[t]o import additional restrictions into the Safeguards Agreement – such as the Article XIII restrictions on TRQs – is unnecessary and would limit Members' ability to achieve the objectives of the Agreement." However, we would suggest that it is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement[61] that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set

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[59] US reply to Question 11 at the second substantive meeting (*see* Annex B-8).
[60] *Argentina – Footwear Safeguard (AB)* at para. 88.
[61] See section VII.B.3(a) below.

forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.[62] In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the "need to clarify and reinforce the disciplines of GATT 1994" in the context of safeguards. We consider that the "disciplines of GATT 1994" surely include those providing for non-discrimination. In any event "the elimination of discriminatory treatment in international trade relations" is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to "establish multilateral control over safeguards and eliminate measures that escape such control". We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement.

7.50 For the above reasons, we find that the line pipe measure is subject to the provisions of Article XIII.

(b) The substance of Article XIII

7.51 Korea raises a number of claims under Article XIII. First, Korea claims that the United States violated the "general overarching requirement"[63] of Article XIII:2 that a Member applying any import restriction "shall aim at a distribution of trade … approaching as closely as possible the shares which the various [exporting Members] might be expected to obtain in the absence of such restriction[]". Second, Korea claims that the United States violated the Article XIII:2(a) requirement to fix an overall quota wherever practicable, and the Article XIII:3(b) requirement to give public notice of the amount of that quota. Third, Korea claims that the United States failed to negotiate quotas with Members having a substantial interest in the product, contrary to Article XIII:2(d).

7.52 Article XIII:2 provides:

> In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
>
> (*a*) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (*b*) of this Article;
>
> (*b*) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
>
> (*c*) Members shall not, except for purposes of operating quotas allocated in accordance with subparagraph (*d*) of this paragraph, require that import licences or permits be utilized for the

[62] The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.

[63] Korea's first submission, para. 124.

> importation of the product concerned from a particular country or source;
>
> (*d*) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

(i) Article XIII:2, chapeau

7.53 Korea claims that the United States violated the general rule set forth in the chapeau of Article XIII:2.[64] According to Korea, the United States could not have "aim[ed] at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the line pipe measure without respecting traditional trade patterns.[65] Besides asserting that Article XIII does not apply to the line pipe measure, the United States has not addressed this argument.

7.54 In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.

7.55 There is nothing in the record before the Panel to suggest that the line pipe measure was based in any way on historical trade patterns in line pipe, or that the United States otherwise "aim[ed] at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the line pipe measure. Instead, as noted by Korea, "the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)".[66] For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2.

(ii) Article XIII:2(a)

7.56 Korea claims that the United States failed to fix a quota "representing the total amount of permitted imports", contrary to Article XIII:2(a). According to Korea, the only exception to the

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[64] In our view, the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle. This is confirmed by the Note *Ad Article XIII:2*, which refers to "the general rule laid down in the opening sentence of paragraph 2".

[65] Korea's first written submission para. 124.

[66] Korea's first written submission, para. 155.

requirement to fix an overall quota is if "quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota".[67] Since the United States did not adopt import licences or permits, an overall quota should have been established.

7.57 The United States argues that the line pipe measure is not regulated by Article XIII. In addition, the United States argues that neither a tariff quota, nor the quota element of a tariff quota, is a "quota" for the purpose of Article XIII. The United States also asserts that Korea's own arguments establish why it was not "practicable" for the United States to fix the overall quantity of imports eligible for the exemption from the 19 per cent supplemental duty. With every Member subject to the exemption, and an indeterminate number of countries capable of exporting line pipe to the United States, there was no way to determine the total volume eligible for exemption.

7.58 Irrespective of whether or not tariff quotas constitute "quotas" within the meaning of Article XIII:2(a), tariff quotas are necessarily subject to the disciplines contained in Article XIII:2(a) as a result of the express language of Article XIII:5. Thus, Article XIII:2(a) must have meaning in the context of tariff quotas. We believe that, in respect of tariff quotas, Article XIII:2(a) requires Members to fix, wherever practicable, the total amount of imports permitted at the lower tariff rate.[68]

7.59 The United States asserted that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption".[69] We asked the United States whether this means "that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9000 short ton exemption".[70] The United States replied:

> On further reflection, it would be more correct to say that the only limit is the number of customs territories that take advantage of the 9000 ton exemption. For example, China and Russia, which are not WTO Members, are still eligible for the 9000 ton exemption. On the other hand, not all countries have line pipe production facilities, so the practical limit would be less than if all customs territories took advantage of the exemption.

7.60 Although we do not consider that the United States provided a direct answer to our question, there would appear to be at least a theoretical limit on the total amount of imports permitted at the lower tariff rate under the line pipe measure (i.e., the number of customs territories multiplied by 9,000 short tons). However, we do not believe that any such theoretical limit is sufficient to meet the requirement of Article XIII:2(a). Under that provision, Members are required to "fix[]", wherever practicable, the total amount of imports permitted at the lower tariff rate, and to give notice of that amount in accordance with paragraph 3(b). We note that "fix" is defined as "decide, settle, specify"[71]. In our view, the fact that there is a theoretical limit on the total amount of imports permitted at the lower tariff rate does not provide the degree of certainty required by the term "fix[]", particularly in the sense of "specify". An amount cannot be "fixed", or "specified", if it has not even been expressly mentioned.[72]

7.61 The United States asserts that it was not "practicable" to fix the overall quantity of imports eligible for the exemption from the 19 per cent supplemental duty because, "[w]ith every Member subject to the exemption, and an indeterminate number of countries capable of exporting line pipe to

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[67] Korea's first written submission, para. 127.

[68] The obligation cannot extend to fixing the total amount of permitted imports at the higher tariff rate, because that would effectively undermine the distinction between tariff quotas and quantitative restrictions.

[69] United States first written submission, para. 184.

[70] Question 2 from the Panel at the first substantive meeting (see Annex B-2).

[71] *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

[72] *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971) defines the term " specify" as "name or mention expressly".

the United States, there was no way to determine the total volume eligible for exemption".[73] First, we note that the United States has failed to demonstrate that it determined, at the time of application of the line pipe measure, that it would not be "practicable" to fix the total amount of imports permitted at the lower tariff rate. Second, we find the United States' argument circular and therefore unconvincing. The United States' argument is premised on the fact that it was not practicable to fix the total amount of imports permitted at the lower tariff rate because of the nature of the line pipe measure. However, this does not explain why the United States could not have chosen another type of measure, in respect of which it would have been practicable to fix the total amount of imports permitted at the lower tariff rate.[74]

7.62 For these reasons, we find that the line pipe measure is inconsistent with Article XIII:2(a).

(iii) Article XIII:2(d) and 3(b)

7.63 Korea also raises claims under Articles XIII:2(d) and XIII:3(b). Having found that the United States violated Article XIII:2(a) by failing to "fix" the total amount of imports permitted at the lower tariff rate, we see no need to examine Korea's claims under Articles XIII:2(d) and XIII:3(b).[75]

3. Claims under Articles 5 and 7 of the Safeguards Agreement and Article XIX of GATT 1994

7.64 Korea claims that the line pipe measure is inconsistent with the requirements in the first two sentences of the first paragraph of Article 5, with Article 5.2(a) and Article 7.1. We shall first address Korea's claims regarding the second sentence of Article 5.1, and Article 5.2(a). We shall then address Korea's claim under the first sentence of Article 5.1 and Article 7.1.

7.65 Article 5 of the Safeguards Agreement provides:

Article 5

Application of Safeguard Measures

> 1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.
>
> 2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

[73] United States first written submission, para. 211.

[74] In particular, we see no reason why the United States could not have chosen another type of measure consistent with the general rule set forth in the chapeau of Article XIII:2.

[75] However, once a Member fixes the total amount of imports permitted at the lower rate, these provisions clearly apply.

> (b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate per centage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

(a) Article 5.1 (second sentence) and Article 5.2(a)

7.66 In substance, Korea's claims under the second sentence of Article 5.1, and Article 5.2(a), are broadly similar to its claims under Article XIII. Before addressing those claims, however, we must first address the threshold issue of whether or not the provisions relied on by Korea apply to tariff quota safeguard measures.

7.67 Korea asserts that tariff quotas are "quantitative restriction[s]" within the meaning of Article 5.1, second sentence. Korea also asserts that tariff quotas are a form of "quota" within the meaning of Article 5.2(a).

7.68 The United States contends that tariff quotas are neither "quantitative restrictions" nor "quotas". According to the United States, tariff quotas are ordinary customs duties.

7.69 We do not consider that tariff quotas are "quantitative restriction[s]" within the meaning of Article 5. We note that the second sentence of Article 5.1 refers to quantitative restrictions in the sense of measures that "reduce the quantity of imports below [a certain] level". Tariff quotas do not necessarily reduce the volume of imports below any predetermined level, since they do not impose any limit on the total amount of permitted imports (whether globally or from a specific country). Tariff quotas merely provide that imports in excess of a certain level shall be subject to a higher rate of duty. Thus, it would appear that tariff quotas are not the sort of measure envisaged by the reference in the second sentence of Article 5.1 to "quantitative restriction[s] [that] reduce the quantity of imports below [a certain] level".

7.70 Furthermore, there would appear to be little sense in applying the second sentence of Article 5.1 to tariff quotas. First, a tariff quota imposes a limit on in-quota imports, but not on out-of-quota imports. The limit on in-quota imports is therefore of less significance relative to the overall limit on imports provided for in a "quantitative restriction" covered by Article 5.1, second sentence. For this reason, there is no need for the second sentence of Article 5.1 to apply in respect of tariff quotas. Furthermore, the application of Article 5.1, second sentence, to tariff quotas could undermine the distinction between tariff quotas and quantitative restrictions. If the in-quota amount of a tariff quota had to be fixed on the same basis, and therefore at the same level, as the overall limit on imports provided for in quantitative restrictions, there would be little incentive for Members to use tariff quotas. This would be most unfortunate, as tariff quotas (applied in a manner consistent with Article XIII) are generally considered to be less restrictive of imports than quantitative restrictions.

7.71 Second, we note that Article 5.1, second sentence, does not appear to impose any disciplines regarding the imposition of safeguard measures taking the form of simple tariff surcharges (with the exception of Article 5.1, first sentence). In other words, if a simple tariff surcharge of 50 per cent were implemented, there would be no obligation (under Article 5.1, second sentence) to ensure that such tariff surcharge would not reduce the quantity of imports below the average of imports in the last three representative years. If Article 5.1, second sentence, were applied to tariff quotas, however, the

imposition of an in-quota limit of zero, and a 50 per cent duty on out-of-quota imports, would violate Article 5.1, second sentence, (assuming the annual average of imports in the last three years is not zero), even though there is no substantive difference between the measures. We cannot imagine that the negotiators of the Safeguards Agreement could have intended such an absurd result.

7.72 In addition, the Appellate Body appears to have distinguished between tariff quotas and quantitative restrictions in *Korea – Dairy Safeguard*. In that case, the Appellate Body stated that a safeguard measure may "take[] the form of a quantitative restriction, a tariff or a tariff rate quota."[76] If the Appellate Body had considered that tariff quotas were quantitative restrictions, it would not have stated that safeguard measures may take the form of quantitative restrictions or tariff quotas.

7.73 We also do not consider that tariff quotas are "quota[s]" within the meaning of Article 5.2(a). If they were, Article XIII:5 would be superfluous (because Article XIII applies expressly to quotas). Although one could argue that a tariff quota must be a form of quota, one would then be equally able to argue that a tariff quota must be a form of tariff. Such a result is not tenable, however, as a measure cannot be both a quota and a tariff. In addition, the above extract from the Appellate Body's report in *Korea – Dairy Safeguard* shows that the Appellate Body does not consider tariff quotas to be tariffs (since it distinguishes between tariffs and tariff quotas). In our view, neither the word "tariff" nor the word "quota" is determinative of the nature of a tariff quota.

7.74 In addition, the parties have both argued[77] that a quota is a form of quantitative restriction. We see no reason to disagree. Since we have already found that a tariff quota is not a "quantitative restriction" (a broader category including quota) within the meaning of Article 5.1, it cannot constitute a "quota" (a narrower category of quantitative restriction) within the meaning of Article 5.2(a).[78]

7.75 For these reasons, we find that the line pipe measure, as a tariff quota, is not subject to the Article 5 disciplines on quantitative restrictions (Article 5.1, second sentence) or quotas (Article 5.2(a)).[79] We therefore reject Korea's claims concerning these provisions.

(b) Article 5.1, first sentence

7.76 Korea asserts that the first sentence of Article 5.1 imposes a specific obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. Korea claims that the United States failed to respect this obligation because it failed to demonstrate the necessity of the line pipe measure at the time of its imposition. Korea asserts that Article 5.1 "requires that 'a measure shall not reduce the quantity of imports below the level of … the last three years … unless clear justification is given that a different level is necessary to prevent or remedy serious injury"'. In

[76] *Korea – Dairy Safeguard (AB)* at para. 96. Under GATT 1947, the Contracting Parties characterized tariff quotas imposed pursuant to Article XIX as a subset of "tariff type measure," rather than quantitative restrictions. Modalities of Application of Article XIX, L/4679, paras. 37-39 (5 July 1978).

[77] Korea's response to Question 7 from the Panel (9 in Korean submission) (see Annex B-1); US response to Question 4 from the Panel (see Annex B-2).

[78] We are fully aware of the asymmetry between the coverage of Article XIII and Article 5 in respect of tariff quota safeguard measures. However, it is important to note that we have not applied Article XIII:2 to the line pipe tariff quota on the basis of the express wording of that provision. We have done so as a result of Article XIII:5 ("[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member]"). There is of course no equivalent to Article XIII:5 in the Safeguards Agreement. Thus, any asymmetry in the coverage of Article XIII and Article 5 in respect of tariff quota safeguard measures is a direct result of the express wording of those provisions.

[79] We are fully aware that our finding would mean that Article 5.2(b) "quota modulation" is not available for tariff quotas. We do not consider that this result is contrary to the principle of effective treaty interpretation, as Article 5.2(b) remains fully applicable, and therefore effective, in respect of safeguard measures falling within the scope of Article 5.2(a).

support, Korea relies on the finding by the Appellate Body in *Korea – Dairy Safeguard* that "this 'clear justification' has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*"[80] (emphasis in original). Korea claims that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment".

7.77 The United States relies on the Appellate Body's findings in *Korea – Dairy Safeguard* to argue that "the recommendations or determinations in a safeguard proceeding *need not* justify the type or extent of [the] safeguard measure applied by the Member, except in the limited circumstance of a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years".[81] According to the United States, "a panel's analysis of the Member's application of a safeguard measure is not confined to the investigation or the report, but may include a Member's *ex post* justification of why the measure was permissible at the time of application".[82] Furthermore, the United States asserts that "[a]s the complainant, Korea bears the burden of demonstrating that the US measure went beyond the extent necessary or, stated differently, as not 'commensurate' with the goals of Article 5.1 – to remedy serious injury and facilitate adjustment".[83]

(i) The obligation of Article 5.1, first sentence

7.78 Before addressing the specific arguments raised by Korea, we note that in *Korea – Dairy Safeguard* the Appellate Body agreed:

> 96. … with the Panel that the wording of [Article 5.1, first sentence] leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. We also agree that this obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[84] (footnotes omitted)

7.79 Article 5.1, first sentence, therefore obliges a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.

(ii) Basis for review of compliance with the obligation of Article 5.1, first sentence

7.80 Korea asserts that we would only be able to find that the United States complied with its Article 5.1, first sentence, obligation if it had made a determination regarding the necessity of the line pipe measure at the time of imposition. We note that this issue was addressed by the Appellate Body in *Korea – Dairy Safeguard*. In that case, the Appellate Body began its analysis of the issue by referring to:

> 97. … paragraph 7.109 of [the Panel's] Report, [where] the Panel stated:
>
> > Members are required, *in their recommendations or determinations on the application* of a safeguard measure, *to explain* how they considered the facts before them and why they concluded, *at the*

[80] *Korea – Dairy Safeguards (AB)* at para. 98.
[81] US first written submission, para. 44.
[82] US first written submission, para. 45.
[83] US first written submission, para. 172.
[84] *Korea – Dairy Safeguard (AB)* at para. 96.

> *time of the decision*, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry. It is such reasoning and explanation concerning the measure adopted, essential to evaluate Korea's compliance with Article 5.1, which we cannot discern in Korea's determination to apply a safeguard measure in the present case. (emphasis added)

98. The second sentence of Article 5.1 provides:

> If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

This sentence requires a "clear justification" if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this "clear justification" has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*.

99. However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".

100. For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:

> Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.

(…)

103. For these reasons, we uphold the Panel's finding, in paragraph 7.101 of its Report, that the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment. However, we reverse the Panel's broad finding, in paragraph 7.109 of its Report, that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. As to the question whether Korea's safeguard measure is consistent with the second sentence of Article 5.1, we are

unable to come to a conclusion in the absence of relevant factual findings in the Panel Report or undisputed facts in the Panel record.

7.81 According to the Appellate Body, therefore, it would appear that Article 5.1 does not require Members to explain, in their recommendations or determinations on the application of a safeguard measure, how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and to facilitate the adjustment of the industry. According to the Appellate Body, it would appear that such an obligation only arises if a Member imposes a safeguard measure in the form of a quantitative restriction that reduces the volume of imports below the average of imports in the last three representative years.[85] The line pipe measure is not a quantitative restriction that reduces the volume of imports below the average of imports in the last three representative years. On the basis of the findings of the Appellate Body in *Korea – Dairy Safeguard*, therefore, we find that the United States was not required to demonstrate, at the time of imposition, that the line pipe measure was "necessary to prevent or remedy serious injury and to facilitate adjustment".[86] [87]

7.82 For these reasons, our review of whether or not the United States complied with its Article 5.1, first sentence, obligation is not confined to any determination on the necessity of the line pipe measure that the United States may have made at the time of imposition.

(iii) Substantive requirements of Article 5.1, first sentence

(1) Arguments by Korea

[85] We considered carefully whether or not the Appellate Body meant to limit its findings to the application of Article 5.1 in respect of quantitative restrictions (since *Korea - Dairy Safeguard* involved the application of a quantitative restriction). In other words, we considered carefully whether the Appellate Body meant that a Member does not need to demonstrate that its safeguard measure is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment if the measure is a quantitative restriction that does not reduce the level of imports below "the average of imports in the last three representative years for which statistics are available". The Appellate Body's findings would then leave open the question of whether a Member must demonstrate that its safeguard measure is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment if that safeguard measure is not a quantitative restriction. Although such an approach may have some merit, on balance it does not reflect a fair reading of the Appellate Body's findings.

[86] In its second written submission, Korea also asserts that "[t]he obligation of the United States to provide an explicit justification independently arose in this case because the President took harsher measures than justified by the ITC decision or the underlying economic analysis. In such a case, where the competent authorities have made explicit findings that certain levels of relief are 'sufficient' and others 'excessive,' the member has an affirmative obligation to explain why a very distinct measure is 'necessary'. An issue existed which had to be affirmatively addressed." We see nothing in the Safeguards Agreement that requires a Member to explain why its safeguard measure is necessary simply because it chooses to adopt a measure that differs from one recommended to it under domestic procedures.

[87] In its oral statement at the second substantive meeting, Korea asserts that the decision of the Appellate Body in *US – Lamb Meat (AB)* "confirms that … an explanation [of why the line pipe measure is not more excessive than "necessary"] should have been made prior to the imposition of the measure". However, we are not persuaded that the Appellate Body in *US – Lamb Meat (AB)* would have deliberately reversed its findings in *Korea – Dairy Safeguard (AB)*. In *US – Lamb Meat (AB)*, the Appellate Body found that "the existence of unforeseen developments is a prerequisite that must be demonstrated 'in order for a safeguard measure to be applied"' consistently with Article XIX of the GATT 1994, [and] it follows that this demonstration must be made *before* the safeguard measure is applied" (para. 72). In our view, the obligation to ensure that a safeguard measure does not exceed what is "necessary to prevent or remedy serious injury and to facilitate adjustment" (Article 5.1, first sentence) is not a "prerequisite" that must be demonstrated "in order for a safeguard measure to be applied". Rather, it is an obligation that must be respected concerning the extent and nature of a safeguard measure, once the decision to apply a safeguard measure has been taken. Thus, we are not convinced that the Appellate Body's findings in *US – Lamb Meat (AB)* regarding unforeseen developments have any bearing on the issue before us.

7.83 Korea claims that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment" because the measure "was significantly more restrictive than the ITC's recommendation or even the Petitioners' proposal"[88]. Korea asserts that the NAFTA exemption had a much more negative impact on other suppliers under the line pipe measure than it did under the measure recommended by the ITC.

7.84 In addition, Korea submits that the line pipe measure exceeded what was "necessary" on the basis of the following "inferential evidence of the intended impact"[89] of the line pipe measure:

(1) Total "in-quota" imports were projected to be approximately 63,000 short tons, based on the fact that the ITC listed only seven significant suppliers other than Canada and Mexico. (Current US import data for March 2000-February 2001, show total "in-quota" imports of 64,067 tons.)

(2) Very limited "out-of-quota" imports could be expected at the 19 per cent tariff level:

(i) The duty imposed was 6 to 10 times the level of the bound rate.

(ii) Each supplying country could supply 9,000 short tons at bound rates. It could be presumed that the market would absorb these imports first (and those of Canada and Mexico) before the imports at the 19 per cent additional duty.

(iii) Two very significant suppliers were not controlled.

(iv) Imported and domestic line pipe were highly substitutable. Moreover, according to testimony before the ITC, consumers preferred domestic products.

(v) The US industry had substantial unused capacity and US capacity exceeded consumption.

(3) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.

(4) The only economic analysis done for the purpose of meeting obligations under Article 5.1 were the Economic Memoranda. From those analyses, the ITC Majority concluded that 151,124 tons at bound rates would reduce imports to a "sufficient" level. These appear to be the only economic basis for the level of restriction recommended by the ITC. The ITC recommendation – which appeared to be more in line with WTO rules – was rejected in favor of a remedy that did not.

7.85 Korea also submits that the line pipe measure was not confined to only addressing the injurious effects of imports. Korea asserts that the Panel should assume that the line pipe measure was also intended to address the injurious effects of the crisis in the oil and gas industry.

7.86 Korea notes the United States' argument that if a 19 per cent tariff were fully translated into increases in the average unit price of line pipe, the impact on operating profits would be an increase that was close to but not equal to operating profit levels before the import surge. According to Korea, one of the conspicuous flaws in the analysis is that the *ex post* explanation ignores the fact that

[88] Korea's first written submission para. 144.
[89] Korea's second written submission para. 39.

demand was improving rapidly. It also assumes that the tariff will translate directly into operating profits but downplays the positive effects of the increase in sales volume which would result from the withdrawal of imports from the market. Thus, the analysis ignores the combined improvements on the company's operating leverage of both price and volume increases.[90] According to Korea, the United States also ignores the fact that virtually no (14,000 tons) imports entered at the 19 per cent tariff in the first year of the tariff quota. To obtain an increase in operating profit of $15-$17 and an operating ratio of 3-4 per cent, the United States simply added $62-$64 to the average unit price of $412/ton in Table 10 of the ITC Report and the same amount to the negative operating profit of $47/ton. Thus, with a new unit price of $474-$476 and operating profit of $15-$17/ton, the United States obtains an operating profit of between 3.2-3.6 per cent. The United States then compares this operating profit level and states that it represents a level closer to, but not equal to, the industry's profitable years before the import surge. However, it must be assumed that one of the purposes of the safeguard measures is to increase the US industry's sales volume as higher priced imports lose market share. If the United States wants to use a reference year for determining the appropriateness of the safeguard measures, then its analysis in reference to Table 10 must be more realistic. For example, the United States should have assumed that operating leverage will result in a decline in various unit costs as volume increases.[91] Moreover, as suggested above, the US reasoning totally ignores the improving market situation, as discerned in the ITC record. According to the ITC, "natural gas and oil prices have increased since early 1999, leading to increased drilling and production activity and hence increased demand for line pipe."[92] The US *ex post* reasoning is at variance with the recommendations found in the ITC Majority and the separate views, which took full account of the improving market situation in their recommendations.[93] For example, the United States does not explain why the ITC Commissioners finding threat of serious injury conclude that only a 12.5 per cent tariff is necessary to return the industry to profitability based on an actual analytical analysis[94] which concluded that such a tariff increase would result in a "modest" price increase "as well as substantially increased revenues . . . due to increased shipment levels."[95]

(2) Arguments by the United States

7.87 The United States asserts that the Article 5.1 benchmark for the application of a safeguard measure is the condition of the domestic industry. Furthermore, the United States submits that the consistency with Article 5.1 can only be analyzed with reference to the application of the measure as a whole, and not the separate components thereof. The United States submits that Korea's arguments are simply non-responsive to the relevant standard. It does not even attempt to address the line pipe

[90] According to Korea, the US analysis also fails to take into account the substitutability of imported and domestic products, or the elasticities of demand or the fact that Mexico and Canada were excluded from the measure.

[91] According to Korea, if the US industry's volume of sales returns to 1997 levels and the per unit costs from 1997 for direct labor, other factory costs and SG&A expenses are substituted for the per unit costs for interim 1999. Per unit direct labor costs would decline by $8, per unit other factory costs would decline by $19 and per unit SG&A expenses would decline by $7, for a total decline of $34. A $34 per unit cost savings is added to the $15-$17 operating profit increase (calculated by the United States as a result of the 19-per cent tariff), the U.S. industry's operating profit increases $49-$51, or equal to an operating profit of 10.3-10.7 per cent (using the increased price resulting from the full impact of the 19-per cent tariff). This is far above the 8.1 per cent achieved in the peak year of 1997. *See* ITC Report, at Table 9, II-27).

[92] ITC Report, Views on Remedy of the Commission ("Majority Views on Remedy") at I-76-77.

[93] *See* ITC Report, Majority Views on Remedy at I-76-77.

[94] *See* ITC Report, Views on Remedy of Chairman Lynn M. Bragg and Commissioner Thelma J. Askey ("Bragg and Askey Views on Remedy") at I-87 and I-92. We note that the United States specifically argues that there is no distinction between a threat or present injury finding for purposes of determining the appropriate remedy. See US Response to Questions at the first substantive meeting at para. 6.

[95] *See* ITC Report, Bragg and Askey Views on Remedy at I-92 (citing to Commission Remedy Memorandum EC-W-071 (Dec. 1, 1999) with Additional Commission Remedy Memorandum EC-W-074 (7 Dec. 1999)).

safeguard in light of serious injury and the facilitation of adjustment. Instead, it compares the line pipe safeguard chosen by the United States with a tariff quota that three USITC Commissioners found "will address the serious injury found to exist and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition." [96] Korea characterizes the line pipe safeguard as "more restrictive" than the measure recommended by the three Commissioners and extrapolates that the line pipe safeguard must accordingly be "excessive." According to the United States, the fact that one potential safeguard measure falls within the Article 5.1 limit does not mean that changing the type, level, or duration of the measure would push it beyond the limit.

7.88 The United States asserts that the line pipe safeguard has two main elements – a supplemental duty of 19 per cent (falling to 15 and then 11 per cent in subsequent years) on subject imports and a 9000 ton exemption. Regarding the effect of the tariff, the United States notes that the average unit value of subject imports in interim 1999 was $330-337 per short ton. The application of a 19 per cent tariff would be expected to cause the average unit values for imports to increase by $62-64 per short ton, to $393-401 per short ton.[97] The 9000 short ton exemption would tend to lessen the increase in average unit values because imports of up to 9000 short tons from each supplying country could enter the United States without additional duties. Thus, one would expect that application of the tariff would, on average, result in price increases somewhat less than 19 per cent and $62-64 per short ton. Any price effect of the measure would also decline over the course of the measure as the tariff decreased to 15 per cent in the second year and 11 per cent in the third year. According to the United States, the effect of increased import prices on US producers would depend on their reaction. On the one hand, they could choose to increase their prices in a manner similar to increases in import prices, which would result in higher prices. In that case, the relative difference between the prices of subject imports and domestic line pipe would stay roughly the same. Customers would be unlikely to change their purchasing patterns, and the market shares of subject imports and domestic line pipe would be unlikely to change to a significant degree. On the other hand, US producers could raise prices by less than the full amount of the import price increase. In that case, the relative price difference between subject imports and domestic line pipe would decrease, which would likely cause some customers to switch to domestic product. As a result, domestic producers' market share would increase.

7.89 If the domestic producers were able to increase their own prices by the entirety of the expected $62-64 average increase in average unit value for subject imports caused by the 19 per cent tariff, their operating profit margin would increase to $15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent.[98] That would represent between 3 and 4 per cent of total revenues, a level closer, but not equal to, the industry's profitable years before the import surge.[99] However, as noted above, increasing prices to match the increase in import prices would likely leave domestic producers' market share – an important aspect of serious injury – unchanged. Moreover, as noted above, it is questionable whether the US producers *could* increase their prices by such an amount. Thus, it cannot be said that the United States applied the line pipe safeguard beyond the extent necessary as it would not alone be likely to reverse the volume and price effects of increased imports. This becomes more clear in light of the 9000 ton exemption from the tariff. Since 9000 tons from each source would not pay the tariff, the average increase in prices would be less than the amount expected if the tariff were applied without exemption. Thus, the 9000 ton exemption

[96] ITC report p. I-5.

[97] Average Unit Value Table, Exhibit USA-21. The calculations in the referenced table are based on the data in Table 3, on page II-15 of the ITC Report, with line pipe from Canada and Mexico excluded. The Average Unit Value Table provides public figures for total imports from subject sources including Japan and a subtotal for subject import sources excluding Japan. Since all nonsubject imports were from Japan, the actual values for any statistic will fall somewhere between the subtotal and total. The United States recognizes that average unit values can be affected by changes in product mix. Line pipe is, however, a fairly standardized product, and this lessens the concern over any such distortions.

[98] ITC report, p. II-28, Table 10.

[99] ITC report, p. II-27, Table 9.

establishes beyond question that the United States applied the line pipe safeguard *less* than the extent necessary.

7.90 According to the United States, Korea's argument that the remedy improperly addresses the injurious effects of factors other than imports is rife with conceptual and factual errors. Korea provides no basis for the Panel to conclude that the Safeguards Agreement requires that a safeguard measure be "confined" to the injurious effect of imports. Korea has not cited any provision of the WTO Agreement that requires that a safeguard measure be "confined" to the effects of increased imports. Thus, it has failed to make a *prima facie* case of an inconsistency with the Agreement. According to the United States, Korea's argument is also factually deficient. Korea asserts that the ITC recommended remedy was "intended to address the effects of both" increased imports and the oil and gas crisis.[100] The United States explains that: first, the ITC recommended remedy is irrelevant to the Panel's analysis, especially since the President did not adopt that remedy.[101] Second, the ITC report does not support Korea's view as to the ITC's intention. Korea cites three portions of the ITC report. The first (p. I-28) merely indicates the ITC majority's finding that a decline in oil and gas drilling reduced demand for line pipe, which contributed to serious injury. The second (p. I-76) recognizes this factor as a condition of demand for line pipe. The third (pp. I-85 - I-86) reflects the finding that the remedy "will address the serious injury" and "does not exceed the amount necessary to remedy serious injury." The United States does not consider that this finding suggests that the ITC recommended remedy attempted to address the effects of declining demand for line pipe. In addition, the text cited by Korea (pp. I-85 – I-86) also reports the majority's expectation that demand for line pipe would "improve." Thus, the ITC majority assumed that demand for line pipe would be a *positive* force in the condition of the industry in the near term. A remedy based on this proposition can scarcely be characterized as remedying *injury* associated with *declining* demand for line pipe. According to the United States, Korea's calculations assume that the US producers increase their prices by the full amount possible *and* obtain an increase in the sales volume. That is economically impossible. In addition, Korea ignored the fact that the 9000 ton exemption would reduce the average price increase of imports, which would further constrain the US producers' ability to increase prices. Another Korean calculation assumes that imposition of a safeguard measure would return the US industry to the conditions of 1997. The US explanation of compliance with Article 5.1 makes no such assumption.

7.91 The United States submits that the record does not support Korea's claim that demand was improving rapidly. The ITC majority noted that 1997 and 1998 were years of unusually high demand, and that demand had by 1999 returned to earlier levels. (ITC report, p. I-28) Other evidence indicated that demand in the largest segment of line pipe consumption was tied to general economic growth, which was forecast to grow at 3-4 per cent annually. US producers projected 4-5 per cent growth.[102] These facts indicate that any future increase in demand was likely to be quite moderate.

(3) Evaluation by the Panel

7.92 In addressing Korea's claim, we note that the onus is on Korea, as the complaining party, to assert and prove that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment", contrary to Article 5.1, first sentence.[103]

7.93 Korea's Article 5.1 claim that the line pipe measure exceeded what was "necessary to prevent or remedy serious injury and to facilitate adjustment" is based in part on a comparison of the line pipe measure with the measure recommended by the ITC and the measure proposed by Petitioners. We

[100] Oral Statement of the Republic of Korea, para. 80.
[101] US first written submission, paras. 173-174.
[102] Petitioners' Posthearing Brief on Remedy, p. 44 (17 November 1999).
[103] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, report of the Appellate Body, WT/DS33/AB/R, p. 16, adopted 23 May 1997.

have some doubts as to whether any such comparison would be an appropriate basis for assessing compliance with the obligation contained in the first sentence of Article 5.1, primarily because there is no guarantee that the ITC recommendation or Petitioners' proposal are themselves in conformity with Article 5.1, first sentence. At most, these measures provide an indication of what the ITC and Petitioners respectively considered to be necessary for the purpose of Article 5.1, first sentence. In any event, the comparison proposed by Korea would only be determinative if the restrictive effect of either the ITC recommendation or the Petitioners' proposal was set at, or above, the maximum amount "necessary" within the meaning of Article 5.1, first sentence.

(i) ITC recommendation[104]

7.94 In making its remedy recommendation, the ITC stated that the recommended action "will not exceed the amount necessary to remedy the serious injury we find to exist".[105] Even assuming that the ITC correctly analysed the restrictive effect of the measure it recommended, there is nothing in this statement to suggest that the restrictive effect of the ITC recommendation was set at (or above) the maximum amount necessary under Article 5.1. The restrictive effect of the recommendation could have been set below the maximum amount necessary, and still the ITC's assertion (that the recommended action "will not exceed the amount necessary") would be accurate. Nor has Korea adduced any evidence (other than the aforementioned ITC statement) to suggest that the restrictive effect of the ITC recommendation is set at (or above) the maximum amount necessary. Since it is theoretically possible that the line pipe measure could be more restrictive of imports than the ITC recommendation, and yet still not exceed the maximum amount "necessary" under the first sentence of Article 5.1, an assertion that the line pipe measure is more restrictive of imports than the ITC recommendation is not indicative of a violation of the first sentence of Article 5.1.[106]

(ii) Petitioners' proposal[107]

7.95 The ITC found that the quota proposed by Petitioners "would exceed the amount necessary to prevent or remedy serious injury".[108] Thus, assuming that the ITC correctly analysed the restrictive effect of the measure proposed by Petitioners, it is possible that the Petitioners' proposal could constitute an appropriate benchmark for the purpose of assessing the line pipe measure. That is to say, if the line pipe measure were shown to be more restrictive of imports than the Petitioners' proposal, one could perhaps infer from this that the line pipe measure also exceeded what was "necessary" for the purpose of Article 5.1, first sentence.

7.96 In this regard, Korea asserts that "assuming each of the seven individual suppliers (excluding Canada and Mexico) identified by the ITC at the time of the investigation supplies its 9,000 short tons of quota, the seven countries would account for a total quota of 63,000 short tons – far below even the quota requested by Petitioners of 105,849 short tons and rejected by the ITC as overly restrictive".[109]

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[104] The ITC recommended the imposition of a four-year tariff quota excluding imports from Canada and Mexico, with the in-quota amount set at 151,124 short tons for the first year (followed by 10 per cent annual increases thereafter), and with over-quota imports subject to a 30 per cent *ad valorem* duty.

[105] ITC Report at p. I-75.

[106] In any event, we do not consider that Korea has established that the line pipe measure is more restrictive than the remedy recommended by the ITC. Although Korea has focused on the difference between the volume of in-quota imports permitted under the ITC recommendation and line pipe measure, it has failed to take proper account of the facts that the ITC recommendation (1) would have applied for one year more than the line pipe measure, and (2) would have provided for a 30 per cent, rather than a 19 per cent, *ad valorem* tariff surcharge. We find Korea's assertion that a 19 per cent tariff surcharge can have a similar effect to a 30 per cent tariff surcharge especially unconvincing.

[107] Petitioners proposed a four-year quantitative restriction excluding imports from Canada and Mexico, with a 105,849 short ton quota for the first year (followed by 5 per cent annual increases thereafter).

[108] ITC Report at p. I-80.

[109] Korea's first written submission, para. 145, footnotes omitted.

Thus, in order to establish that the line pipe measure is more restrictive of imports than the Petitioners' proposal, Korea focuses on the quantitative element of the line pipe tariff quota, and compares it to the quantitative limit included in the quantitative restriction proposed by Petitioners. In doing so, Korea disregards the fundamental difference in the qualitative nature of the two measures, and more particularly the fact that the line pipe measure allows imports in excess of 63,000 short tons (albeit at a higher rate of duty), whereas the measure proposed by Petitioners would not allow any imports in excess of the 105,849 short ton quantitative limit. Korea also overlooks the fact that the line pipe measure applies for three years, while the quantitative restriction proposed by Petitioners would have applied for four years.

7.97 In our view, in order to demonstrate that the line pipe measure was more restrictive of imports than the measure proposed by Petitioners, Korea should have compared the application of the measures as a whole. Korea should not have compared the application of the separate constituent parts of the measures in isolation. Nor should Korea have ignored certain important qualitative differences between the two measures. In light of these considerations, we believe that Korea has failed to demonstrate that the line pipe measure as a whole is more restrictive of imports than the Petitioners' proposal. Thus, even if one assumes that one could establish a violation of Article 5.1, first sentence, on the basis of a finding that the line pipe measure is more restrictive of imports than the measure proposed by Petitioners, Korea has failed to demonstrate that this is the case.

(iii) Inferential evidence

7.98 In support of its claim, Korea also refers to certain "inferential evidence of the intended impact" of the line pipe measure:

(1) In-quota imports

7.99 Korea asserts that total in-quota[110] imports were projected to be approximately 63,000 short tons. Korea uses this figure as a basis for comparing the restrictive effect of the line pipe measure with that of the ITC recommendation and the Petitioners' proposal. This issue is addressed in the preceding section.

(2) Out-of-quota imports

7.100 Korea argues that very limited out-of-quota imports could be expected at the 19 per cent tariff level. Korea notes that the 19 per cent tariff surcharge is six to 10 times the bound rate, and that the market would absorb in-quota imports before imports subject to the 19 per cent tariff surcharge.

7.101 We note the US assertion that the 19 per cent tariff surcharge would be expected to increase the average unit value of imports by $62-64 per short ton, to $393-401 per short ton. Domestic producers could either increase their own prices by the same amount and maintain market share relative to imports, or increase their prices by less than $62-64 per short ton and increase their market share relative to imports. If domestic producers were to increase their prices by the full $62-64 per short ton, their operating profit margin would increase to $15 to 17 per short ton on average, for an operating income ratio of 3 to 4 per cent. This would be close to, but not equal to, the industry's profitable years before the import surge. According to the United States, however, it is unlikely that domestic producers could increase their prices by the full $62-64 per short ton, as imports benefiting from the 9,000 short ton exemption would mean that the average unit value of imports would be unlikely to increase by as much as $62-64 per short ton.

[110] For convenience, the Panel is using terminology employed by Korea. The Panel does not use such terminology to define the nature of the line pipe measure.

7.102 Korea claims that the United States' analysis ignores the combined improvements on domestic producers' operating leverage of both price and volume increases. In our view, however, unless there is a sufficient increase in demand,[111] it is economically impossible for domestic producers to increase their prices by the full amount of the increase in the average unit value of imports and obtain an increase in sales volume. In addition, the effect of the 9,000 short ton exemption would make it unlikely that the average unit value of imports would increase by as much as $62-64 per short ton. In light of these considerations, we do not consider that Korea has established that the 19 per cent tariff surcharge renders the line pipe measure more restrictive than "necessary".[112]

(3) Import data

7.103 Korea has submitted actual import data for the period March 2000 – February 2001 (i.e., the 12 month period following imposition of the line pipe measure).[113] During this period, 14,604 tons entered at the 19 per cent duty rate, and in-quota imports totalled 64,067 tons. Even if it were appropriate for the Panel to base any findings on this data – a matter which the Panel does not need to resolve – the data does not necessarily establish that the line pipe measure is more restrictive of imports than "necessary". Korea relies on the import data to show that imports under the line pipe measure decreased below the level of imports envisaged by the ITC recommendation or the Petitioners' proposal.[114] As noted above, the ITC recommendation does not constitute an appropriate benchmark against which to analyse the consistency of the line pipe measure with Article 5.1, first sentence.

7.104 Even if the Petitioners' proposal did constitute an appropriate benchmark (and assuming that the ITC was correct to find that the Petitioners' proposal was "excessive"), no reliable conclusions can be drawn by comparing the quantitative limit on imports under the proposed measure (105,124 short tons) with actual imports after the imposition of the line pipe measure. This is because there is no telling what the volume of imports would have been in the absence of the line pipe measure. In other words, it is not certain that imports dropped to their actual level between March 2000 and February 2001 purely as a result of the line pipe measure. Other factors, such as unfavourable economic conditions causing a general slow-down in demand, could have contributed to the decline in

[111] Korea asserts at para. 17 of its second oral statement that "demand was improving rapidly". However, this assertion is not supported by the ITC's findings. The ITC found that demand for line pipe came from three categories of line pipe usage: gathering, transmission and distribution. The ITC found that increased gathering would lead to "increased demand for line pipe". The ITC also found that demand for line pipe resulting from transmission and distribution is tied to general economic growth. In particular, the ITC found that "if the economy grows at a 3-4 per cent annual rate, line pipe consumption should grow by 4-5 per cent. US economic growth in 1999 is predicted to be approximately 3.8 per cent and 3.1 per cent in 2000" (page I-77, footnotes omitted). Thus, although the ITC found that there would be some increase in demand, the evidence relied on by the ITC – which Korea does not dispute – does not demonstrate that demand was "improving rapidly". Korea has adduced no additional evidence to the effect that the increase in demand for line pipe would be sufficient to allow domestic producers to both increase their prices by the full amount of the increase in the average unit value of imports and obtain an increase in sales volume.

[112] Korea has asserted that "[t]he US analysis also fails to take into account the substitutability of imported and domestic products, or the elasticities of demand or the fact that Mexico and Canada were excluded from the measure" (note 31, Korea's second oral statement). However, Korea has made no attempt to show how consideration of such factors would demonstrate that the line pipe measure is more restrictive than "necessary" within the meaning of the first sentence of Article 5.1. In addition, the fact that the tariff element of the line pipe measure is "six to 10 times the bound rate" is irrelevant, as it simply reflects on the level of the bound rate, and not on the necessity of the measure.

[113] The United States asked the Panel to rule such information inadmissible. Our response to this request is contained in section VII.A.2 above. Since we find it inappropriate to draw any conclusions from the import data submitted by Korea, it is not necessary for us to rule on whether we could base any conclusions on that data, if we considered it appropriate to do so.

[114] Korea's second written submission, para. 41.

imports of line pipe.[115] Although the Petitioners' proposal envisaged imports of 105,124 short tons, one cannot be certain that 105,849 short tons of line pipe would have actually been imported had the United States applied the measure proposed by Petitioners. Since one cannot assume that 105,849 short tons would have been imported under the measure proposed by Petitioners, it makes no sense to compare that figure to actual imports under the line pipe measure. In addition, a simple year-to-year comparison of import volume fails to take into account the fact that the line pipe measure was applied for three years, whereas the measure proposed by Petitioners would have applied for four years. In light of these considerations, it would be highly speculative for the Panel to draw any conclusions (for the purpose of Article 5.1, first sentence) on the basis of a comparison between actual import data and the quantitative limit on imports proposed by Petitioners.

(4) Economic analysis

7.105 We understand Korea to argue that no economic analysis was performed upon imposition of the line pipe measure, and that the only economic analysis available at the time of imposition of the measure was that justifying the ITC recommended measure. As we understand it, therefore, this claim is based on Korea's argument that the United States was required to demonstrate at the time of imposition that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment".

7.106 We recall our finding, on the basis of the conclusions of the Appellate Body in *Korea – Dairy Safeguard*, that the United States was not required to demonstrate at the time of imposition that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment". Consistent with this finding, we consider that the United States would be entitled to provide an ex post economic analysis of the facts on the record at the time of imposition to demonstrate that the line pipe measure did not exceed what was "necessary to prevent or remedy serious injury and to facilitate adjustment". Although we find it difficult to imagine how a Member could ensure that its safeguard measure does not exceed what is "necessary to prevent or remedy serious injury and to facilitate adjustment" without performing some form of economic analysis at the time of imposition, failure to do so does not constitute a violation of Article 5.1, first sentence, which is the claim raised by Korea.

(5) Injury caused by other factors

7.107 Korea asserts that the ITC recommendation and the ITC's economic memoranda (from which it was drawn) addressed the injurious effects of the crisis in the oil and gas industry. Korea notes the United States' assertion that the line pipe measure was also based on the economic memoranda. According to Korea, safeguard measures should be confined to addressing the injurious effects of imports.

7.108 The United States denies that the line pipe measure was intended to address the injurious effects of the crisis in the oil and gas industry. The United States asserts that, in any event, the Safeguards Agreement does not require safeguard measures to be confined to addressing the injurious effects of imports.

7.109 Korea asserts that, because the United States does not consider that safeguard measures should be confined to addressing the injurious effects of imports, the Panel should assume that the line pipe measure was not so confined.

[115] Korea has adduced no evidence to the effect that the decrease in imports after the imposition of the line pipe measure was more significant than the increase in domestic shipments. Such evidence may have indicated that the decline in imports was not caused by unfavourable economic conditions.

7.110 First, we note that Korea has failed to identify any aspect of the line pipe measure which would suggest that it was intended to address the injurious effects of the decline in the oil and gas industry. Second, even assuming for the sake of argument that the remedy recommended by the ITC was intended to address the injurious effects of the crisis in the oil and gas industry - and we make no finding to that effect – this does not mean that the line pipe measure was also intended to address the injurious effects of the crisis in the oil and gas industry (especially given the significant differences between the ITC recommendation and the line pipe measure). The fact that the ITC recommendation and the line pipe measure are both based on the same economic memoranda, and that those economic memoranda may have addressed the injurious effects of the decline in the oil and gas industry,[116] does not change this. For these reasons, we are not persuaded by Korea's argument that the line pipe measure was intended to address the injurious effects of the crisis in the oil and gas industry. There is certainly no evidence before us that might prompt us to assume that this was the case. Since Korea has failed to establish any factual basis for its argument, it is not necessary for us to consider the substantive issue of whether or not safeguard measures should be confined to addressing the injurious effects of imports.

(iv) Conclusion

7.111 To conclude, we find that Article 5.1, first sentence, imposes a specific obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. We find that compliance by the United States with this obligation is not to be assessed exclusively on the basis of any determination made by the United States regarding the necessity of the line pipe measure at the time of imposition.[117] We further find that Korea has failed to meet its burden to assert and prove that the United States violated Article 5.1, first sentence, by imposing a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment".

(c) Article 7.1

7.112 Korea claims that the United States failed to comply with the requirements of Article 7.1 concerning the duration of a safeguard measure. According to Korea, "there was significant evidence that the temporary downturn in the industry from the second half of 1998 until the first half of 1999 had reversed by the time of the ITC's decision in October of 1999 and, therefore, no remedy, let alone a measure for three years, was necessary". [118]

7.113 Article 7.1 provides that:

> A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

7.114 We understand Korea to argue that the duration of the line pipe measure was excessive because the condition of the industry at the end of the period of investigation was such that there was no serious injury, and therefore no safeguard measure was justified, let alone a measure of three years. We therefore understand Korea's Article 7.1 claim to be dependent on a finding that the condition of the industry at the end of the period of investigation precluded a determination of serious injury. We address this issue in section VII.C.2, where we find no basis for any such finding. Since there is no basis for a finding that a determination of serious injury at the end of the period of investigation was

[116] We make no finding as to whether or not the economic memoranda did address the injurious effects of the decline in the oil and gas industry.

[117] This finding is based on Article 5.1, first sentence. We make no finding as to whether or not Articles 3.1 or 4.2(c) would have required the United States to include a determination as to the necessity of the measure in its published report.

[118] Korea's first written submission at para. 167.

precluded, we reject Korea's Article 7.1 claim that the absence of serious injury at the end of the period of investigation prevented the imposition of any safeguard measure, let alone a measure of three years.

(d) Article XIX:1(a)

7.115 In the context of its claims under Articles 5.1 (first sentence) and 7.1 concerning the extent and duration of the line pipe measure, Korea also alleged an infringement of Article XIX:1(a). This provision authorizes the imposition of safeguard measures "to the extent and for such time as may be necessary to prevent or remedy" injury caused by increased imports. Korea's Article XIX:1(a) claim is based on the same arguments advanced in support of its Article 5.1 (first sentence) and 7.1 claims. Since we have already rejected those claims, we also reject Korea's Article XIX:1(a) claim regarding the duration and extent of the line pipe measure.

4. Claims under Articles 3.1 and 4.2(c)

7.116 Korea asserts that the United States violated Articles 3.1 and 4.2(a) by failing to demonstrate, at the time of imposition, that the line pipe measure was in conformity with the requirements of Article 5.1, first sentence.[119]

7.117 It is somewhat unclear to us whether this assertion forms the basis of a separate claim by Korea, or whether it forms part of its claim regarding Article 5.1, first sentence. Although the title of the relevant section in Korea's second written submission states that "[t]he obligations of Article 5.1 of the SA have to be read together with the obligations imposed by Articles 3.1 and 4.2(c)", the relevant section concludes with the statement that "the United States has violated its obligations under Articles 3.1 and 4.2(c) as well as under Article 5.1 of the SA" (emphasis supplied). Given Korea's contention that the United States violated Articles 3.1 and 4.2(c) "as well as" Article 5.1, we shall treat Korea's assertion regarding Articles 3.1 and 4.2(c) as a separate claim.

7.118 In our view, Korea's Article 3.1 / 4.2(c) claim falls outside our terms of reference, as defined by the Request for the Establishment of a Panel by Korea contained in document WT/DS202/4.

7.119 In response to a question from the Panel, Korea asserted that the claim is within our terms of reference because it is covered by Claims 3 and 9 in its Request for Establishment:

> 3. The safeguard measure also violates Articles 5 and 7.1 of the Agreement on Safeguards since the United States did not justify and could not justify that the Measure was imposed only to the extent and for such period of time necessary to prevent or remedy the injury and to facilitate adjustment.
>
> 9. The United States failed to provide critical information on which it relied in its decision-making in violation of Articles 3 and 4 of the Agreement on Safeguards. In this regard, the United States has failed to provide an adequate public summary of critical confidential information relied on in reaching its decision.

7.120 In respect of Claim 3, Korea asserts that its Article 5 claim is "integrally linked" to Articles 3.1 and 4.2(c). In respect of Claim 9, Korea asserts that the reference to "critical confidential information" includes "the basis for the President's decision-making documents or any information at all with respect to the justification of the safeguard measure",[120] and that "[t]he obligation to

[119] See Korea's response to Question 10 of the Panel at the first substantive meeting (see Annex B-1).
[120] Korea's response to Question 4 from the Panel at the second substantive meeting (see Annex B-7).

sufficiently explain why the measure was 'necessary' by reference to the evidence that existed at the time that the Presidential decision was taken is a 'pertinent issue of fact or law'"[121] within the meaning of Article 3.1. Korea relies on the Appellate Body's finding in *EC –Bananas III* that "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint."[122] Korea also asserts that the United States had not made any claims of prejudice prior to the Panel's question, and that the United States responded fully to Korea's claims regarding Article 3.1 as they related to Article 5 since the first substantive meeting.

7.121 With regard to Korea's Claim 3, we are not persuaded that Korea's Article 5.1 claim is "integrally linked" to its Article 3.1 and 4.2(c) claims. There is nothing in Claim 3, nor in the Safeguards Agreement, to suggest such a linkage. Indeed, Korea argued in its second written submission that Article 3.1 contains an "independent obligation", suggesting that there is no linkage between Articles 3.1 and 5.1:

> Whether or not Article 5.1 requires an explicit finding or holding regarding the necessity of the measure under Article 5.1, Article 3.1 of the SA imposes an independent obligation that the investigation itself and the findings and conclusions of the competent authorities resulting from such investigation must demonstrate that (*sic*) the legal and factual basis for the measure.[123] (emphasis supplied)

7.122 Korea argues that Article 5.1 "is textually related to Article 4.2(c) of the SA since the 'necessary' level must be to alleviate the serious injury contained in the 'detailed analysis' referred to in SA Article 4.2(c)." Korea may be correct in linking what it calls the "'necessary' level" (Article 5.1) to the serious injury identified in the "detailed analysis" (Article 4.2(c)). However, this does not mean that a reference in the Request for Establishment to a claim under Article 5.1 necessarily implies a claim under 4.2(c), since there is nothing in the text of either provision to suggest that a claim under one necessarily implies a claim under the other.

7.123 With regard to Claim 9, we note that reference is made to an alleged failure to "provide critical information", and to an alleged failure to "provide an adequate public summary of critical confidential information" (emphasis supplied). We fail to see how a claim expressly referring to an alleged failure to provide information could be interpreted to include claims of failing to "publish a report setting forth … findings and reasoned conclusions reached on all pertinent issues of fact and law" (Article 3.1), and failing to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined" (Article 4.2(c)). Since Articles 3.1 and 4.2(c) call for far more than the simple provision of information, no reasonable reading of Claim 9 could encompass the more detailed requirements of those provisions.

7.124 Korea asserts that its Article 3.1 and 4.2(c) claim should be included in our terms of reference because the United States has not suffered any prejudice in respect of those claims. It would appear that the question of prejudice, or due process, has most commonly arisen in the context of the DSU Article 6.2 requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[124] We do not consider that the question of prejudice arises in respect of whether or not Korea's Article 3.1 and 4.2(c) claim falls within our terms of reference, since there is no question of whether or not the legal basis of that claim, or the claim itself, was set forth with sufficient clarity in the Request for Establishment. It is patently obvious to us that the language used

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[121] Id.

[122] *EC –Bananas III (AB)* at para. 142.

[123] Korea's second written submission, para. 53.

[124] See, for example, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, report of the Appellate Body, WT/DS122/AB/R, para. 88, adopted 5 April 2001.

by Korea in its Request for Establishment, which forms the basis of our terms of reference, simply does not include any such claim. Thus, the issue of whether or not it was specified with sufficient clarity simply does not arise.

7.125 Having found that Korea's claim under Articles 3.1 and 4.2(c) is not in our terms of reference, we note the Appellate Body's finding in *EC – Regime for the Importation, Sale and Distribution of Bananas* that

> [i]f a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.[125]

Thus, the inclusion of this claim in Korea's submissions to the Panel is not sufficient to "cure" Korea's failure to include this claim in its Request for Establishment and bring it within our terms of reference.

7.126 Accordingly, we find that Korea's Article 3.1 and 4.2(c) claim regarding the alleged failure of the United States to demonstrate, at the time of imposition, that the line pipe measure was in conformity with the requirements of Article 5.1, first sentence, falls outside our terms of reference.

5. The exclusion of Canada and Mexico – Articles I, XIII and XIX, and Article 2.2

(a) Arguments by Korea

7.127 Korea claims that the United States violated the MFN principle set forth in Articles I, XIII:1 and XIX and Article 2.2 by excluding Mexico and Canada from the line pipe measure.

7.128 Korea argues that, consistent with the MFN principle, safeguard measures must apply to imports from all sources. Korea asserts that the parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. The United States could only impose a safeguard remedy on the basis of a serious injury analysis which was based on all imports. Articles 2 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994 speak only in terms of "imports." There is no basis on which certain imports can be excluded. Since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports.

7.129 Korea asserts that the exemption of Mexico was particularly egregious in this case since Mexico was the second largest supplier to the US market during the ITC's period of investigation. Mexico is now the largest supplier to the US market, and Canada has increased its imports three-fold to become the number three supplier to the US market.

7.130 Korea asserts that the United States cannot rely on an Article XXIV defence in respect of the MFN violation because the last sentence of footnote 1 of the Safeguards Agreement does not apply to the line pipe measure. According to Korea, the last sentence of footnote 1 only applies in cases where a safeguard measure is applied by a customs union, either as a single unit or on behalf of a member State. In any event, Korea submits that NAFTA has not been demonstrated to be in compliance with Article XXIV:8.

[125] *EC –Bananas III (AB)* at para. 143.

(b) Arguments by the United States

7.131 The United States asserts that Articles I and XIII:1, and Article 2, do not prohibit a Member from excluding its free-trade agreement partners from a safeguard measure, as a result of the exception to the MFN principle contained in Article XXIV. The United States asserts that no provision of the Safeguards Agreement will nullify the effect of Article XXIV, because of the last sentence of SA footnote 1.

7.132 The United States notes that, by virtue of Article XXIV:5, "the provisions of [the GATT] shall not prevent" the formation of a free-trade area, provided that certain conditions are met. The United States further notes that GATT Article XXIV:8(b) defines a free-trade area as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The United States remarks that the list of measures that Article XXIV:8 specifically authorizes free-trade area parties to maintain against each other does not include safeguard measures applied under Article XIX. The United States therefore argues that, by implication, safeguard measures either may or must be made part of the general elimination of "restrictive regulations of commerce" under any free-trade area. The United States argues that, under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Articles I, XIII or XIX, can be read to prevent participants in a free-trade area from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.

7.133 With regard to Korea's Article 2.2 claim, the United States acknowledges that Article 2.2 imposes a non-discrimination requirement. However, the United States argues that this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. In this regard, the United States relies on the last sentence of footnote 1, which states that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." Thus, the United States considers that issues related to free-trade area imports are to be addressed exclusively under the relevant GATT 1994 articles. In particular, the "relationship" between Articles XIX and XXIV:8 addresses the application of safeguard measures in the context of a free-trade area that may prohibit or limit safeguard measures as one way to eliminate duties and other restrictive regulations of commerce. According to the United States, the last sentence of SA footnote 1 means that the provisions of the Safeguards Agreement are not intended to disturb the relationship between the GATT 1994 rules addressing safeguard measures on the one hand and the rights and obligations of the participants in a free-trade area on the other.

7.134 In respect of Korea's argument that the NAFTA safeguards exclusion discriminates against it because the safeguard measure has made Korean line pipe less competitive with imports from Canada and Mexico in the United States, the United States argues that the line pipe safeguard operates no differently from any other duty rate that the United States maintains in conformity with the WTO Agreement. NAFTA trading partners receive an advantage as a result of their agreement to remove restrictions from substantially all trade with the United States.

(c) Evaluation by the Panel

7.135 We shall begin our evaluation by focusing on Korea's claims regarding Articles I, XIII and XIX. We shall then address Korea's claim under Article 2.2. Before turning to the substance, however, we consider it appropriate to clarify the factual basis of Korea's claims.

7.136 Korea's claims rest on the exclusion of imports from Canada and Mexico, i.e., NAFTA imports, from the line pipe measure. Korea asserts that the inclusion of non-NAFTA imports, but the exclusion of NAFTA imports, is discriminatory, and therefore contrary to the MFN requirement set forth in GATT 1994 and the Safeguards Agreement. In other words, Korea's claims of discrimination arise from the fact that the United States accorded more favourable treatment - in respect of the line pipe measure - to its NAFTA partners than to its non-NAFTA partners.

(i) Articles I, XIII and XIX

7.137 Korea asserts that the non-discriminatory application of safeguard measures is required by Articles I, XIII:1 and XIX.[126] To the extent that these provisions impose an MFN requirement, the United States relies on the "limited exception" set forth in Article XXIV. We must decide to what extent, if at all, any such Article XXIV defence is available to the United States.

7.138 We begin our analysis with Article XXIV:5, which provides in relevant part:

> Accordingly, the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of … a free-trade area …; Provided that: …

By virtue of Article XXIV:5, therefore, Members are entitled to form free-trade areas (provided the conditions set forth in sub-paragraphs (b) and (c) of that provision are met).

7.139 Article XXIV:8(b) defines a free-trade area as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

7.140 In light of this definition of a free-trade area, we understand Article XXIV:5 to mean that Members are authorised, under certain prescribed circumstances, to eliminate "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) … on substantially all the trade" between them and their free-trade area partners. This authorisation exists, despite the fact that the formation of a free-trade area will necessarily result in more favourable treatment for free-trade area partners than for non-free-trade area partners (in respect of whom "duties and other restrictive regulations of commerce" are not eliminated).

7.141 As noted above, the alleged violation of GATT 1994 arises from the exemption of imports from Canada and Mexico from the scope of the line pipe safeguard measure. Since the line pipe measure introduces a tariff quota, we consider that the line pipe measure constitutes a "dut[y] [or] other restrictive regulation[] of commerce" within the meaning of Article XXIV:8(b). As the exclusion of imports from Canada and Mexico therefore forms part of the elimination of "duties and other restrictive regulations of commerce" between NAFTA members,[127] it is in principle authorised by Article XXIV:5, provided the relevant conditions are fulfilled. Having regard to paragraphs 5 and 8 of Article XXIV, the relevant conditions are that NAFTA must (1) comply with Article XXIV:5(b)

[126] The United States does not dispute that Article XIX dictates MFN treatment.

[127] Imports from Canada and Mexico were excluded from the line pipe measure on the basis of Article 802 of NAFTA, which provides for the *elimination* of safeguard measures between NAFTA members in certain circumstances. Accordingly, the application of that provision in a given case (through the NAFTA Implementation Act) should also be treated as the *elimination* of safeguard measures between NAFTA members.

and (c),[128] and (2) eliminate duties and other restrictive regulations of commerce on "substantially all" intra-NAFTA trade.

7.142 As the party seeking to rely on an Article XXIV defence (or "limited exception"), the onus is on the United States to demonstrate compliance with these conditions.[129] In this regard, the United States has argued that:

> NAFTA provided for the elimination within ten years of all duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. This is the basis for our belief that, wherever the threshold established under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA exceeds that threshold.
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> With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures among themselves under certain conditions. There is also no question of NAFTA raising barriers to third countries, since none of the NAFTA Parties increased tariffs on trade with non-NAFTA measures. The NAFTA Parties also did not place other restrictive regulations of commerce on other WTO Members upon formation of the free-trade area.
>
> Further explanation of the US views on NAFTA and its compliance with Article XXIV appear in the following documents: L/7176, WT/REG4/1 & Corr.1-2, WT/REG4/1/Add.1 & Corr.1, WT/REG4/5, and WT/REG4/6/Add.1. Since these are voluminous materials, we will not append them, but incorporate them into this submission by reference.[130]

7.143 Korea, on the other hand, has argued that NAFTA is "not in compliance Article XXIV:8 of the GATT 1994".[131] In response to a question from the Panel on this issue, Korea asserted:

> Korea's position that NAFTA has not been demonstrated to be in compliance with Article XXIV:8 is based on the preliminary analysis of the Committee on Regional Trade Agreements which is still considering the question and has not yet issued a final decision on the matter.[132]

We understand Korea to argue that NAFTA is not in compliance with Article XXIV:8 because the Committee on Regional Trade Agreements has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8.

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[128] Article XXIV:5 specifies that the "formation" of a free-trade area shall not be prevented. We do not consider that this necessarily restricts the Article XXIV defence to safeguard measures (excluding free-trade area partners) introduced upon formation of a free-trade area. In our view, it is sufficient that the mechanism providing for the exclusion of free-trade area partners from safeguard measures (i.e., providing for the MFN violation for which the defence is required) is established upon formation of the free-trade area. In this regard, we note that imports from Canada and Mexico were excluded from the line pipe measure on the basis of Article 802 of NAFTA, and that this provision was included upon the formation of NAFTA.

[129] In *Turkey – Textiles*, the Appellate Body found that the party claiming the benefit of the Article XXIV defence must demonstrate that the conditions governing the application of that defence are met (paras 58-59).

[130] Response to Panel Question 2 to the United States at the second substantive meeting (see Annex B-8).

[131] Korea's oral statement at the first substantive meeting, note 21.

[132] Response to Panel Question 1 to Korea at the second substantive meeting (see Annex B-7).

7.144 In our view, the information provided by the United States in these proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ("CRTA") (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b). Concerning Article XXIV:8(b), we do not consider that the fact that the CRTA has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 is sufficient to rebut the prima facie case established by the United States. Korea's argument is based on the premise that a regional trade arrangement is presumed inconsistent with Article XXIV until the CRTA makes a determination to the contrary. We see no basis for such a premise in the relevant provisions of the Agreement Establishing the WTO (including, in particular, the Understanding on the Interpretation of Article XXIV of the GATT 1994).[133] Nor has Korea pointed to any provision that might support such a premise.

7.145 Concerning Article XXIV:5(b) and (c), Korea has not even argued that NAFTA is not in conformity with these provisions. While the United States has placed on the record extensive evidence[134] supporting its right to rely on Article XXIV as a defence, Korea has not disputed any of this evidence, either in terms of its accuracy or its sufficiency. On balance, therefore, there is no basis for us to find that Korea has rebutted the prima facie case established by the United States that NAFTA is in compliance with Article XXIV:5(b) and (c).[135]

7.146 In light of the above, we find that the United States is entitled to rely on an Article XXIV defence against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

7.147 We note that the Appellate Body considered the availability of Article XXIV as a defence in *Turkey – Textiles*. The Appellate Body found that

> 58. (…) Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.[136] (emphasis in original)

7.148 Thus, in addition to the conditions set forth above, the Appellate Body conditioned the availability of Article XXIV as a defence on a necessity test ("[a] party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue"). In our view, the Appellate Body's findings in *Turkey – Textiles* were conditioned by the facts of that case. In particular, *Turkey – Textiles* concerned the imposition by a member of a customs union of restrictive measures against imports from a third country, upon the formation of that customs union. Clearly, if members of a customs union seek to introduce restrictive measures against imports from third countries, contrary to GATT 1994, it is entirely appropriate that they should be required to

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[133] We would also note that Article XXIV:7 does not require the CRTA to approve regional trade arrangements, or issue formal decisions on their conformity with the WTO Agreement.

[134] See para. 7.144 *supra*.

[135] This does not mean that the Panel has found NAFTA to be in conformity with Article XXIV:5(b) and 8(b). We simply find that the United States has established a prima facie that NAFTA is in conformity with Article XXIV:5(b) and 8(b), and that Korea has failed to rebut that *prima facie* case.

[136] *Turkey – Textiles (AB)* at para. 58.

demonstrate the necessity of such measures. That being said, we are not at all convinced that an identical approach should be taken in cases where the alleged violation of GATT 1994 arises from the elimination of "duties and other restrictive regulations of commerce" between parties to a free-trade area, which is the very raison d'être of any free-trade area. If the alleged violation of GATT 1994 forms part of the elimination of "duties and other restrictive regulations of commerce", there can be no question of whether it is necessary for the elimination of "duties and other restrictive regulations of commerce".[137]

(ii) Article 2.2 of the Safeguards Agreement

7.149 Korea claims that the exclusion of imports from Canada and Mexico from the line pipe measure violates Article 2.2, which provides:

> Safeguard measures shall be applied to a product being imported irrespective of its source.

We must determine whether, given the non-discrimination requirement in Article 2.2, the United States should have included imports from Canada and Mexico in the scope of the line pipe measure.

7.150 Having found that the United States is entitled to rely on the Article XXIV defence in respect of a violation of the non-discrimination requirement in *inter alia* Article XIX, we consider it would be incongruous if the United States were precluded from relying on the Article XXIV defence in respect of a violation of the non-discrimination requirement in Article 2.2. A contrary interpretation would ignore the close interrelation between Article XIX and the Safeguards Agreement. This interrelation is evidenced in particular by Article 1, whereby the Safeguards Agreement

> … establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

By virtue of this provision, therefore, safeguard measures subject to the provisions of the Safeguards Agreement are understood to be Article XIX measures. Thus, if an Article XXIV defence is available for Article XIX measures, by definition it must also be available for measures covered by the disciplines of the Safeguards Agreement. To deny this is to deny the fact that, by virtue of Article 1, measures covered by the Safeguards Agreement and measures provided for in Article XIX are essentially one and the same thing. Thus, to the extent that an Article XXIV defence is available against claims brought under Article XIX, it must necessarily also be available against claims brought under the provisions of the Safeguards Agreement.

7.151 We consider that the availability of the Article XXIV defence against claims brought under the provisions of the Safeguards Agreement is also confirmed by the last sentence of footnote 1 of the Safeguards Agreement. Footnote 1 provides

> A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the

[137] Indeed, the application of a necessity test in such circumstances would give rise to absurd results. For example, assume that an FTA eliminates duties on peanuts, but not cars. In the context of a necessity test, third countries could claim that it was not necessary to eliminate duties on peanuts to meet the "substantially all the trade" threshold of Article XXIV:8(b), as that threshold could have been met by eliminating duties on cars. In such cases, it is difficult to imagine how a necessity requirement could ever be fulfilled.

> requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. *Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.* (emphasis supplied)

7.152 We note that the Appellate Body stated in *Argentina – Footwear Safeguard* (a case concerning the imposition of a safeguard measure by a member of a customs union) that "the ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Korea relies on this finding to argue that the last sentence of footnote 1 does not apply in the present case, which concerns a free-trade area. The United States submits that the Appellate Body "reached [its] conclusion in response to a panel's analysis based on the *first* and *third* sentences of footnote 1. At no point did either the panel or the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote. Consequently, the Appellate Body's finding does not provide any guidance for the Panel's interpretation of the last sentence".[138]

7.153 We agree with the United States regarding the status of the Appellate Body's findings in *Argentina – Footwear Safeguard*. In that case, the Appellate Body did not base its finding regarding the exclusion of customs union members from a safeguard measure on the last sentence of footnote 1. Nor was the Appellate Body called on to address the application of footnote 1 in the context of free trade areas. For these reasons, we do not consider that the Appellate Body's finding that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'" pertains to the application of the last sentence of footnote 1 in the context of free trade areas, which is the issue before us in this case. Indeed, the last sentence of footnote 1 itself indicates that it is not restricted to cases in which a safeguard measure is imposed by a customs union (either "as a single unit or on behalf of a member State"). In particular, the last sentence of footnote 1 refers to paragraph 8 of Article XXIV. Paragraph 8 of Article XXIV has two sub-paragraphs. Sub-paragraph (a) relates to customs unions, whereas sub-paragraph (b) relates to free-trade areas. By referring to paragraph 8 of Article XXIV as a whole, rather than sub-paragraph 8(a) exclusively, the last sentence of footnote 1 clearly also refers to Article XXIV:8(b), i.e., free-trade areas. Thus, even though the first three sentences of footnote 1 address the application of safeguard measures in the context of a customs union, the broader reference in the last sentence to paragraph 8 extends the coverage of that last sentence to include the application of safeguard measures in the context of free trade areas, as defined by Article XXIV:8(b).

7.154 Having found that the last sentence of footnote 1 applies in the context of free trade areas, we must now resolve the disagreement between the parties as to the impact, if any, of the last sentence of footnote 1 on the application of the Article 2.2 non-discrimination requirement. In this regard, Korea argues that footnote 1 addresses the term "Member", and notes that it is included in Article 2.1, rather than 2.2. According to Korea, therefore, the last sentence of footnote 1 does not qualify the application of the Article 2.2 non-discrimination requirement.

7.155 We note that the *Argentina – Footwear Safeguard* panel was

> mindful of the fact that the footnote was inserted after the word "Member" in the first paragraph of Article 2. It therefore clearly refers solely to the question of who can impose a measure, and not to the supplier countries that might be affected by it. For the footnote to have a broader meaning, the drafters would have had to place it after

[138] Response to Question 20 from the Panel at the first substantive meeting (see Annex B-2).

> the title of Article 2, or in both paragraphs of that article. The fact that they did not do so must have meaning and has to be taken into account in our interpretation.[139]

7.156 The *Argentina – Footwear Safeguard* Appellate Body also stated that "footnote 1 relates to the word 'Member' in Article 2.1, which is commonly understood to mean a Member of the WTO". However, we note that neither the panel nor the Appellate Body in that case was called on to examine the last sentence of footnote 1. Their findings, therefore, provide no guidance as to whether the last sentence of footnote 1 extends beyond the word "Member" in Article 2.1.

7.157 The last sentence of footnote 1 begins with the phrase "[n]othing in this Agreement". The ordinary meaning of this phrase indicates that the last sentence of footnote 1 concerns the Safeguards Agreement as a whole, and not only Article 2.1 thereof. Indeed, a finding that the last sentence only applies in respect of the word "Member" in Article 2.1, rather than the Agreement as a whole, would render the phrase "[n]othing in this Agreement" meaningless, contrary to the principle of effective treaty interpretation.[140] Such a finding would essentially replace the phrase "[n]othing in this Agreement" with the phrase "[n]othing in the word Member". Accordingly, we find that the last sentence of footnote 1 means that nothing in any provision of the Safeguards Agreement, including Article 2.2 thereof, "prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994".

7.158 We have already found that Article XXIV can provide a defence against claims brought under Article XIX. In effect, this finding touches on "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994", since it means that Article XXIV may in certain circumstances prevail over Article XIX. We have also found that, consistent with the last sentence of footnote 1 of the Safeguards Agreement, Article 2.2 does not prejudge the interpretation of the relationship between Articles XIX and XXIV:8. Taken together, these findings lead us to conclude that Article XXIV can provide a defence against claims of discrimination brought under Article 2.2. Any other conclusion would mean that 2.2 disturbs the relationship we have identified between Articles XIX and XXIV, as it would effectively mean that an Article XXIV defence against a claim of discrimination resulting from the exclusion by a Member of its free-trade area partners from its safeguard measure would no longer be available, as a result of Article 2.2. As noted above, the last sentence of footnote 1 excludes the possibility of Article 2.2 having this effect. Thus, just as we found that the United States is entitled to rely on Article XXIV as a defence against Korea's claims under *inter alia* Article XIX, so too the United States is entitled to rely on Article XXIV as a defence against Korea's claim under Article 2.2 of the Safeguards Agreement.[141]

7.159 Korea also asserts that Article XXIV cannot operate as a defence to a claim under Article 2.2 as a result of the conflict provision contained in the general interpretative note to Annex 1A:

> In the event of a conflict between the provisions of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization …, the provision of the other agreement shall prevail to the extent of the conflict.

7.160 To the extent that Article 2.2 could be perceived to be in conflict with the availability of an Article XXIV defence against claims of non-discrimination, that conflict is resolved through the last

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[139] *Argentina – Footwear Safeguard* at para. 8.84.

[140] As the Appellate Body found in *Argentina – Footwear Safeguard*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (footnote 76)

[141] In making this finding, we express no view as to whether Article XXIV is available as a defence to claims under Multilateral Agreements on Trade in Goods more generally.

sentence of footnote 1 of the Safeguards Agreement (whereby Article 2.2 shall not disturb the fact that Article XXIV may in certain circumstances provide a defence to claims under Article XIX).

7.161 Korea also argues that the exclusion of imports from Canada and Mexico from the line pipe measure has made Korean line pipe less competitive with imports from Canada and Mexico in the United States. This may be so. However, this is the very essence of a free-trade area. By virtue of Article XXIV:8(b), a free-trade area will always result in positive discrimination in favour of the members of that free-trade area in respect of "duties and other restrictive regulations of commerce … on substantially all the trade" between them. Other WTO Members are taken to accept such positive discrimination, provided all the relevant conditions of Article XXIV are met.

7.162 Korea has further argued that "[t]he parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. … Therefore, since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports".[142] In light of our findings above regarding the ability of the United States to exclude imports from Canada and Mexico from the line pipe measure, we are unable to accept Korea's argument that, on the basis of parallelism, Article 2.1 requires all imports to be included in the determination, and that any resultant measure must also cover all imports. Our understanding of the principle of parallelism is that if the United States were, on the basis of Article XXIV, to exclude imports from Canada and/or Mexico from the scope of its safeguard measures, the United States must establish explicitly that imports from sources other than Canada and/or Mexico satisfied the Article 2.1 conditions for the application of a safeguard measure.[143] In other words, while there must be a parallelism between the scope of the investigation and the scope of any resultant measure, the principle of parallelism does not determine the scope of the investigation.

(iii) Conclusion

7.163 To conclude, we find that the United States is entitled to rely on Article XXIV as a defence to Korea's claims under Articles I, XIII and XIX of GATT 1994, and Article 2.2 of the Safeguards Agreement, regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

6. The exclusion of Canada and Mexico - Parallelism

7.164 Korea's Request for Establishment of a panel includes the following claim:

> 7. The United States also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure.

7.165 Since it did not appear to us that Korea had pursued Claim 7 in its written or oral submissions to the Panel, we asked Korea at the second substantive meeting to clarify the status of this claim. In particular, we asked "has Korea dropped this claim or does this claim stand"? Korea replied:

> [r]eturning to whether Korea is standing by paragraph 7, yes, we certainly are and if we read Korea's first submission we were making arguments then in that connection, in the sense that the US measure is in violation of MFN as well as in violation of parallelism.

[142] Korea's first written submission, paras 172 and 173.
[143] *See US - Wheat Gluten (AB)* at para. 98.

7.166 The Panel then asked Korea to specify where in its submission Korea had pursued Claim 7. Korea referred the Panel[144] to paragraphs 172-173 of its first written submission, and paragraph 61 of its second written submission. We consider it useful to set these paragraphs out in full:

> 172. The parallelism between Articles 2.1 and 2.2 of the Agreement on Safeguards also requires that the measure be applied to all imports. The ITC's footnoted analysis of imports, separating out the imports from Canada and Mexico, has no legal significance. The United States could only impose a safeguard remedy on the basis of a serious injury analysis which was based on all imports. Articles 2 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994 speak only in terms of "imports." There is no basis on which certain imports can be excluded. Therefore, all imports must be examined.
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> 173. Any other interpretation of Article 2 would not comport with its plain meaning. Further, it would lead to a "selective safeguard" regime in which countries could arbitrarily pick and choose which countries to exclude from the serious injury determination in order to exclude those countries from the measure. This is precisely what has happened here. Therefore, since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports.
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> 61. In conclusion, the United States must comply with Article 2.2 of the SA and apply the measure to all sources or remove the measure. As Korea previously argued, this result (that the measure should be applied to NAFTA Members) also is confirmed by the "parallelism" analysis. That being said, Korea believes that the obligation of Article 2.2 is clear on its face. No additional support or alternative basis is necessary.

7.167 The United States argued at the second substantive meeting that "Korea has not prosecuted that claim, and has not raised any real arguments about it". The United States asserted in particular that Korea had failed to address note 168 on pages I-26/27 of the ITC determination during the course of these proceedings.

7.168 We have significant reservations as to whether the abovementioned extracts from Korea's submissions support Korea's claim that "[t]he United States also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure."[145] We consider that these arguments were more likely intended to support Korea's claim that "[t]he United States violated Article 2.2 of the Agreement on Safeguards and Articles I, XIII and XIX of GATT 1994, by not applying the safeguard measure on an MFN basis to all line pipes being imported, including Mexico and Canada".[146] Nevertheless, it could be argued that there is probably sufficient detail in Claim 7 for us to understand it, and rule on it, even in the absence of additional argumentation by Korea during the course of these proceedings.

7.169 During the course of these proceedings, the United States referred the Panel to note 168, on pages I-26/27 of the ITC determination. This note provides:

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[144] *See* Note to the Panel, attached to Korea's replies to questions from the Panel at the second substantive meeting.

[145] Korea only refers to Articles 2 and 4 jointly to argue that a safeguards investigation should cover all imports. As noted above in para. 7.162, we do not understand the principle of parallelism to require the inclusion of all imports in the scope of the investigation.

[146] Hence our treatment of this argument in the preceeding section (at para. 7.162).

> We note that we would have reached the same result had we excluded imports from Canada and Mexico from our analysis. Imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a per centage of domestic production. Non-NAFTA imports fell from *** tons in 1994 to *** tons in 1996, but then rose sharply to *** tons in 1997 and *** tons in 1998. While non-NAFTA imports fell from *** tons in interim 1998 to *** tons in interim 1999, they remained at a very high level in interim 1999, exceeding in just 6 months the level of *full* year 1995 and 1996 imports. These imports also increased significantly in terms of market share at the end of the period of investigation, rising from *** per cent in 1996 to *** per cent in 1998, and from *** per cent in interim 1998 to *** per cent in interim 1999. Moreover, the non-NAFTA imports were among the lowest-priced imports. Except for 1994, the average unit value of imports from Canada exceeded the average import unit value throughout the period of investigation, and the volume of imports was relatively small. The average unit value of imports from Mexico exceeded the average for all imports in 1998 and interim 1999, the period in which the serious injury occurred, and the volume of imports from Mexico declined during this period. Moreover, in the 244 possible product-specific price comparisons, non-NAFTA imports undersold domestic line pipe in 194 instances (about 80 per cent), and Korean product accounted for by far the largest number of instances of underselling (95 of the 194). Data are based on those in Table C-1 adjusted to exclude certain imports of Arctic-grade and alloy line pipe.

7.170 Korea's only argument regarding note 168 is that it "has no legal significance".[147] Korea did not explain why, in its view, note 168 has no legal significance. For our part, we fail to see why note 168 has no legal significance; it clearly forms part of the ITC's published determination, and contains findings by the ITC. In particular, note 168 contains a finding by the ITC that imports from non-NAFTA sources increased significantly over the period of investigation, in absolute terms and as a per centage of domestic production. Note 168 also contains the basis for a finding that non-NAFTA caused serious injury to the relevant domestic industry.

7.171 In *United States – Wheat Gluten*, the Appellate Body upheld the panel's finding that the United States had violated Articles 2.1 and 4.2 because it had excluded imports from Canada from its safeguard measure, without "establish[ing] explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".[148] Accordingly, we would only be in a position to uphold Korea's Claim 7 if it had established a prima facie case that the United States had excluded imports from Canada and Mexico from the line pipe measure, without establishing explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure. To do so, at a minimum Korea would have had to specifically address, and rebut, the contents of note 168. We recall that Korea has made no attempt to do this. Instead, Korea limited itself to arguing that note 168 has no legal significance, without making any attempt to substantiate that argument. On balance, therefore, and particularly in light of the contents of note 168, we are unable to find that Korea has established a prima facie case that the United States "also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure." We therefore reject Korea's Claim 7.[149]

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[147] Korea's first written submission at para. 172.

[148] *US – Wheat Gluten (AB)* at para. 98, emphasis in original.

[149] In doing so, we do not find that note 168 is sufficient for the purposes of Articles 2.1 and 4.1. We merely find that Korea has failed to establish a prima facie case that the United States violated those provisions.

7. The exclusion of developing countries under Article 9 of the Safeguards Agreement

7.172 Korea claims that the United States violated Article 9.1 because it did not determine which developing countries were to be exempted from the measure. Rather, the United States treated developing countries, regardless of their prior import levels, as equal to all suppliers, and assigned them each the same 9,000 short tons quota applied for other suppliers.

7.173 The United States argues that the 9000 short ton exemption from the supplemental duty satisfied the requirements of Article 9.1 to exclude developing country Members from application of safeguard measures. It also asserts that the 9000 short ton exemption from the supplemental duty would have represented 2.7 per cent of total imports in 1998, before application of the line pipe safeguard. As the United States expected the measure to result in a decrease in the total volume of imports, any country reaching the 9000 ton limit of the exemption would account for more than three per cent of total imports. Thus, a developing country would only become subject to the 19 per cent tariff in conditions under which it was permissible under Article 9.1 for the United States to impose such relief.

7.174 As a starting-point of our analysis we note that the text of Article 9.1 provides:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[2]

[2] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

7.175 Article 9.1 is clear in its mandate that a safeguard measure **"shall not be applied"** to imports of developing countries accounting for not more than 3 per cent of total imports. Thus the first question for us to resolve is whether the line pipe measure "applies" to developing countries within the factual circumstances described in Article 9.1. In our view, if a measure is not to apply to certain countries, it is reasonable to expect an express exclusion of those countries from the measure.[150]

7.176 In order to determine whether the line pipe measure contains an express exclusion of developing countries which comply with the conditions of Article 9.1, the Panel has carefully examined the documents whereby the measure was imposed and notified to the WTO. The first document examined was Presidential Proclamation 7274 of 18 February 2000.[151] In this document, there is no specific mention of compliance with the provisions of Article 9.1 concerning developing countries. Neither could we find a list of developing countries to be excluded from application of the measure for reason of their imports not exceeding 3 per cent of total imports of the subject product. This lack of a specific exclusion from the measure of certain developing countries under Article 9.1

[150] We find support for our view in the Committee on Safeguards' format for notifications under Article 9, footnote 2 on the non-application of a safeguard measure to developing countries under Article 9.1 (G/SG/1). While we note that the notification formats are without prejudice to the interpretation of the relevant provisions in the Agreement on Safeguards by the competent bodies (*see*, G/SG/1 at p. 1), we consider that the notification format in this case provides guidance as to what is expected from Members in fulfilling their obligations under Article 9.1, footnote 2. The format requires Members to "specify the developing countries to which the measure is not applied under Article 9.1 of the Agreement on Safeguards, and the import shares of these countries individually and collectively". In our view "the developing countries to which the measure is not applied under Article 9.1" cannot be "specif[ied]" if they are not specifically and expressly identified.

[151] Presidential Proclamation No. 7274, To Facilitate Positive Adjustment to Competition From Imports of Certain Circular Carbon Welded Steel Line Pipe (18 February 2000), 65 Fed Reg. 9193 ("Presidential Proclamation").

contrasts with the exclusion of line pipe imports from Mexico and Canada: "Such imported line pipe that is the product of Mexico or Canada shall not be subject to the increase in the duty…".[152]

7.177 Two other documents pertaining to the application of the measure also seem to indicate that it applies to all developing countries regardless of whether they fulfil the conditions of Article 9.1. The President's Memorandum to the Secretary of the Treasury and the United States Trade Representative of 18 February 2000[153] instructs the Secretary of the Treasury "to publish or otherwise make available, on a weekly basis, import statistics that will enable importers to identify when imports from each supplying country approach and then exceed the 9,000 short ton threshold".[154] There is no distinction made in those instructions between those developing countries to which the measure would not apply by virtue of Article 9.1 and those which exceed the Article 9.1 threshold. The Treasury Memo makes it clear that in implementing the measure all supplying countries[155] will receive the same treatment regardless of whether the supplier is a developed country, a developing country or a developing country which fulfils the conditions of Article 9.1.

7.178 The Memorandum from the Customs Service Director of Trade Programs to all Port Directors[156] also supports the view that no allowance was made in the application of the measure for countries under the conditions outlined in Article 9.1. In the Customs Memo the Director of Trade Programs notifies all Port Directors of the adoption of a safeguard measure on imports of line pipe and instructs that "the following tariff rate quota limits … will apply to certain line pipe from the following countries". The Customs Memo then proceeds to list all supplier countries of line pipe to the United States, among them several WTO developing country Members.[157] Again, the Customs Memo would indicate that the line pipe measure applies to all countries including those which, by virtue of fulfilling the conditions of Article 9.1, should be excluded from the measure.

7.179 Turning to the US notification pursuant to Article 9, footnote 2,[158] we observe that it too does not "specify" the developing countries to which the measure is not applied.

7.180 After a careful analysis of the Presidential Proclamation, the Treasury Memo, the Customs Memo and the WTO notification, we find that these documents do not contain any express exclusion of developing countries below the 3 per cent of imports individual or 9 per cent cumulative threshold for application of a measure to developing countries prescribed in Article 9.1. In the absence of any other relevant documentation, we therefore conclude that the line pipe measure also applies to those developing countries. Given the specific language used in Article 9.1, which mandates that a measure "shall not be applied" to developing countries that fulfil the conditions of that provision, we find that the United States has not complied with its obligations under Article 9.1.

7.181 We also note the US argument that "a developing country would only fall subject to the 19 per cent tariff in conditions under which it was permissible under Article 9.1 for the United States to impose such relief". In making this argument, the United States relies on its expectations that the measure will result in a decrease in the total volume of imports, and that any country reaching the

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[152] Id. at 9194.

[153] Presidential Documents, *Action Under Section 203 of the Trade Act of 1974 Concerning Line Pipe*, Memorandum for the Secretary of the Treasury and the United States Trade Representative, 65 Fed. Reg. 9197 (23 February 2000) ("Treasury Memo").

[154] We note that with respect to imports from Canada and Mexico the Secretary of the Treasury is only instructed to monitor these imports and report quarterly to the USTR on their relevant volumes.

[155] Except Mexico and Canada.

[156] Memorandum From US Customs Service Quota Headquarters Director, Trade Programs, to All Port Directors, Regarding QBT-2000-508: Presidential Proclamation 7274--Tariff-Rate Quota on Certain Circular Welded Carbon-Quality Line Pipe (29 February 2000) ("Customs Memo").

[157] The developing WTO Members included in the list are: Bangladesh, Brazil, Colombia, Egypt, India, Indonesia, Korea, South Africa, Turkey and Venezuela.

[158] G/SG/N/10/USA/5.

9000 ton limit of the exemption would account for more than three per cent of total imports. We note that the measure imposed does not set an overall limit on the quantity of imports of line pipe, and if importers are willing to pay the 19 per cent duty for over quota imports there is no restriction on the total volume of imports which may enter from any particular country. Moreover, given that Mexico and Canada are completely excluded from the measure there is no impediment for those countries' exports to continue their increase.[159] Given these conditions it is possible to envisage a scenario where total imports grow to a level where imports from developing countries above the 9,000 short tons exemption constitute less that 3 per cent of the total imports. In this situation a portion of the imports from a developing country would be subject to the 19 per cent tariff surcharge, even though its share of total imports did not exceed 3 per cent. The United States argues that "historical import patterns demonstrate the unlikelihood that any developing country Member would export more than 9,000 short tons of line pipe to the United States in a single year and yet remain below a three per cent share of total exports". Although we agree with the United States that the situation described may be unlikely to materialize, the Appellate Body has repeatedly stated that a trade effects test is irrelevant if the measure has been found to violate the provisions of the WTO.[160] We would also note that there is a clear difference between an obligation that a measure not **affect** imports from certain developing countries and an obligation that a measure not be **applied** to imports from certain developing countries. Article 9.1 contains an obligation not to apply a measure, and we find that the line pipe measure "applies" to all developing countries in principle, even though it may not have any impact in practice. Therefore, for the reasons described above we find that the United States has not complied with its obligations under Article 9.1 of the Agreement on Safeguards.

C. CLAIMS RELATING TO THE INVESTIGATION

7.182 Korea makes a number of claims relating to the investigation leading up to the imposition of the line pipe measure. These claims question the ITC's determination of increased imports, serious injury, threat of serious injury and causation. Korea also claims that the United States failed to demonstrate the existence of unforeseen developments and the need for emergency action. In addition Korea makes two claims on procedural issues regarding the opportunity for adequate consultations and compensation. We shall begin our examination of Korea's claims relating to the investigation by addressing Korea's claim regarding the ITC's finding of increased imports.

1. Increased imports

(a) Arguments by Korea

7.183 Korea claims that the ITC erred in finding any increase in imports within the meaning of Article XIX and/or Article 2, either in absolute terms, or relative to domestic production.

7.184 Korea asserts that the ITC found an increase in imports on the basis of the trend in imports from 1994 to 1999. Korea asserts that the ITC violated Article XIX:1(a) and Article 2.1 by failing to base its December 1999 determination on "the very recent past". In support, Korea cites the Appellate Body in *Argentina - Footwear Safeguard*. In that case, the Appellate Body disagreed with the panel's finding that, for the purpose of determining whether there was a requisite increase in imports, an investigating authority could reasonably examine the trend in imports over a five-year historical period. In particular, the Appellate Body concluded that:

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[159] Although Canada and Mexico have been excluded from the measure, the language of Article 9.1 is clear that in calculating the shares of developing countries this calculation should be done on the basis of "imports of the product concerned" and "total imports of the product concerned". Therefore, in our view when calculating the developing country share of imports in this particular case imports from Mexico and Canada must also be included as part of the total imports.

[160] See, *Japan – Taxes on Alcoholic Beverages*, report of the Appellate Body, WT/DS8/AB/R page 16, adopted 1 November 1996; *Korea – Taxes on Alcoholic Beverages*, report of the Appellate Body, WT/DS75/AB/R, paras. 128 – 133, adopted 17 February 1999.

> the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years - or, for that matter, during any other period of several years. In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent.[161]

In a footnote, the Appellate Body also disagreed with the panel's finding that, whatever the starting point of the investigation period, "it has to *end* no later than the recent past"[162] (emphasis in original). According to the Appellate Body, "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the very recent past". Korea also argues that a five-year period of investigation is in conflict with the decision of the Appellate Body *in Argentina – Footwear Safeguard* and does not meet the requirements of Article 2.1 or Article XIX:1(a) of GATT 1994.

7.185 Korea notes that the ITC found that "[a]lthough imports declined from *** tons in interim (January-June) 1998 to *** tons in interim 1999, (footnote omitted) they remained at a very high level in interim 1999, exceeding in just 6 months the level of *full* year 1995 and 1996 imports" (emphasis in original). On the basis of the indexed import data submitted by the United States to the Panel on 16 February 2001, Korea asserts that there was actually a decline in the absolute volume of imports in the recent past (as at the time of the ITC determination). According to Korea, the indexed data demonstrates that there was a steady, sustained pattern of decline in the absolute volume of imports starting in the second half of 1998, and therefore in the four quarters preceding the ITC determination. Korea asserts that the ITC could not properly have found a sudden, sharp, and recent increase in the absolute volume of imports, as there was no increase at all.[163] Korea asserts that the ITC failed to take proper note of the lengthy period over which imports had actually declined, because it only compared interim periods covering the first half of 1998 and 1999 respectively, without comparing the volume of imports in the second half of 1998 to the volume of imports in the first half of 1999.

7.186 Korea notes that the ITC also found that relative imports (the ratio of imports to domestic production) increased during the period of investigation:

> [the ratio] was at its highest level in January-June 1999. Like actual imports, the ratio declined from 1994 to 1995 and then rose each year thereafter. The ratio was *** per cent in 1994 and fell to *** per cent in 1995; it then increased to *** per cent in 1996 and *** per cent in 1997, and then nearly doubled to *** per cent in 1998. It rose to its highest level, *** per cent, in interim 1999 (as compared to *** per cent in interim 1998). (footnotes omitted)

7.187 Korea asserts that the ITC erroneously compared interim 1998 with interim 1999, without taking into account a decline in relative imports in the recent past, *i.e.*, between the second half of 1998 and the first half of 1999. Korea's argument is based on the dissenting view of Commissioner Crawford, who stated that the ratio declined between the second half of 1998 and the first half of 1999. Korea points out that the ITC was inconsistent in its analysis of the increased imports as there were instances when analysing serious injury where the ITC compared the second half of 1998 with the first half of 1999.

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[161] *Argentina – Footwear Safeguard (AB)* at para. 130.
[162] *Argentina – Footwear Safeguard (AB)* at footnote 130.
[163] *See* Korea's first written submission at para. 205.

(b) Arguments by the United States

7.188 The United States asserts that there was a recent, sudden, sharp, and significant increase in imports, both in absolute and relative terms, so that the ITC's findings are consistent with the decisions of the panel and Appellate Body in *Argentina - Footwear Safeguard*.

7.189 The United States resists Korea's attempt to compare imports in interim 1999 with imports in the second half of 1998. The United States explains that the ITC, consistent with its longstanding practice in safeguards investigations (as well as antidumping and countervailing duty investigations), collected import and domestic industry data enabling it to make year-to-year comparisons. The ITC customarily gathers and evaluates import data on a calendar year basis with extra data on interim periods, and not on the basis of arbitrarily defined snapshots of time. That the ITC followed its long-standing approach in examining increased imports demonstrates neutrality and lack of bias in its analysis. The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, not chosen to achieve a particular result. Korea's method of breaking out annual import data in such a way as to capture a brief and slight decline in imports is as arbitrary and results-oriented as the end-point-to-end-point comparison that the Panel found lacking in *Argentina-Footwear Safeguard*. The United States argues that a comparison of "mismatched" interim periods could create distortions because of seasonal changes in market conditions.

7.190 With regard to the absolute increase in imports, the United States asserts that there was a "sudden and sharp increase" in the "recent past", i.e., in 1998. While the United States acknowledges a "modest" decline in absolute imports from interim 1998 to interim 1999, it argues that imports still remained at high levels (interim 1999 imports higher than full year 1995 or 1996), such that the decline between interim 1998 and interim 1999 did not negate the sudden and sharp increase that immediately preceded it. The United States also rejects Korea's argument that absolute imports declined continuously for the full 12 months prior to the ITC determination; monthly data show that imports actually increased toward the end of interim 1999 (in May, June and July).

7.191 In any event, the United States notes that a safeguard measure may be imposed on the basis of an increase in imports relative to domestic production, even if there is no increase in absolute terms. The United States asserts that relative imports nearly doubled in 1998, and continued to increase in interim 1999.

(c) Evaluation by the Panel

7.192 Three main questions need to be addressed in resolving this matter. The first question pertains to whether the ITC used an appropriate methodology in making its finding of increased imports. More specifically the appropriateness of the methodology hinges on the question of whether the ITC was entitled to compare interim 1998 with interim 1999 in performing the analysis or whether it was, in addition, required to compare the second half of 1998 with interim 1999. The second question is whether the ITC could properly conclude that there was an increase in imports despite the fact that imports in absolute terms declined at the end of the investigation period. The third question is whether the ITC could properly conclude that there was a relative increase in imports.[164]

[164] Following a careful review of Korea's submissions, we do not understand Korea to argue that, on the basis of the methodology applied by the ITC (*i.e.* a comparison of first semester 1998 with first semester 1999), the ITC could not properly have found that the increase in the imports was "sudden enough [and] sharp enough" for the purposes of Article 2.1 or Article XIX. Rather, we understand Korea to argue that, on the basis of a comparison between the level of imports for the second half of 1998 and the first half of 1999, there was no increase in imports either in absolute or relative terms, but instead a decline in both instances. In its first submission Korea states: "In this case, imports did not increase suddenly and sharply during the recent past. To

7.193 We shall conduct the examination described above in light of the provisions in Article 2.1 and Article XIX:1(a). In *Argentina – Footwear Safeguard*, the Appellate Body made the following findings regarding those provisions:

> [T]here must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[165] (emphasis in the original)

(i) The methodology used by the United States in its analysis of increased imports

7.194 Turning first to the appropriateness of the methodology used by the ITC in evaluating the increase in the imports, we note that the *US - Wheat Gluten* panel stated that the standard of review for an increased imports determinations is:

> [W]hether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.[166]

We concur with the standard of review established by that panel. However, the standard of review was formulated for the purpose of examining the factual, rather than the methodological, issues in an increased imports determination. Since the question immediately before us concerns the methodology chosen by the ITC, it is necessary to expand on the standard formulated by the panel in *US – Wheat Gluten*, in order to identify the appropriate standard for reviewing the methodological issue before us. Therefore, in determining whether the US methodology for the analysis of the existence of increased imports complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment, pursuant to Article 11 of the DSU, of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.

7.195 The ITC describes the methodology applied to evaluate the increased imports in the line pipe investigation in the following terms:

> The Commission considers imports from all sources in determining whether imports have increased over the most recent 5 full years, and partial data for the most recent current year if available. There is no minimum amount by which imports must have increased. A simple increase is sufficient.[167] [168]

7.196 Korea argues that the ITC's period of investigation of five years is in conflict with the requirements of Article 2.1 and Article XIX:1(a). We note that the Agreement contains no requirements as to how long the period of investigation in a safeguards investigation should be, nor

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the contrary, imports declined." Thus, Korea's emphasis is on whether imports decreased or increased, not on whether the increase was sudden and sharp.

[165] *Argentina – Footwear Safeguard (AB)* at para. 131.

[166] *US – Wheat Gluten* at para. 8.5.

[167] ITC Report, p. I-14.

[168] We are not convinced that the standard applied by the ITC whereby "[a] simple increase [in imports] is sufficient", complies with the requirements of the Agreement. However, we do not have to decide this issue in this case as Korea provides no argumentation on the question of whether the increase in imports was sudden and sharp enough for purposes of Article 2.1 and Article XIX. (see footnote 164 above).

how the period should be broken down for purposes of analysis. Thus, the period of investigation and its breakdown is left to the discretion of the investigating authorities.

7.197 In the case before us, the ITC, consistent with its past practice, examined a five-year period covering 1994-1998, and also collected data for the first semester of 1999. In order to evaluate the existence of increased imports, the ITC compared the figures for each full year with the preceding year, and the figures for interim 1999 with those of the first semester of 1998.

7.198 Regarding the length of the period of investigation, Korea argues that the period selected by the ITC did not meet the requirements of Article 2.1 and/or Article XIX:1(a). Korea relies on the following findings of the Appellate Body in *Argentina – Footwear Safeguards*:

> [W]e do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[130]

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[130]The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

7.199 In the case before us the period selected by the ITC was five years and six months, which is a period similar in length to the one used by the Argentine investigating authority in *Argentina – Footwear Safeguards*. However, we note that the Appellate Body, in the findings relied upon by Korea to argue the question of the length of the period of investigation, emphasized not the length of the period *per se,* but that there should be a focus on recent imports and not simply trends over the period examined. In the case of the line pipe investigation the ITC did not merely compare end points, or look at the overall trend over the period of investigation, (as Argentina had done in the investigation at issue in *Argentina - Footwear Safeguard*). It analysed the data regarding imports on a year-to-year basis for the 5 complete years, and also considered whether there was an increase in interim 1999 as compared with interim 1998.[169] In the absence of any specific obligation in the Agreement regarding the period of investigation, we are not prepared to make a ruling of inconsistency based merely on the length of the period of investigation actually used. Of course, the analysis and determination based on the information for that period of investigation may be inconsistent with the requirements of the Agreement, but for reasons other than or additional to the length of the period of investigation *per se*.

7.200 The Appellate Body has recently stated, regarding its findings in *Argentina – Footwear Safeguard* cited above, that:

> We note that, at footnote 130 of our Report in *Argentina – Footwear Safeguard*, [ ], we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow

[169] We will deal with the appropriateness of this "matched" semester analysis *infra*.

> appropriate conclusions to be drawn regarding the state of the domestic industry.[170] (emphasis added)

We concur with the Appellate Body's finding regarding the length of the period of investigation. Although this finding refers to the period of investigation for a serious injury determination, it appears that the Appellate Body does not distinguish between the factors governing the appropriate length of the period of investigation with respect to increased imports and the length of the period of investigation for the serious injury factors. Our conclusion is based on the fact that, although the quote pertains to "the state of the domestic industry", it refers to a footnote in the *Argentina – Footwear Safeguard* report that pertains to the period of investigation for the increased imports.

7.201 We are of the view that by choosing a period of investigation that extends over 5 years and six months, the ITC did not act inconsistently with Article 2.1 and Article XIX. This conclusion is based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC allows it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.

7.202 Regarding the breakdown of the period of investigation for purposes of analysing trends in the level of imports, Korea questions the appropriateness of comparing the first semester of 1999 to the first semester of 1998, rather than to the second semester of 1998. The United States argues that the ITC was not required to compare the second half of 1998 with the first half of 1999, and it could not do so as it did not collect data for the second half of 1998 in isolation (it collected data for 1998 as a whole). Korea responds that data for the second half of 1998 could have been easily derived from subtracting the figures for the first half of 1998 from the yearly total for 1998. Korea further argues that not only could the ITC have easily done a second half of 1998 to first half of 1999 comparison, but that it did so for the purpose of its injury analysis.[171] According to Korea this inconsistency in the analysis of data for serious injury/threat thereof and increased imports violates the requirements of Articles 2.1 and 4.2(b).

7.203 We recall that there are no provisions in the Safeguards Agreement which give any guidance on how the period of investigation should be broken down for purpose of analysis by the investigating authorities. In the case before us the period selected by the ITC would have allowed it to find that there was a decrease in the imports if the facts in the case supported such a finding. We do not believe that the methodology chosen by the ITC for the purposes of analysing whether or not there was an increase in imports was inherently biased or would have precluded it from performing a reasonable evaluation of the facts in the investigation. The United States asserts that the ITC acted according to its past practice, and that this shows that the methodology was objective and unbiased. We agree with the United States. The United States responds that a comparison of matching interim periods, in this case January-June, of different years, is the standard ITC practice.[172] According to the United States this standard practice helps eliminate the possible effect of any seasonal or cyclical distortions which may affect the comparison. Although the ITC concedes that line pipe is not a seasonal product, we are of the view that the methodology applied in the comparison was not chosen in order to manipulate the data and show a particular result. Nor is there any evidence of manipulation or bias resulting from an alleged inconsistency with the ITC's serious injury analysis.

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[170] *US-Lamb Meat (AB)* at footnote 88.

[171] In support of their argument Korea cites certain paragraphs in pages I-19, I-22 and I-28 of the serious injury and causation analysis sections of the ITC Report. Korea also refers to pages I-38-41, I-43-44, and I-46 in the separate views on injury by Commissioners Bragg and Askey section of the ITC Report.

[172] The fact that the ITC conformed to its previous practice does not necessarily mean that the methodology used, or that such past practice, is in conformity with the Agreement. Nevertheless, it has not been established that the usual ITC practice regarding the period of investigation was not appropriate for the line pipe investigation.

Although the ITC did make some observations that include or make reference to the second half of 1998 in its determination on serious injury or threat of serious injury, we do not consider that the ITC was comparing the situation in the first half of 1999 to that in the second half of 1998. The ITC was simply describing factual circumstances that existed in the second half of 1998 and the first half of 1999. The ITC was not drawing conclusions based on a comparison of those periods.

7.204 Korea further questions whether an analysis that compares interim 1999 with the first half of 1998, as opposed to the second half of 1998, permits a finding that there was a recent increase in imports, as it considers the "recent period" to be the last one-year period, with particular emphasis on the last six months. In this regard, we note that the Appellate Body in *Argentina-Footwear Safeguard* found that "the phrase 'is being imported' implies that the increase in imports must have been sudden and recent". According to Korea, the phrase "is being imported … in such increased quantities" refers to "the period immediately preceeding the authority's decision".[173] The word "recent" – which was used by the Appellate Body in interpreting the phrase "is being imported" - is defined as "not long past; that happened, appeared, began to exist, or existed lately".[174] In other words, the word "recent" implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceeding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation. We consider that an analysis that compares the first semester of 1998 with the first semester of 1999 is not inconsistent with the requirement that the increase in imports be "recent".

7.205 Based on the above considerations, we uphold the methodology applied by the ITC as being unbiased and objective, such that its application permitted an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports. Having upheld the methodology applied by the ITC for determining the existence of increased imports, we shall review the ITC's findings on absolute and relative import increase in light of that methodology.

(ii) Absolute imports

7.206 With respect to absolute imports, the ITC found that when comparing import volumes on a yearly basis, imports rose steadily from 1996 to 1998. When the ITC compared import volumes for the first semester of 1998 and first semester of 1999, it found that imports had declined. Although there was a decline in imports for interim 1999 when compared to interim 1998, the ITC still found that there were increased imports, on the basis that imports remained at "a very high level".[175] Korea claims that given that absolute imports declined as of first semester of 1998 there was no recent increase in the volume of imports.

7.207 We have already found that the methodology applied by the ITC was appropriate. However, there remains the question of whether the finding of increased imports can be maintained in light of the decline in absolute imports from the first semester of 1998 to the first semester of 1999. In order to answer this question we recall our discussion regarding the meaning of "recent", and our finding that "recent" does not imply an analysis of the present. We are also of the view that the fact that the increase in imports must be "recent" does not mean that it must continue up to the period immediately preceeding the investigating authority's determination, nor up to the very end of the period of investigation. We find support for our view in Article 2.1, which provides "that such product is being imported … in such increased quantities". The Agreement uses the adjective "increas**ed**", as opposed to "increas**ing**". The use of the word "increas**ed**" indicates to us that there is no need for a determination that imports are presently still increas**ing.** Rather, imports could have "increas**ed**" in the recent past, but not necessarily be increasing up to the end of the period of investigation or

[173] Korea's reply to Question 1 from the Panel at the first substantive meeting (see Annex B-1).
[174] *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).
[175] ITC Report at p. I-14.

immediately preceeding the determination. Provided the investigated product "is being imported" at such increas**ed** quantities at the end of the period of investigation, the requirements of Article 2.1 are met.[176]

7.208 Korea, on the question of the use of the word "recent" in the *Argentina – Footwear Safeguard* Appellate Body report, argues that "'[r]ecent imports' are those that occurred in the last year of the period with the most recent trends being the most significant trends".[177] However, we are of the view that it is not necessarily the case that "the most recent trends [are] the most significant trends", since this would imply that a decrease in imports in the most recent period is necessarily of greater significance than a prior increase in imports. As noted above, the word "recent" need not require that imports be increasing right up to the date of the determination. There can still be a "recent" increase even if that increase has ceased prior to the date of the determination, provided imports remain at a sharply increased level. Under Korea's approach, which would afford greater significance to the decrease at the time of the determination than to the earlier increase evidenced in the yearly comparison, the earlier increase would cease to be "recent" for the purpose of Article 2.1, even though imports remain at an increased level. We therefore reject Korea's interpretation of the *Argentina - Footwear Safeguard* Appellate Body report. We find support for our views in the Appellate Body's report in *US – Lamb Meat* where the following finding was made with respect to which part of the period of investigation was the most relevant in evaluating the state of the industry when making a threat of serious injury determination:

> The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.
>
> However, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation.[178]

We believe that the same considerations apply when it comes to which part of the period of investigation is the most relevant in a determination of increased imports.

7.209 In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard*, "the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination."[179] The Appellate Body noted that when it comes to a determination of increased imports "the competent authorities are required to consider the *trends* in imports over the period of investigation".[180] The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination.

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[176] We observe that an increase in imports before the date of a determination, but not sustained at the date of the determination, could still cause actual serious injury at the time of the determination.

[177] Korea's reply to Question 1 from the Panel at the first substantive meeting.

[178] *US-Lamb Meat (AB)*, at paras. 137-138.

[179] *Argentina – Footwear Safeguard (AB)* at para. 131.

[180] Id. at 129.

7.210 In view of the considerations expressed above we do not believe that the analysis of data for the first semester of 1999 should be considered in isolation. We find the analysis of whether imports had increased on a yearly basis from 1994 to 1998 very relevant to the question of whether there were increased imports. Although we are aware that imports decreased for the first semester of 1999 when compared to the first semester of 1998, we note that regardless of the decrease for the first half of 1999, the ITC in their report found that imports of line pipe "remained at a very high level in interim 1999".[181] This high level of imports for 1999 supports a finding that imports were still entering the United States "in such increased quantities" as prescribed in Article 2.1.[182] In other words, although Korea may be correct in arguing that absolute imports declined, this does not preclude a finding of imports "in such increased quantities" for the purpose of Article 2.1. Based on the above considerations we conclude that the ITC was correct in its finding of an absolute increase in imports of line pipe.[183] [184]

7.211 Even if we had found that the United States was not correct in finding an absolute increase in imports, we note that Article 2.1 provides that a Member may apply a safeguard measure on a product after a determination that such product is "being imported … in such increased quantities, absolute **or** relative to domestic production … as to cause or threaten to cause serious injury" (emphasis supplied). Therefore, a determination of either an absolute or relative increase in imports causing serious injury is sufficient to authorize a Member to adopt safeguard measures. We conclude in the next section of our report that, on the basis of the methodology applied by the ITC, there was a clear increase in imports relative to domestic production. Accordingly, the increased imports requirement would have been met regardless of whether there was or there was not an absolute increase in imports.

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[181] ITC Report, p. I-14.

[182] Additionally, we are of the view that a temporary change in the behaviour of the imports may not be sufficient to reverse an overall trend indicating existence of increased imports. Indeed, regarding the temporary nature of the interim 1999 decrease we note the US argument that "monthly import data show that imports actually increased toward the end of interim 1999". However, we wish to clarify that this increase in imports towards the end of interim 1999 is not determinative of our finding that there was an overall trend indicating increased imports.

[183] In its second submission Korea mentions that data for interim 1999 is public data, which includes imports of Arctic-grade line pipe, a product not subject to the safeguards investigation. The United States responds by asserting that there were no imports of Arctic-grade line pipe during interim 1999. At the second meeting, the Panel requested confirmation from the United States on this assertion. The United States reiterated their assertion that there were no imports of Arctic-grade line pipe for interim 1999, and regretted that they could not provide the Panel with a letter from the Japanese respondents from which the ITC inferred this information, as it had been designated as confidential by those respondents (we note that the only imports of Arctic grade line pipe during the period of investigation came from Japan). Korea later questioned why the fact that there were no exports of Arctic-grade line pipe was not itself confidential, and if this was not the case why was all data concerning imports of Arctic-grade line pipe not non-confidential as well.

The Panel notes that the United States has effectively provided the Panel with public information which would be no different than the confidential data on imports of line pipe for interim 1999. The fact that the United States has failed to provide the Panel with the confidential letter confirming the absence of imports of Arctic-grade line pipe in interim 1999, is of no consequence to a finding of whether on the basis of the data relied upon by the ITC there were absolute increased imports. Rather, the provision of the letter is pertinent only to a question of whether the data relied upon by the ITC is accurate. We do not understand Korea to be arguing that the data relied upon by the ITC on the issue of increased imports is inaccurate. Therefore, we consider that it is not necessary for us to draw any conclusions from the refusal of the United States to provide the documentary support for their assertion that there were no imports of Arctic-grade line pipe for interim 1999.

[184] As noted above in footnote 164, Korea provides no argumentation on the question of whether the absolute increase in the imports was sudden enough and sharp enough for the purposes of Article 2.1 and Article XIX. Korea focuses its arguments on whether or not there was an increase in imports and if so whether this increase was recent. Therefore, we do not need to consider whether the absolute increase in imports found by the ITC was sudden enough and sharp enough.

(iii) Relative imports

7.212 Regarding relative imports, the ITC found that the ratio of imports to domestic production rose steadily from 1996 to 1998. It also found that this ratio rose to its highest level in interim 1999 as compared to interim 1998.

7.213 Korea's basic argument is that the ITC was precluded from finding that there was a "recent" increase in imports relative to domestic production because relative imports decreased in the last six months of the period of investigation (Jan-Jun 1999), as compared to the previous six-month period (July-Dec 1998). This comparison put forward by Korea was not performed by the ITC in their analysis of the relative increase in the imports. Therefore to uphold Korea's view, we would have to find either, 1) that such a comparison would be obligatory as a legal matter, or 2) that it was unreasonable to reach the conclusion that relative imports increased based on a comparison of the first half of 1998 with the first half of 1999. We have already found that the ITC's methodology of making a comparison between the first semester of 1999 and the first semester of 1998 is consistent with the Agreement on Safeguards. Application of that methodology led the ITC to the conclusion that there was an increase in the ratio of imports to domestic production, not only on a year-to-year basis from 1996 to 1998, but also between interim 1998 and interim 1999. It is indisputable that the data supports the finding by the ITC that there was an increase in imports relative to domestic production from the first half of 1998 to the first half of 1999. Having upheld the methodology, and in the absence of a challenge by Korea to the conclusion drawn by the ITC from its methodology, we also uphold such a conclusion. Therefore, we uphold the ITC's finding that there were increased imports relative to domestic production.[185]

(iv) Conclusion

7.214 For the above reasons, we reject Korea's claim that the United States' finding of increased imports was inconsistent with Article 2.1 and Article XIX.

2. Serious injury

7.215 Korea asserts that the USITC serious injury determination is inconsistent with Article XIX, and Articles 3 and 4. In particular, Korea submits that the injury data on which the ITC relied was flawed because it contained data from other industries; the US domestic industry was experiencing only a one-year downturn from a historical high and the condition of the domestic industry was improving at the end of the period of investigation; and the ITC's decision does not contain an adequate demonstration of factors and conclusions of law and fact to support its serious injury determination.

7.216 In addressing these claims, we take careful note of the standard of review to be applied by panels when reviewing claims under Article 4.2(a). In particular, we note that

> in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in

[185] As previously noted in footnote 164, Korea provides no argumentation on the question of whether the relative increase in imports was sudden enough and sharp enough for the purposes of Article 2.1 and Article XIX, focusing instead only on whether there was or there was not an increase. Therefore we do not need to pronounce ourselves as to whether the relative increase in imports found by the ITC was sudden enough and sharp enough.

> particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[186]

(a) The injury data on which the ITC relied was flawed because it contained data from other industries

(i) Declines in the sale and production of OCTG; collective operating leverage

(1) Arguments by Korea

7.217 Korea claims that the US violated Article 4.1(c) and Article 4.2(a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries. In particular, certain performance factors for the line pipe industry (especially regarding capacity utilisation and profitability) were severely distorted by a disproportionately large decline in the production and sales of oil country tubular goods ("OCTG").

7.218 Korea notes that 14 of the 15 welded line pipe producers that responded to ITC questionnaires also produced other types of pipe (such as OCTG) in their line pipe production facilities. Korea argues that this resulted in a collective operating leverage effect, in the sense that when sales of one type of pipe are down, a manufacturer's production levels and capacity utilization overall are directly affected unless increases in the production of other pipe products can fully compensate for the reduction in that product. If the other products cannot fully compensate, then production levels fall, capacity utilization falls and all fixed costs on a per unit basis rise and net revenue declines.[187] In this way, negative profitability for one segment of production, if the product and the decline in this product are significant enough, can negatively affect overall profitability. Declines in overall profitability necessarily affect the profitability of each product. Korea claims that the US failed to take this into account when allocating overall production (including OCTG) costs to line pipe. Korea asserts that the declines in OCTG were much more severe than line pipe, and had a greater impact on the producers' profitability. Furthermore, Korea notes that the Staff Report itself refers to the existence of collective operating leverage:

> "[c]hanges in operating income during the period of investigation generally followed sales revenue, but also reflected the presence of some form of collective operating leverage. For example, the 101-per cent increase in operating income in 1997 significantly exceeded the 26-per cent increase in 1997 sales revenue. In the opposite direction, the 1998 14-per cent decline in sales revenue was accompanied by a 69-per cent drop in operating income. In the first half of 1999, operating income declined even further to a loss of $12.8 million."[188]

(2) Arguments by the United States

7.219 The United States submits that Korea has provided neither a legal nor a factual basis that would compel the Panel to conclude that Article 4.2(a) requires the use of data that excludes all products other than line pipe.[189] As a legal matter, the provision requires the consideration of

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[186] *US – Lamb Meat (AB)*, at para. 106.

[187] *See* ITC Report, Crawford Dissenting Views on Injury, at I-69 n.68 ("Despite only a modest ($5, or 0.9 per cent) decrease in per-ton net sales in fiscal year 1998, per-ton operating income fell by $26, as unit labour, factory overhead, and SG&A expenses increased by 10-20 per cent.").

[188] ITC Report, p. II-26

[189] Korea's first written submission paras. 226-236.

"factors" – that is, categories of data like import volume and profitability – and requires that they be "relevant" as well as "objective and quantifiable." However, it does not speak to how the competent authorities may quantify these factors. It certainly does not prevent the use of statistics that reflect, in part, products other than those under investigation, as long as they serve to quantify the factor in question with respect to the product in question.

7.220 In collecting and evaluating the injury data with respect to line pipe, the USITC recognized that most of the producers of this product also made other types of pipe, including OCTG, standard pipe, and structural pipe.[190] Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not imply that a Member has failed to evaluate industry-specific factors "of an objective and quantifiable nature," as required by Article 4.2(a) of the Safeguards Agreement. As noted above, the USITC carefully evaluated company allocation methods and verified the allocations of two of the largest US producers.

7.221 The United States also argues that the ITC specifically addresses Korea's arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry. The USITC explained:

> We are satisfied that increases in per-unit allocated overhead and SG&A resulting from declines in the production of other pipe products such as OCTG were not mistakenly or disproportionately attributed to line pipe. Increases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies. As indicated above, the Commission verified the data furnished by two of the largest domestic producers of line pipe and found the allocations made to be reasonable.[191]

7.222 The United States also argues that Korea's claim rests entirely on the faulty premise that OCTG shipments declined much more severely than shipments of line pipe and other pipe products made by the US firms.[192] These disproportionate declines in OCTG shipments were significant, according to Korea, because US producers allocated fixed costs to the various products they produced in proportion to their sales of the end-product. In other words, if sales of OCTG declined to a much greater degree than sales of line pipe, a disproportionate share of costs would be attributed to line pipe.[193]

7.223 According to the United States, Korea's only evidence for the proposition that OCTG sales fell disproportionately is Commissioner Crawford's statement (which is not part of the determination of the competent authorities of the United States) that net shipments of welded OCTG products "collapsed altogether between September 1998 and March 1999."[194] In fact, the US argues, line pipe shipments declined precipitously, at the same time and virtually to the same degree as OCTG shipments, in late 1998 and early 1999.[195] OCTG shipments stayed at depressed levels for slightly longer than line pipe shipments, but the two products showed similar and nearly simultaneous trends. There is thus no basis for Korea's argument that a disproportionate share of fixed costs were allocated to line pipe, thereby distorting the financial results of the line pipe industry. Furthermore, Korea's argument assumes that the largest component of average unit costs consisted of fixed costs. Operating leverage (as discussed on p. II-26 of the USITC Report) generally refers to the ability to

[190] ITC Report, p. II-25.

[191] ITC Report, p. I-31.

[192] Korea's first written submission para. 229 (quoting from USITC Report, Crawford Dissenting Views on Injury, p. I-69 n.67) (footnote omitted).

[193] Korea's first written submission, para. 234.

[194] ITC Report, p. I-69 n.67.

[195] US shipments of welded line pipe declined from 752,824 tons in 1997 to 640,061 tons in 1998, and from 388,844 tons in interim 1998 as compared to 265,757 tons in interim 1999. ITC Report, p. C-4, Table C-1.

increase profitability by an amount that is more than proportionate to the increase in sales volume. This is achieved by spreading fixed costs over a larger volume of products. Because raw material and direct labour are generally variable costs, the most significant contributors to operating leverage are the fixed portions of factory overhead and selling, general, and administrative expenses. Despite operating leverage explaining a portion of the changes in profitability during the period examined, the majority of average unit costs (raw material and direct labour) were ultimately variable and therefore could not be directly influenced by changes in production volume.[196] Thus, even if there had been a disproportionately large decline in OCTG sales – and Korea has produced no record evidence of this – the effect that this could have had on average unit costs for line pipe was nominal.

(3) Evaluation by the Panel

7.224 In essence, Korea's claim is based on the fact that company-wide fixed costs were allocated to domestic producers' line pipe and OCTG operations on the basis of turnover. According to Korea, as turnover in OCTG declined more than turnover in line pipe, a disproportionately large amount of fixed costs were allocated to line pipe.

7.225 As a preliminary matter, we see nothing in the Safeguards Agreement that would preclude the allocation of company-wide fixed costs to the specific product under investigation. Nor is there any provision in the Safeguards Agreement that would preclude the allocation of company-wide fixed costs on the basis of turnover.

7.226 Article 4.2(a) requires competent authorities to evaluate all relevant factors "having a bearing on the situation of" the relevant domestic industry. In our view, company-wide fixed costs have a bearing on the situation of the relevant domestic industry because of their impact on the relevant domestic industry's profits and losses. If the relevant domestic industry is defined as producers of a narrow category of product, company-wide fixed costs (such as general overhead) must be allocated to that narrow category of product. Failure to make such an allocation would mean that a relevant factor, namely fixed costs, which necessarily "ha[s] a bearing on the situation of" the relevant domestic industry because of its impact on profitability, would not be evaluated by the competent authorities.

7.227 A failure to evaluate company-wide fixed costs would defy economic reality. Company-wide fixed costs are necessarily incurred in respect of a number of products,[197] and must therefore be absorbed by the totality of those products. If a competent authority were only to take into account costs incurred specifically in respect of the product under investigation, it would not comply with the Article 4.2(a) requirement to evaluate all relevant factors "having a bearing on the situation of" the relevant domestic industry.

7.228 We note that investigating authorities commonly allocate company-wide fixed costs between specific product categories on the basis of turnover. Since there must be some form of allocation of company-wide fixed costs, we would only consider condemning the United States' resort to turnover allocation if Korea were able to propose an allocation methodology that removed the alleged distortion resulting from allocation on the basis of turnover, while still providing for full absorption of all company-wide fixed costs. Korea has failed to do so. By challenging the ITC's use of a turnover allocation, but by failing to propose any suitable alternative form of allocation, Korea effectively argues that company-wide fixed costs should not have been allocated to domestic producers' line pipe operations at all. As noted above, however, failure to take into account company-wide fixed costs would constitute a violation of Article 4.2(a).

[196] ITC Report, p. II-28, Table 10.
[197] Assuming that the company at issue produces more than one product.

7.229 The above analysis is based on a mandatory requirement set forth in Article 4.2(a). Korea's claim is based on Articles 4.1(c), and 4.2(a), (b) and (c) read together. Since we have found that Korea's Article 4.2(a) claim must fail, the remaining provisions relied on by Korea clearly cannot be read so as to result in a finding inconsistent with the mandatory requirement set forth in Article 4.2(a). Accordingly, we reject Korea's claim that the United States violated Articles 4.1(c), and 4.2 (a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries.

(ii) The profitability of some major producers was affected by factors not related to line pipe production

7.230 Korea claims that the industry's profitability performance, which was considered as part of the ITC's analysis of significant overall impairment, was skewed by the peculiar problems of certain producers, such as Lone Star Steel and Geneva Steel. Korea submits that their problems were unrelated to their line pipe production or line pipe imports.

(1) Geneva Steel

(i) Arguments by Korea

7.231 Korea relies on Commissioner Crawford's finding that:

> Geneva Steel temporarily shut down one of its two blast furnaces between December 1998 and September 1999, and filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in February 1999. While I do not discount the negative effects that these actions have had on the company's cost structure and on its employment levels, I find that they reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate.[36]

[36] *See, e.g., Transcript* at 51-52 (Mr. Johnsen, Executive Vice President and General Counsel, Geneva Steel) and CR at I-32, PR at II-25.[198]

7.232 Korea asserts that costs incurred by Geneva Steel in (1) closing down one of its blast furnaces between December 1998 and September 1999 and (2) filing for bankruptcy affected its profitability. However, since these costs should have been attributed to the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate, they should not have been attributed to its line pipe operations. Thus, the financial performance of Geneva Steel should not have been taken into account when the ITC analysed the financial health of the US line pipe industry.

(ii) Arguments by the United States

7.233 The United States submits that Commissioner Crawford's dissenting opinion does not form part of the ITC determination, and is therefore irrelevant to the Panel's deliberations. According to the United States, there was ample information on the record that the decline in Geneva Steel's line pipe business played a major role in the decision to shut down one of its blast furnaces, and in the company's bankruptcy. At the injury hearing, an executive from Geneva Steel stated that line pipe "is an essential part of our business from an overall margin perspective", and that Geneva Steel lost half of its volume of line pipe sales between 1997 and 1998.

(iii) Evaluation by the Panel

[198] ITC Report p. I-63.

7.234 This claim raises the issue of whether the negative impact on Geneva Steel's (and therefore the US industry's) profitability of costs associated with the temporary closure and filing for bankruptcy were properly attributed to that company's line pipe activities. In asserting that the costs associated with the temporary closure of the second blast furnace and the filing for bankruptcy were not properly attributed to that company's line pipe activities, Korea relies on Commissioner Crawford's statement that "the negative effects that these actions have had on the company's cost structure and on its employment levels … reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate".[199] In support of this statement, Commissioner Crawford referred to testimony given by a Geneva Steel[200] executive at the ITC injury hearing, and to parts of the ITC's confidential and public reports.

7.235 Regarding the testimony of the Geneva Steel executive, we see nothing to suggest that the costs associated with the temporary closure of the second blast furnace and the filing for bankruptcy were not properly attributed to Geneva Steel's line pipe activities. Although the Geneva Steel executive stated that "imports of hot-rolled sheet and cut plate surged in 1998, decimating those markets", he also stated that

> "In line pipe, the import surge has been just as dramatic. At Geneva, we have lost half of our volume between 1997 and 1999. We estimate that approximately 75 to 80 per cent of that lost tonnage is directly due to imports with only 20 to 25 per cent being related to demand. The effect is similar with respect to prices and profitability. Profitability suffers because of declining prices, but also from the pernicious effect of declining through put on average unit cost. For an integrated producer, such as Geneva Steel, this is particularly important, in light of the fact that we make our own feed stock for line pipe. The import crisis has forced us to shut down one of our two blast furnaces. … Increased orders of line pipe are vital to maintaining the base load of production we need to run that second blast furnace."[201]

Thus, the testimony of the Geneva Steel executive (in particular the statement that "[t]he import crisis[202] has forced us to shut down one of our two blast furnaces") supports the US argument that costs associated with the closure of Geneva Steel's second blast furnace, and its filing for bankruptcy, were related to a decline in its line pipe activities. There is nothing in this testimony to support Korea's argument that such costs should be attributed exclusively to a decline in Geneva Steel's hot-rolled sheet and cut-to-length plate activities.[203]

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[199] To the extent that some of Commissioner Crawford's findings and/or arguments have been relied upon as evidence by Korea (*see*, Korea Second Written Submission at para. 81), we will have regard to them in our findings. It is therefore not necessary for us to determine whether or not Commissioner Crawford's minority opinion forms part of the ITC determination.

[200] We note that Geneva Steel produces three main finished products: cut-to-length plate, hot-rolled sheet, and line pipe. Geneva Steel is an integrated producer of line pipe, in the sense that it uses internally produced hot-rolled steel to make line pipe.

[201] *Transcript of ITC Injury Hearing* (30 September 1999). p. 53.

[202] Given the specific context of these remarks, we are in no doubt that the relevant "import crisis" is that concerning imports of line pipe.

[203] Korea criticises the ITC for having accepted the Geneva Steel executive's testimony. Korea contrasts this with the ITC's alleged reluctance to accept testimony from a Respondent witness regarding the proportion of dual-stencilled pipe used for standard applications. First, we note that Korea's claim regarding Geneva Steel is based on a statement by Commissioner Crawford, and that Commissioner Crawford herself relied on the Geneva Steel executive's testimony (see ITC Report, p. I-63, note 36). Korea's criticism of the ITC therefore lacks some consistency. In addition, we note that the Respondent witness himself acknowledged that "there is no way of actually knowing [the proportion of dual-stencilled pipe used for standard applications] without tabulating every sale". In light of this admission by the Respondent witness himself, we believe that the ITC was entitled to question his testimony regarding the proportion of dual-stencilled pipe used for standard applications.

7.236 Regarding Commissioner Crawford's references to the confidential and public reports, we note that the United States has not made a copy of the confidential report available to us. However, the only data concerning Geneva Steel removed from the relevant part of the public report (i.e., II-25) appears to relate to "a question about the company's operations subsequent to bankruptcy" (emphasis supplied). In other words, the deleted information does not appear to relate to the closure of Geneva Steels second blast furnace, or to the time when Geneva Steel filed for bankruptcy. It is possible, therefore, to examine Commissioner Crawford's statement on the basis of the public report. However, we can see nothing in the part of the public report referred to by Commissioner Crawford to suggest that Geneva Steel's closure of its second blast furnace, or its filing for bankruptcy, was caused exclusively by its hot-rolled sheet and cut-to-length plate activities.

7.237 For these reasons, we see no reason to accept Korea's claim that the costs associated with the closure of Geneva Steel's second blast furnace, and with its filing for bankruptcy, should not have been attributed to its line pipe activities. We therefore see no reason why the ITC should have excluded Geneva Steel for the purpose of assessing the financial health of the US line pipe industry.

(2) Lone Star

(i) Arguments by Korea

7.238 Korea asserts that certain costs were allocated to Lone Star's line pipe operations for the purpose of calculating the industry-wide operating income for 1998, even though such costs were not related to the production or sale of line pipe. In this regard, Korea relies on the following statement by Commissioner Crawford:

> I note that the 1998 operating income on the record may be somewhat misleading. In 1998, Lone Star allocated *** of charges for *** (primarily a reduction in operating its *** in favor of ***). The results of this decision appear to have been felt most keenly in the second half of 1998. This decision had a marked impact on SG&A for the company and for the industry as a whole, reducing the industry's level of operating income to $10.8 million in 1998.[204]

(ii) Arguments by the United States

7.239 The United States submits that Commissioner Crawford's opinion does not form part of the ITC determination, and is therefore irrelevant for the Panel's deliberations. The United States also notes that the remaining Commissioners found that domestic producers had allocated increases in overhead and SGA on the basis of acceptable allocation methodologies. Furthermore, the United States asserts that the severe deterioration in the domestic industry's financial condition was not the result of any accounting decision by Lone Star Steel. In 1998, five of the 14 domestic producers operated at a loss in their line pipe operations, and five additional firms had reduced operating incomes. In interim 1999, 10 of the 14 firms operated at a loss, and all had reduced operating incomes, compared with interim 1998.

(iii) Evaluation by the Panel

7.240 We are not convinced that Commissioner Crawford's statement[205] alone constitutes a prima facie case that the ITC allocated certain non-line pipe costs to Lone Star's line pipe activities. Her

[204] ITC Report, p. I-63.

[205] We consider Commissioner Crawford's findings and/or arguments to the extent that they are relied on as evidence by Korea (see footnote 199). It is therefore not necessary for us to determine whether or not Commissioner Crawford's minority opinion forms part of the ITC determination.

statement must be weighed against the remaining Commissioners explicitly finding that "[i]ncreases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies".[206]

7.241 Furthermore, we note that in response to a question from the Panel, the United States "assure[d] the Panel that adding the Lone Star charge would not increase the industry's 1998 aggregate operating income of $ 10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one per centage point".[207] Thus, even adding the charge, the domestic industry's 1998 aggregate operating income would still not have exceeded $12.96 million, compared to $34.662 million in 1997. In addition, operating income for interim 1999 – **minus** $12.786 million – was not affected by the 1998 Lone Star charge. According to the United States, adding the Lone Star charge would not increase the 1998 ratio of operating income to net sales to more than 3.9 per cent (from the 2.9 per cent presently reported). Korea argues that a ratio of 3.9 per cent is close to the 1995 ratio of 4.3 per cent, and that the ITC found the financial situation of the domestic to be "healthy" at that time.[208] However, the fact that a ratio of 4.3 per cent may be "healthy" does not necessarily mean that a ratio of 3.9 per cent (i.e., 9.3 per cent less) is equally "healthy", or inconsistent with a finding of serious injury. Indeed, a 1998 ratio of 3.9 per cent would still have to be measured against a 1997 ratio of 8.1 per cent. In addition, the Lone Star charge did not affect interim 1999, when the ratio was **minus** 11.4 per cent. Finally, we note that the ITC did not rely only on the operating income ratio in its assessment of the industry's financial performance; it also relied on absolute declines in revenue, and noted that in 1998 ten of the 14 US producers reported reduced operating income or increased losses.[209] Thus, even if the Lone Star charge had not been deducted from its operating income, we do not consider that this would have invalidated the ITC's finding of serious injury.

7.242 In light of the above, we see no basis for concluding that the injury data on which the ITC relied was flawed because it contained data from other industries.

(b) The downturn in the industry's condition was temporary and the condition of the industry was improving at the end of the period of investigation

(i) Arguments by Korea

7.243 Korea claims that the ITC erred in finding "serious injury", because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation.

7.244 According to Korea, the 1998 / interim 1999 downturn should have been viewed in the context of record industry performance in 1997. Korea asserts that a temporary downturn from a peak performance period does not constitute "significant overall impairment", especially in an industry that traditionally experiences wide swings in demand and profitability. Korea argues that even the US industry itself recognised that it was only in a temporary downturn, as evidenced by substantial investment in new / modernised production facilities. Thus, investments by the industry doubled in 1997, and doubled again in 1998. Capital expenditures increased another 30 per cent in the first half of 1999. Furthermore, one new producer began operations in 1998, and another in 1999. Nine US producers made capital expenditures in excess of $1 million in at least one fiscal year.

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[206] ITC Report, p. I-31.

[207] Response to Question 8 to the United States at the first substantive meeting (see Annex B-2). We understand the United States to mean that, if the Lone Star charge had not been deducted from its 1998 operating income, the industry's 1998 aggregate operating income would not have increased by more than 20 per cent, and the ratio of operating income to net sales for 1998 would not have increased by more than one per centage point.

[208] Korea's second written submission at para. 98.

[209] ITC Report, p. I-18, I-20.

7.245 Korea asserts that the industry was not in a state of "significant overall impairment" at the time the ITC made its serious injury determination. Korea quotes from the *US - Wheat Gluten* panel, which "consider[ed] it essential that current serious injury be found to exist, up to and including the very end of the period of investigation".[210] Korea asserts that the "very end of the period" demonstrated a continuing decline in imports and an improving market for the US producers. Thus, the volume of US mill shipments stabilized in 1999 and began recovering strongly beginning in April 1999, and US producers had already announced significant price increases. Demand was also increasing. Increased domestic demand for line pipe and increased domestic shipments were due to an improvement in oil and gas prices that began in April 1999.

(ii) Arguments by the United States

7.246 The United States submits that Korea's argument that a one-year downturn from a historical high in an industry should not be viewed as a "significant overall impairment" of the industry[211] has no basis in the Safeguards Agreement. Article 4.1(a) defines "serious injury" as "a significant overall impairment in the position of the domestic industry." As Korea itself explains, the word "impair" is defined as "to weaken or make worse, to lessen in power," "overall" indicates that such impairment must be widespread and comprehensive, and "position of the domestic industry denotes its overall health."[212] The downturn experienced by the US industry was sufficient to satisfy the Safeguards Agreement's requirements of serious injury or threat of serious injury caused by increased imports. The record before the ITC contained extensive evidence to satisfy fully each of these components of the definition of serious injury. The condition of the domestic line pipe industry deteriorated greatly in 1998, and in interim 1999 as compared with interim 1998. This deterioration was observable in virtually every factor examined by the ITC and broadly affected industry participants. There is no basis for arguing that this did not amount to an "impairment" of the domestic industry, or that this impairment was not widespread and comprehensive.

7.247 The United States denies that domestic shipments of line pipe began recovering strongly in April 1999. Although shipments did increase in the months following the first quarter of 1999, average monthly shipments in the period April through August 1999 remained lower than in any prior year of the period investigated except 1994. With regard to capital expenditures by the domestic industry, the United States capital investment projects in the steel industry generally involve long lead times, and there was evidence in the record that 1998 capital spending reflected analysis and decisions that preceded the 1998 surge in imports.

7.248 Furthermore, the United States denies that the Safeguards Agreement requires a finding of current serious injury at the time of the competent authority's serious injury determination. There is no requirement that competent authorities collect information up to the day of their determination. Furthermore, the United States disagrees that the US line pipe industry was improving at the end of the period of investigation. The United States asserts that imports were actually increasing in May and June of 1999. With regard to the price increases referred to by Korea, the United States notes that in fact only the price increase announcements were made on 15 September 1999, and that the announced increases were to take effect in late 1999 and early 2000. The price increase announcements on which Korea relies do not prove that the industry was no longer in a state of significant overall impairment, for several reasons. First, there is no evidence in the record that these attempts at price increases were actually successful. As the two Commissioners finding threat of serious injury indicated in their views,[213] mere announcements of future price increases have little probative value, as it is always unclear whether these will actually "stick" in the market. Second, the evidence indicates price increase announcements by only three firms (Maverick Tube Corporation,

[210] *US – Wheat Gluten*, at para. 8.81.
[211] Korea's first written submission, paras. 245-251.
[212] Korea's first written submission, para. 247.
[213] ITC Report, p. I-48 n.88.

Lone Star Steel Company, and Newport Steel) out of the 14 producers in the industry. Third, one of those companies (Lone Star) explained the price increase as being "necessary to offset increases in raw material costs," and another (Newport Steel) stated that the price hike was "[d]ue to an increase in overall costs to manufacture tubular goods."[214] Furthermore, the price increase announcements made in August 1999 coincided with the imposition of antidumping duties and the entry into effect of suspension agreements, affecting hot-rolled steel, the principal raw material used in the production of line pipe. Thus, the price increase announcements reflected rising raw material costs rather than an improvement in the condition of the industry as Korea contends.

(iii) Evaluation by the Panel

7.249 Korea claims that a finding of serious injury is precluded if there is only a temporary, one-year downturn in the condition of the industry, following an historical high, and if the condition of the industry is improving at the end of the period of investigation. In examining this claim, we shall first consider Korea's argument that there was only a temporary downturn in the condition of the industry. We shall then consider Korea's argument that the condition of the industry was improving at the end of the period of investigation.

7.250 According to Korea, the temporary nature of the downturn in the US line pipe industry was evidenced by the capital investments made by that industry during the downturn. However, there is evidence in the ITC report to the effect that "1998 investment expenditures reflect pre-import surge analysis and decisions".[215] The ITC noted that "capital investment projects in the steel industry generally require long lead times in order to afford sufficient time for project approval, securing of financing, installation, and start-up operations".[216] In addition, the ITC found that "there is evidence that the decline in profitability since the middle of 1998 has caused the postponement or elimination of discretionary capital spending".[217] In light of these considerations, we find no basis for concluding that capital investments made in 1998 and 1999 indicate the temporary nature of the downturn experienced by the US line pipe industry.[218]

7.251 In support of its argument that the condition of the domestic industry was improving at the end of the period of investigation, Korea refers to increasing demand, increasing domestic shipments, and domestic producer price increases.

7.252 There would appear to be little doubt that demand was increasing at the end of the period of investigation. However, increasing demand at the end of the period of investigation is not necessarily indicative of an absence of serious injury at the end of the period of investigation. Article 4.2(a) enumerates a number of factors ("changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment") which must[219] be evaluated by Members in making a determination of serious injury. Although there may be circumstances in which demand is relevant to the question of serious injury, the fact that demand is not included as an Article 4.2(a) factor clearly indicates that this will not always be the case. Thus, changes in demand at the end of the period of investigation need not necessarily be taken into account by competent authorities for the purpose of making a finding on serious injury. A competent authority would only need to evaluate demand for the purpose of determining the existence of serious injury if it were shown in a given case that demand was a "relevant factor[] … having a bearing on the situation of that industry". Korea has not

[214] Post-hearing Injury Brief of Japanese and Korean Respondents, Exhibit 1.
[215] ITC Report, note 122.
[216] ITC Report, p. I-42.
[217] ITC Report, p. I-20.
[218] We note that the parties disagree as to the amount of increased capacity during the POI. However, this issue was raised by Korea in the context of its claim regarding causation (see, for example, para. 75 of Korea's oral statement at the second substantive meeting). There is therefore no need for us to resolve this issue at this juncture.
[219] *See Argentina – Footwear Safeguard (AB)* at para. 136.

established that this was the case in the line pipe investigation. Indeed, increased demand at the end of the period of investigation may be of extremely limited relevance to the state of the domestic industry, since there is no guarantee that the increased demand will be met by domestic shipments rather than by imports. For these reasons, we do not consider that increased demand at the end of the period of investigation necessarily means that the condition of the domestic industry was improving at the end of the period of investigation, or that a finding of serious injury is precluded.

7.253 With regard to Korea's argument that shipments began recovering strongly in April 1999, we note the US argument that average monthly shipments for April – August 1999 were lower than average monthly shipments for any prior year other than 1994. Korea has not disputed this argument. We further note that shipments declined from June to July 1999, and from July to August 1999. Shipments in August 1999 were only five per cent higher than shipments in April 1999. For these reasons, we see no basis to accept Korea's argument that shipments began recovering strongly in April 1999. In any event, we consider that an upturn in respect of one Article 4.2(a) serious injury factor, such as shipments / sales, towards the end of the period of investigation does not necessarily indicate that the domestic industry is recovering, especially if all, or the majority, of the remaining serious injury factors demonstrate negative trends over the entirety of the period of investigation.[220]

7.254 With regard to price increases, announcements were made by three domestic producers in September 1999. The announced price increases were to take effect in late 1999 and early 2000. We are not convinced that the announced price increases indicate that the condition of the domestic industry was improving at the end of the period of investigation. This is because, according to one witness at the ITC's injury hearing, the price increases "are sticking, but … the mills … will verify that their raw material costs pretty much are offsetting that".[221] Another witness stated that "[t]he prices are up. We did announce a price increase, but it was not market-driven so much as it was cost-driven … Those costs have gone up for us more than the price increase we announced, so we are still under water significantly".[222] Since it therefore appears that the announced price increases were driven by cost increases, it is far from certain that the announced price increases would have improved the state of the domestic industry (rather, they may simply have prevented the state of the domestic industry from deteriorating further). Furthermore, since the price increases were made by only three (out of 14) domestic producers, it is far from certain (1) that they would have had any significant impact on the overall state of the industry (especially as the prices of one of the largest producers, California Steel, were unaffected by these increases), and (2) that they would have been followed by the remaining domestic producers.

7.255 We recall that the onus is on Korea, as the complaining party, to assert and prove its case.[223] For the above reasons, we find that Korea has failed to assert and prove that the ITC erred in finding serious injury because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation. We reject Korea's claims accordingly.

(c) Adequate explanation and justification: the requirements of Articles 3.1 and 4.2(c) of the Safeguards Agreement

(i) Arguments by Korea

[220] Korea has not claimed that other Article 4.2(a) factors show an upturn in domestic industry performance at the end of the POI.

[221] ITC injury hearing transcript, page 126 (Congressman Berry).

[222] ITC injury hearing transcript, page 127 (Mr. Dunn).

[223] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, report of the Appellate Body, WT/DS33/AB/R, p. 16, adopted 23 May 1997.

7.256 Korea claims that the ITC's serious injury finding is inconsistent with Article XIX and Articles 3.1 and 4 because the ITC's conclusions are not adequately explained and justified. According to Korea, Articles 3 and 4.2(c), as interpreted by the panel and Appellate Body in *Argentina - Footwear Safeguard*, and by the Appellate Body in *Wheat Gluten* and *Lamb*, require that the reasoning and explanation of the ITC's determination be contained in its published report. Korea argues that the United States violated this requirement because the published ITC determination does not contain certain confidential record data which forms the basis for the Commissioners' conclusions, and because the ITC Commissioners reached contrary conclusions on the record data, without providing sufficient explanation for, or reconciling, their different views. In particular, Korea notes that three Commissioners found serious injury, two found a threat of serious injury, and one found neither serious injury nor threat of serious injury. According to Korea, "[t]he first question is, did the ITC Majority and/or the Separate Views on Injury, consider the[] facts or issues sufficiently, or at all? The second question is, if they did, why weren't the[] facts and issues reconciled with the decision reached?"

(ii) Arguments by the United States

7.257 The United States rejects Korea's argument that the fact that the Commissioners of the USITC were not unanimous in their injury findings renders the ITC's determination inconsistent with Articles 3.1 or 4.2(c). Articles 3 and 4 of the Safeguards Agreement impose requirements concerning the publication of the decisions of the "competent authorities of a Member". The Safeguards Agreement does not address the question of how the "competent authorities of a Member" make their decisions. This is a matter left to the Member. Under US law the competent authority for making serious injury determinations is the USITC. US law does not require that decisions of the USITC be unanimous. The decisions of the five Commissioners who made affirmative findings in this case constitute the only determination of the USITC. The views of the one Commissioner who made a negative decision do not constitute, and are not a part of, the USITC determination.

7.258 The United States notes that Article 3.1 provides that the "competent authorities shall publish a report setting forth *their* findings and reasoned conclusions . . . ." Since the views of the Commissioner who found in the negative do not constitute a determination of the USITC, and thus of the competent authorities, the United States is not required by Article 3.1 to publish the views of the dissenting Commissioner. The fact that the United States has disclosed more than is required of it by the Safeguards Agreement does not increase the burdens imposed on it by the Safeguards Agreement. Thus, the fact that a Commissioner whose views do not form part of the determination did not agree with that determination does not undermine the decision of the five Commissioners who made affirmative findings, which collectively constitutes the determination of the USITC, and thus of the United States.

7.259 Nor does the fact that two Commissioners found increased imports to be a substantial cause of threat of serious injury undermine the finding of the three Commissioners who found such imports to be a substantial cause of present serious injury. The difference between a finding of serious injury and one of threat is a matter of degree and timing; it does not involve Commissioners coming to opposite conclusions. The Commissioners did not reach contrary findings of fact. After evaluating and weighing the many factors involved in the injury analysis, the Commissioners making affirmative injury findings merely came to somewhat different conclusions as to the timing of when serious injury had occurred or would occur.

7.260 The United States contends that Korea's argument also fails because the Safeguards Agreement does not require the competent authorities of a Member to choose between serious injury or the threat thereof. Article 2 permits a Member to impose a safeguard measure if that Member has determined that a product is being imported in such quantities and under such conditions "as to cause *or* threaten to cause serious injury to the domestic industry." The Safeguards Agreement does not require to choose between serious injury or threat thereof. According to the US, the five

Commissioners making affirmative findings in the Line Pipe investigation might each have found "serious injury or the threat thereof" (without specifying which), and their collective determination would still have been consistent with the requirements of Article 2 of the Safeguards Agreement.

7.261 The United States denies that findings of serious injury and threat of serious injury are mutually exclusive. Since a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, the nature of a safeguard measure depends primarily on the condition of the industry and its need for adjustment. The competent authorities' finding of serious injury or threat of serious injury is a legal characterization of the condition of the industry. Thus, there is likely to be a relationship between the finding of the competent authorities and the safeguard measure applied by a Member. However, it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure. In contrast to the diversity of potential industry situations and safeguard measures, the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment.

(iii) Evaluation by the Panel

7.262 We shall begin by examining Korea's claim under Article 3.1, which requires Members to set forth findings and reasoned conclusions on "all pertinent issues of fact and law" in their published report. In order to address Korea's claim under this provision, we must determine whether the ITC Report, which contained a finding of "serious injury or the threat of serious injury", satisfied this requirement.

7.263 The basic conditions for the application of safeguard measures are contained in Article 2.1. In our view, the fulfilment of these basic conditions is a "pertinent issue[] of … law" in respect of which "findings" or "reasoned conclusions" must be included in the published report. By virtue of Article 2.1, a safeguard measure may only be applied if a product "is being imported … in such increased quantities, … and under such conditions as to cause or threaten to cause serious injury to the domestic industry". As confirmed by Article 4.2(a), one of the conditions for the application of a safeguard measure is a determination that "increased imports have caused or are threatening to cause serious injury". Thus, Article 3.1 requires Members to include in their published reports findings or reasoned conclusions on whether "increased imports have caused or are threatening to cause serious injury".

7.264 Korea claims that this requirement cannot be met by a finding of "serious injury or the threat of serious injury". According to Korea, Article 3.1 requires either a discrete finding of serious injury, or a discrete finding of threat of serious injury. We agree, as a result of the definitions of "serious injury" and "threat of serious injury" contained in Article 4.1(a) and (b) respectively:

> (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
>
> (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent …"

Since "threat of serious injury" is defined as "serious injury that is clearly imminent", necessarily "threat of serious injury" can only arise if serious injury is not present. If serious injury is present, it

cannot at the same time be "clearly imminent". In other words, "serious injury" and "threat of serious injury" are mutually exclusive. Accordingly, the Article 3.1 requirement that Members include in their published reports findings or reasoned conclusions on whether "increased imports have caused or are threatening to cause serious injury" cannot be fulfilled by a finding of "serious injury or the threat of serious injury". Rather, Article 3.1 requires a finding either that increased imports have caused serious injury, or that increased imports are threatening to cause serious injury.

7.265 The United States asserts that although the competent authorities' finding of serious injury or threat of serious injury is a "legal characterization of the condition of the industry", "it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure." According to the United States, "the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment."[224]

7.266 We agree with the United States that the condition of the domestic industry is the benchmark for application of a safeguard measure.[225] However, we disagree that the terms "serious injury" and "threat of serious injury" are merely labels that do not themselves indicate the condition of the industry. On the contrary, the term "serious injury" signifies that the condition of the industry is one of "significant overall impairment", whereas the term "threat of serious injury" signifies that the condition of the industry is one where "significant overall impairment" is "clearly imminent". In other words, the terms "serious injury" and "threat of serious injury" do indicate the condition of the industry, as a result of the definitions of those terms contained in Article 4.1(a) and (b).

7.267 The US argument that the terms "serious injury" and "threat of serious injury" are merely labels is also contradicted by the first sentence of Article 5.1, whereby "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy *serious injury* and to facilitate adjustment" (emphasis supplied). In our view, this provision establishes a clear link between the benchmark for the application of a safeguard measure (i.e., the condition of the industry), and the term "serious injury". If the term "serious injury" were not itself indicative of the condition of the industry, we fail to see why that term would have been included in the first sentence of Article 5.1. Article 5.1 allows a Member to apply a safeguard measure to "prevent … serious injury", which presupposes a finding of threat of serious injury, or to "remedy serious injury", which presupposes a finding of serious injury. Since Article 5.1 does not allow Members to apply safeguard measures to "prevent and/or remedy serious injury", we consider that Members must clearly determine in advance whether there is either a threat of serious injury to be prevented, or present serious injury to be remedied.

7.268 Furthermore, Article 5.2(b) precludes quota modulation "in the case of threat of serious injury". In other words, there are important substantive consequences resulting from whether a Member finds "serious injury" or "threat of serious injury". In our view, this further confirms that the terms "serious injury" and "threat of serious injury" are not mere labels.

7.269 Turning to Korea's claim under Article 4.2(c), this provision requires Members' competent authorities to

[224] US response to Question 1 from the Panel at the first substantive meeting (see Annex B-2).

[225] The United States also made this argument in para. 4 of its additional statement at the second substantive meeting.

> 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.

7.270 Given the inclusion of the phrase "in accordance with the provisions of Article 3", we consider that Article 4.2(c) should be read in light of Article 3. In particular, given the similarities between the last sentence of Article 3.1 and Article 4.2(c), we consider that Article 4.2(c) should be read in light of the last sentence of Article 3.1. Accordingly, we are of the view that the "detailed analysis" to be published under Article 4.2(c) should include "findings and conclusions reached on all pertinent issues of fact and law", including a finding and conclusion on whether there is either serious injury, or threat of serious injury.

7.271 For the above reasons, we find that the United States violated Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury.

7.272 In respect of Korea's claim that a failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c), we note that the panel in *US - Wheat Gluten* found that

> the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2.

7.273 We see no reason not to be guided by the *US - Wheat Gluten* panel's finding in respect of Korea's Article 4.2(c) claim. Similarly, and given the express reference in Article 4.2(c) to Article 3, we fail to see how the Article 3.1 (last sentence) requirement to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" could entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2. Accordingly, we reject Korea's claim that failure to include relevant confidential information in a published determination is *per se* a violation of Articles 3.1 and 4.2(c).

3. Threat of serious injury

(a) Arguments by Korea

7.274 Korea claims that the ITC finding of threat of serious injury did not comply with the Article 4.1(b) requirement that "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility". Korea claims that the two Commissioners who found threat of serious injury did so merely on the allegation, conjecture or remote possibility that imports would increase in the future, despite a decline in imports at the end of the period of investigation. Korea also claims that the ITC findings of threat of serious injury did not comply with the requirements of Article 2 regarding the conditions for a safeguard measure.

(b) Arguments by the United States

7.275 The United States asserts that, in making their threat of serious injury determination, Commissioners Askey and Bragg did not rely on a threat of increased imports, but on an actual surge in import levels between 1997 and 1998 that continued through interim 1999. These two Commissioners therefore made the finding of increased imports that Korea implies is a sufficient basis for a threat of serious injury. This is not changed by the fact that the two Commissioners also

made a supplemental finding that subject imports were likely to increase in the foreseeable future, a finding which further supported their conclusions of a threat of serious injury. The United States also denies that the two Commissioners failed to identify a causal link between increased imports and threat of serious injury.

(c) Evaluation by the Panel

7.276 In our view, the facts do not support Korea's claim that Commissioners Askey and Bragg found a threat of serious injury merely on the allegation, conjecture or remote possibility that imports would increase in the future. In respect of increased imports, the two Commissioners found:

> Although we find that the existing increase in imports is a cause no less than any other cause of the threat of serious injury to the domestic line pipe industry, we *further* find that, notwithstanding the decline in subject import volume evidenced between interim periods, subject imports are likely to increase in the foreseeable future.[226] (emphasis supplied)

Accordingly, we consider that Commissioners Askey and Bragg based their determination primarily on actual increased imports, and merely made a supplemental finding ("we further find") regarding the threat of future increased imports.[227] There is, therefore, no factual basis to Korea's Article 4.1(b) or 2 claims.

4. Causal link between increased imports and serious injury or threat of serious injury

(a) Arguments by Korea

7.277 Korea claims that the ITC violated Article 4.2(b) by failing to properly demonstrate that injury caused by other factors had not been attributed to increased imports. Korea relies on the Appellate Body's finding in *US - Wheat Gluten* that, in order to comply with the non-attribution requirement, investigating authorities must distinguish the injurious effects caused by increased imports from the injurious effects caused by other factors. Korea asserts that the ITC failed to make this distinction.

7.278 Korea asserts that the ITC did not properly distinguish the injurious effects caused by these other factors from the injurious effects of increased imports, with the result that the ITC was not able to assure that it did not attribute injury caused by other factors to increased imports. In particular, the US causation standard - substantial cause - requires the ITC to look at the injurious effects of other factors in isolation, relative to the injurious effects of increased imports (i.e., are the other factors individually a greater cause of injury than increased imports?). The substantial cause standard does not require the ITC to consider the possibility that the combined injurious effects of these other factors taken together could have caused any serious injury suffered by the US line pipe industry.

7.279 Korea argues that the entire focus and the sequence of the US evaluation of "other factors" in this case is inconsistent with Article 4.2(b) and contains the same methodological flaws already identified by the Appellate Body in *US – Lamb Meat*. The ITC began with an analysis of the combined effects of other factors plus imports and determined whether, all together, they caused "injury." Based on that finding, the ITC then examined whether "the impact of increased imports was as great or greater than the effect of the downturn in demand," or any other individual factor. That examination of the "relative" impact of imports, in and of itself, was the only basis, for deciding that imports were a substantial cause of the serious injury. The ITC did not independently evaluate

[226] ITC Report, p. I-48.

[227] The issue of whether or not the two Commissioners were correct to find actual increased imports has not been raised by Korea in this context.

whether increased imports bore a "substantial and genuine" relationship to serious injury. The fact that imports may be a greater cause of injury than a single other factor cannot establish that increased imports caused serious injury.

(b) Arguments by the United States

7.280 The United States asserts that the ITC properly distinguished the effects of other factors from the effects of increased imports. In particular, the ITC examined six factors other than increased imports as possible other causes of serious injury. While the ITC found that one other causal factor, declining demand in the oil and gas sector, contributed to the serious injury experienced by the domestic industry, it also found that the impact of increased imports was as great or greater than the effect of the downturn in oil and gas sector demand.

7.281 According to the United States the ITC distinguished any injurious effects caused by increased imports from the effects of declining demand due to decreased oil and gas drilling and production by finding that the decline in demand for line pipe could not explain the level of financial losses experienced by the domestic industry, the domestic producers' loss of market share, or the across–the-board price declines affecting line pipe products not used in oil and gas gathering applications. Therefore, the ITC did not improperly attribute to imports injury caused by the decline in oil and gas demand, and its findings demonstrated that the causal link between the increased imports and the serious injury was undisturbed by any contribution to injury resulting from reduced oil and gas drilling and production activities. The ITC also considered competition among domestic producers, changes in the OCTG market, declines in the domestic industry's exports, increases in per-unit overhead and SG&A resulting from declines in overall production and declining raw material costs which had been the cause of declining line pipe prices, as other possible causes of injury to the domestic production. For each of the factors above the ITC found that they were not a more important cause to the serious injury than increased imports.

(c) Evaluation by the Panel

7.282 Korea's claim is based on the second sentence of Article 4.2(b), which provides:

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

7.283 The ITC identified a number of factors (in addition to increased imports) which caused injury to the line pipe industry. These factors were a decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities; competition among domestic producers; a decline in export markets in 1998 and interim 1999; a shift from OCTG production to line pipe production; and a decline in raw material costs.

7.284 The ITC analysed the relative causal importance of these factors by determining whether any factor is a more important cause of injury than increased imports.[228] This type of analysis is very similar to that reviewed by the Appellate Body in *US- Wheat Gluten* and *US –Lamb Meat*. Therefore, the Appellate Body's analysis and findings in these cases will provide useful guidance for the Panel in this case.

7.285 In *US – Lamb Meat* the Appellate Body referred to the need to establish

[228] In a safeguards investigation the standard applied by the ITC consists of determining whether the subject product is being imported in such increased quantities as to be a "substantial cause" of serious injury. The term "substantial cause" is defined in the statute as "a cause which is important and not less than any other cause" (Section 202 of the Trade Act of 1974, as amended; notified to the WTO and circulated as G/SG/N/1/USA/1)

> "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof. As part of that determination, Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.[229]

7.286 The Appellate Body emphasised that,

> [t]o be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC should also have assessed, to some extent, the injurious effects of these other factors.[230]

7.287 Among the other factors causing injury that were analysed by the ITC, the ITC paid particular attention to the decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities. In its evaluation of this other factor, the ITC:

> "recognize[d] that apparent consumption of line pipe in 1999 was significantly lower than in 1998. We presume that this decline in demand largely resulted from reduced oil and natural gas drilling and production activity, as respondents argued. There is no question that such a substantial decline in demand contributed to the serious injury experienced by the domestic industry in 1998-99."
>
> "For several reasons, however, we are not persuaded that the decline in oil and natural gas activities was a greater contributing factor to the industry's serious injury than the imports." [231]

7.288 From the above findings of the ITC, it can be established that the methodology used in its analysis of the injury caused by the oil and gas industry decline has the objective (consistent with applicable US law) of determining whether this factor is a more important cause of injury than the increased imports. We are not convinced that such a determination is enough to satisfy the requirements of Article 4.2(b), which mandates that injury caused by other factors not be attributed to the increased imports. Indeed, the ITC recognizes that the decline in the oil and gas industry was having injurious effects on the domestic line pipe industry. However, it is not apparent from this analysis how, if at all, the ITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The ITC's analysis provides no insight into the nature and extent of the injury caused by the decline in the oil and gas industry. Instead, as in the *US – Lamb Meat* case, the United States effectively assumed that the decline in the oil and gas industry did not cause the injury attributed to increased imports. As found by the Appellate Body in *US –*

[229] *US – Lamb Meat (AB)* at para. 179.
[230] *US – Lamb Meat (AB)* at para. 185.
[231] ITC Report, p. I-28.

Lamb Meat, such an assumption is inconsistent with Article 4.2(b). The same assumption was effectively made by the ITC in respect of the other causes of injury identified above, since its analysis of those factors was also confined to a determination of whether the injury caused by the relevant factor was not a more important cause of serious injury than increased imports.

7.289 We further note that the ITC immediately determines whether there is a link between the increased imports and the serious injury, without first attempting to separate out injury that is being caused by other factors. Then the ITC takes each of the other factors, one at a time, and examines its relative causal importance with respect to the serious injury that it has previously determined to exist (*i.e.*, injury that has been caused by increased imports and all other factors). We note that the serious injury under examination remains "polluted" by the injurious effects, however, of the remaining other factors. Therefore, the United States is not assessing the relative causal importance of the injurious effects of the other factor at issue against the injurious effects of the increased imports. Rather, it assesses the injurious effects of the other factor at issue against the injurious effects of increased imports and the remaining other factors. We do not consider that such an analysis allows an investigating authority to determine whether there is "a genuine and substantial relationship of cause and effect" between the serious injury and the increased imports.

7.290 In light of the above, we find that the ITC in its report did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports. For this reason, we find that the United States acted inconsistently with Article 4.2(b) of the Safeguards Agreement.

7.291 Korea also claims that the United States failed to demonstrate a causal relationship between the increased imports and the serious injury for two other reasons. First, Korea argues that there was no coincidence of trends between the imports and the performance of the domestic industry. Second, Korea argues that conditions of competition, including the relationship between volumes and price declines and an overstatement of the imports, did not demonstrate that there was a causal relationship between the increased imports and the performance of the industry. Since we have already concluded that the US causation methodology as performed in this case is not in compliance with Articles 4.2(b) because it failed to ensure that injury caused by other factors was not attributed to the increased imports, we consider that it is not necessary to rule on these additional arguments.

7.292 We also note that Korea claims that, with respect to the threat of serious injury finding by two of the ITC Commissioners, there was a failure to demonstrate a causal relationship between the imports and the imminent serious injury. In essence the methodology applied by the ITC for a finding of a causal link between the serious injury and the increased imports and between the threat of serious injury and the increased imports is one and the same. To the extent that we have already found that the methodology used for a finding of causation in the case of serious injury does not comply with Article 4.2(b) and that such methodology is the same as the one used for a finding of causation in the case of threat of serious injury, it follows that the methodology used for a determination of existence of a causal link between the increased imports and a threat of serious injury is also in violation of Article 4.2(b).

5. Unforeseen developments

7.293 Korea asserts that the US violated Article XIX by failing to demonstrate any unforeseen developments justifying the need for safeguard action. Korea asserts that there is no indication in the ITC determination that the ITC addressed the issue of unforeseen developments. Therefore, Korea claims that the ITC determination does not demonstrate unforeseen developments.

7.294 The United States asserts that Korea itself has identified the relevant unforeseen developments, by referring to the unexpected collapse in oil prices in late 1998 and early 1999. In its

first written submission the United States also points to the East Asian financial crisis as another unforeseen development of importance.

7.295 We note that the requirement to demonstrate the existence of unforeseen developments in order to apply a safeguard measure under Article XIX is an issue that is well established in WTO law. The Appellate Body in their *Korea – Dairy Safeguard* report, when referring to the issue of unforeseen developments, found:

> [W]e do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.[232]

This finding has been subsequently confirmed by the Appellate Body in its reports on *Argentina – Footwear Safeguard, US – Wheat Gluten* and *US – Lamb Meat*. Moreover, we do not understand the United States to dispute the existence of the requirement to demonstrate the existence of unforeseen developments.

7.296 In evaluating the US compliance with the requirements of Article XIX we observe the Appellate Body's finding in *US – Lamb Meat* that:

> as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied" consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed.[233] (footnote omitted)

We also note that the Appellate Body has established that the demonstration of unforeseen developments is required not only before the measure is applied but also that such a demonstration must appear in the report of the investigating authorities:

> In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of [Article 3.1 SA] dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.[234]

7.297 In view of the Appellate Body's findings, we turned to the ITC report in order to verify whether the United States had carried out the demonstration required by Article XIX. In this case, the ITC report does not contain any demonstration of the existence of unforeseen developments. While the US arguments in these proceedings point to the collapse in oil and gas prices and the East Asian financial crisis as being the unforeseen developments referred to in Article XIX, they were not considered or identified as such in the ITC report. Rather, the collapse in oil and gas prices was examined in the ITC report only as another factor causing injury to the domestic industry.[235] Regarding the East Asian financial crisis, the US points to page II-66 of the ITC report where it is mentioned that:

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[232] *Korea - Dairy Safeguard (AB)* at para. 85.
[233] *US – Lamb Meat (AB)* at para. 72.
[234] Id.
[235] ITC Report, p. I-27 to I-30.

> A few producers felt that one reason for the increase in imports was a decrease in demand in Asia due to the financial crisis there.

This reference can hardly be considered a demonstration of the existence of unforeseen developments as required by Article XIX.

7.298 To obtain further clarification on this issue, we requested the United States to indicate to the Panel where it considered that it had fulfilled its obligation to demonstrate the existence of unforeseen developments.[236] The United States did not directly answer our question and limited its reply to reiterate its argument that Korea had conceded the existence of unforeseen developments and that therefore it had failed to make a *prima facie* case of violation of Article XIX. Therefore, in the absence of anything in the ITC report or any other document leading up to the imposition of the measure that contains a demonstration of the existence of unforeseen developments, we find that the United States has failed to comply with its obligations under Article XIX in its application of a safeguard measure to imports of line pipe.

7.299 Now we turn to the US argument that Korea has failed to make a *prima facie* case of violation of Article XIX by conceding that certain conditions leading up to the increase in imports were unexpected. We note that the Appellate Body has made it very clear that the existence of unforeseen developments is a prerequisite that must be demonstrated before the safeguard measure is applied. Therefore it is for the competent authorities of a Member to ensure the demonstration of the existence of unforeseen developments at the time of the investigation. As we have found above the United States has failed to do so. The fact that, in its submission, Korea may have pointed to some circumstances which led to an increase in the imports, and that those circumstances may have not been foreseen, does not change the fact that before the measure was applied the ITC did not demonstrate the existence of unforeseen developments. Korea correctly argued before the Panel that there was no indication that the ITC addressed the issue of unforeseen developments in its determination. We do not see how else Korea could have complied with the burden to make a *prima facie* case of failure by the ITC to demonstrate the existence of unforeseen developments. Nor do we see how Korea could be understood to have conceded the existence of unforeseen developments. Therefore, we reject the US argument that Korea has failed to make a *prima facie* case that the United States is not in conformity with Article XIX by failing to demonstrate the existence of unforeseen developments leading to the injurious increased imports.

7.300 The United States also argues that in absence of a *prima facie* case by Korea (that the United States failed to comply with the unforeseen developments requirement in Article XIX) the Panel is not permitted to construct a claim Korea has failed to make.[237] The US argument is based on the premise that Korea fails to make a *prima facie* case of violation under Article XIX. Having found that Korea has made a *prima facie* case of violation of Article XIX, there is no basis for an argument that the Panel is constructing a claim not made by Korea.

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[236] During the second meeting of the Panel with the parties the following question was put to the United States:

> 10. In *US - Lamb Meat (AB)*, the Appellate Body found that "as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied." Please indicate where the United States made the required demonstration of unforeseen developments. Please provide any supporting documentation, and give specific references.

[237] In support of their arguments the United States cites to the Appellate Body report on *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129, adopted 19 March 1999.

6. Emergency action

(a) Arguments by Korea

7.301 Korea claims that the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX. According to Korea, safeguard measures cannot be imposed unless an emergency situation exists which has been brought on by a sudden, significant increase in imports due to an unforeseen event. Such an emergency situation does not exist in this case, as safeguard measures were not meant to address temporary downturns, which are expected in a business cycle. Nor were safeguard measures intended to remedy temporary downturns caused by factors other than imports. As the Appellate Body recognized in *Argentina – Footwear Safeguard (AB)*, safeguard measures were not intended to address "ordinary events in routine commerce." To the contrary, the Appellate Body explained, "safeguard measures were intended ... to be matters out of the ordinary, to be matters of urgency, to be, in short, '*emergency actions*'" (emphasis added).[238]

(b) Arguments by the United States

7.302 The United States asserts that nothing in the Safeguards Agreement or Article XIX requires a showing that imports present an emergency situation. Rather, the Safeguards Agreement and Article XIX set forth the conditions under which a Member may take the "emergency action" provided under Article XIX.

(c) Evaluation by the Panel

7.303 Although Article XIX is entitled "*Emergency Action on Imports of Particular Products*", there is no further reference to the phrase "emergency action" in that Article. The plain language of that provision does not require Members to demonstrate the existence of an "emergency" before being able to take Article XIX safeguard action. Rather, the phrase "emergency action" describes the nature of the (safeguard) action to be taken, once the conditions set forth in Article XIX (and the Safeguards Agreement) have been fulfilled. While the reference to "emergency action" in the title of Article XIX may serve to infer meaning into the substantive obligations of Article XIX (and the Safeguards Agreement), it does not constitute a substantive obligation itself.

7.304 Article 11.1(a) of the Safeguards Agreement provides that:

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

7.305 Again, we consider that the reference to "emergency action" in this provision simply describes the type of (safeguard) action that may be taken by a Member once the conditions of Article XIX and the Safeguards Agreement are fulfilled. Article 11.1(a) does not impose any additional requirement on Members to demonstrate an "emergency" situation before being able to impose safeguard measures.

7.306 For these reasons, we reject Korea's claim that the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX.

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[238] *Argentina - Footwear Safeguard (AB)* at para. 93.

7. Procedural Issues

(a) Alleged violation of Article 12.3: failure to provide adequate opportunity for prior consultations

(i) Arguments by Korea

7.307 Korea claims that the US violated Article 12.3 by failing to provide adequate opportunity for prior consultations on the line pipe measure. Korea asserts that the United States did not disclose the proposed measure to Korea prior to or during the consultations held in Washington on 24 January 2000. Korea notes that it learned of the details of the President's proposed measure through a White House press release issued on 11 February 2000 (the "press release"). Korea argues that this press release did not provide it with an "adequate opportunity" for prior consultations. According to Korea, it therefore had no meaningful ability to discuss the actual remedy proposed before it was imposed.

(ii) Arguments by the United States

7.308 The United States argues that Korea received notice of the measure that the President proposed to apply on 11 February 2000, 17 days before the date the measure was scheduled to take effect. The US notes that Article 12.3 obliges a Member proposing to apply a safeguard measure to provide "adequate opportunity for prior consultations". The US refers to the Appellate Body finding in *US - Wheat Gluten* that this obligation:

> [R]equires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure.[239]

7.309 The United States argues that the Article 12.3 obligation must be interpreted in light of the object and purpose of the Safeguards Agreement and Article XIX, which allow "emergency actions". According to the United States, Article 12.3 requires the provision of an *opportunity* for prior consultations, rather than requiring consultations themselves. Thus, a Member satisfies the Article 12.3 obligation by providing a time or chance for consultations, by providing necessary information and by making itself available for consultations. Since the consultations cover "emergency" action, tight time-frames will obviously be necessary. The US argues that it announced in its supplemental Article 12.1(b) notification of 24 January 2000 that it was prepared to consult with any Member having a substantial interest as an exporter of line pipe, and did not foreclose the possibility of further consultations following the President's 11 February 2000 announcement of the proposed safeguard measure. Moreover, the press release provided the information a Member would need to conduct consultations under Article 12.3. In light of the emergency nature of the action, this schedule presented Korea with an adequate opportunity to request consultations (the US notes that its authorities met with EC officials during this period). That it failed to seize this opportunity is Korea's fault, and does not establish a failure by the United States to comply with its obligations under the WTO Agreement.

(iii) Evaluation by the Panel

7.310 On 8 November 1999, pursuant to Article 12.1(b), the United States notified to the Committee on Safeguards that the ITC had reached an affirmative finding of serious injury or threat thereof

[239] *US – Wheat Gluten* (AB), para. 136.

caused by increased imports.[240] On 24 January 2000 the United States made a supplemental notification under Article 12.1(b).[241] This supplemental notification in essence summarized the 22 December 1999 ITC report, and contained detailed information on the measure that had been proposed by the ITC majority to the US President (as well as an alternative recommendation by two ITC Commissioners). Also on 24 January 2000, the United States and Korea held consultations in Washington, D.C. On 11 February 2000, the US President issued a press release announcing his decision to apply a safeguard measure on imports of line pipe. The press release contained details of the measure decided upon by the President, and stated that the measure would take effect on 1 March 2000. On 22 February 2000, pursuant to Article 12.1(c), the United States notified the Committee on Safeguards of its decision to apply a safeguard measure on imports of line pipe.[242]

7.311 Before we proceed with our analysis, we note that Korea is not challenging the timeliness of the US notifications under Article 12.1, nor the content of those notifications under Article 12.2. Korea's challenge rests exclusively on an asserted violation of the consultation obligations under Article 12.3, which provides that:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

7.312 According to Korea, the consultations held on 24 January 2000 did not fulfil the requirement of Article 12.3, because they did not provide a meaningful opportunity to discuss the actual remedy proposed before it was imposed. The United States responds that Korea was informed of the measure by the 11 February 2000 press release and therefore had the opportunity to request consultations before the actual imposition of the measure, but failed to do so.

7.313 The US position relies on the assumption that the press release was sufficient, both in form and content, to ensure Korea an "adequate opportunity for prior consultations" under Article 12.3.[243] On this issue we note that Article 12.3 provides that the purpose of the consultations provided for therein is to "*inter alia*, review the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set our in paragraph 1 of Article 8." The Appellate Body concluded that with regard to the adequacy of the opportunity for prior consultations under Article 12.3:

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[240] Document G/SG/N/8/USA/7.

[241] Document G/SG/N/8/USA/7/Suppl.1.

[242] G/SG/N/10/USA/5/Rev.1.

[243] The United States does not argue that either its revised Article 12.1(b) notification of 24 January 2001, or its Article 12.1(c) notification of 23 February 2000, provided Korea with an adequate opportunity for Article 12.3 consultations.

We recall that the measure decided upon by the President in this case differed substantially from that recommended by the ITC. Korea's argument rests on the premise that information about the measure actually to be imposed, in this case the measure decided upon by the US President, must be provided in order to afford an adequate basis for consultations under Article 12.3. The Appellate Body, in *US - Wheat Gluten*, did not specifically address the question whether the measure recommended by the ITC and notified under Article 12.1(b) was the "proposed measure" for which an adequate opportunity for prior consultations was required under Article 12.3 (*US – Wheat Gluten (AB)* at note 130). The United States does not contend, in this case, that its revised notification under Article 12.1(b), setting out the recommendations of the ITC, provided the necessary precise description of the proposed measure. We note, in passing, that the two measures recommended by the USITC, as described in the revised Article 12.1(b) notification, do not contain information on the allocation of the recommended quota measures, information which was considered important in assessing the adequacy of the description of the proposed measure by the Appellate Body in *US- Wheat Gluten.*

> [A]n exporting Member will not have an "adequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.[244]

7.314 In order to have adequate opportunity for consultations, an exporting Member must have obtained sufficiently detailed information on the proposed measure. We consider that a press release does not ensure that exporting Members obtained the necessary detailed information on the proposed measure. A simple press release does not guarantee that exporting Members obtained the information contained therein, because, *inter alia*, a press release may not be accessible to all Members having a substantial interest. Indeed, Members may not even know of the existence of such a press release, or may be unable to obtain a copy of it. Therefore, we find that the 11 February 2000 press release, regardless of its content, cannot itself be considered to have provided Korea with an adequate opportunity for prior consultations. Accordingly, we are of the view that the United States has acted inconsistently with its obligations under Article 12.3 by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe.[245]

(b) Article 8.1 compensation

7.315 Korea claims that the United States violated Article 8.1 in the same way that it violated Article 12.3. According to Korea, Articles 8.1 and 12.3 are explicitly linked, and require that there be an opportunity for prior consultation with full knowledge of the proposed measure.

7.316 The United States notes that Korea's Article 8.1 claim is explicitly linked to its Article 12.3 claim. Since the United States argues that it complied with Article 12.3, it considers that it also acted in conformity with Article 8.1.

7.317 Article 8.1 provides:

> A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

7.318 In our view, Korea's Article 8.1 claim is entirely dependent on its Article 12.3 claim. This view is supported by the Appellate Body's finding in *US – Wheat Gluten*:

> In view of [the] explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, "endeavour 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.[246]

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[244] *US - Wheat Gluten (AB)* at para. 137.

[245] We note the US argument that its 12.1(b) notification did not foreclose the possibility of further consultations following the announcement of the safeguard measure. Although this assertion may be correct, still this does not change our finding that the press release was not an adequate basis for consultations under Article 12.3. Thus, even though further consultations may not have been precluded, there was still no adequate basis on which meaningful consultations could take place.

[246] *US - Wheat Gluten (AB)* at para. 146.

7.319 We concur fully with the Appellate Body's finding that if a Member has not provided adequate opportunity for consultations under Article 12.3, it cannot have complied with its obligation to endeavour to maintain a substantially equivalent level of concessions and other obligations. Therefore, we find that the United States, by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of our findings, we conclude that the US line pipe measure was imposed inconsistently with certain provisions of GATT 1994 and/or the Safeguards Agreement, in particular:

(1) the line pipe measure is not consistent with the general rule contained in the chapeau of Article XIII:2 because it has been applied without respecting traditional trade patterns;

(2) the line pipe measure is not consistent with Article XIII2:(a) because it has been applied without fixing the total amount of imports permitted at the lower tariff rate;

(3) the United States acted inconsistently with Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury;

(4) the United States acted inconsistently with Article 4.2(b) by failing to establish a causal link between the increased imports and the serious injury, or threat thereof;

(5) the United States has not complied with its obligations under Article 9.1 by applying the measure to developing countries whose imports do not exceed the individual and collective thresholds in that provision;

(6) the United States acted inconsistently with its obligations under Article XIX by failing to demonstrate the existence of unforeseen developments prior to the application of the line pipe measure;

(7) the United States has acted inconsistently with its obligations under Article 12.3 by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe;

(8) the United States has acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations;

8.2 In light of our findings, we reject Korea's claims that:

(1) the line pipe measure is inconsistent with the provisions of Article 5;

(2) the line pipe measure violates Article XIX:I and Articles 5.1 and 7.1 because the measure was not limited to the extent and the time necessary to remedy the injury and allow adjustment;

(3) the United States' finding of increased imports was inconsistent with Article 2.1 and Article XIX;

(4) the United States violated Articles 4.1(c), and 4.2 (a), (b) and (c) because the data relied on by the ITC was flawed since it contained data from other industries;

(5) the ITC erred in finding serious injury because the downturn in the state of the domestic industry was merely temporary, and the condition of the industry was improving at the end of the period of investigation;

(6) the United States acted inconsistently with its obligations under Articles 2 and 4.1(b) by basing a finding of threat of serious injury on an allegation, conjecture or remote possibility;

(7) the United States' failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c);

(8) the line pipe measure does not satisfy the requirements of emergency action of Article 11 (and the preamble) of the Safeguards Agreement or Article XIX of GATT 1994;

(9) the United States violated Article 2 and 4 by exempting Mexico and Canada from the measure;

(10) the United States violated Articles I, XIII:1 and XIX by exempting Mexico and Canada from the measure.

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described in paragraph 8.1 *supra*, it has nullified or impaired the benefits accruing to Korea under the Agreement on Safeguards and GATT 1994.

8.4 We therefore recommend that the Dispute Settlement Body request the United States to bring its line pipe measure into conformity with its obligations under the WTO Agreement on Safeguards and the GATT of 1994.

8.5 We also note that in its first written submission Korea requests the Panel to "find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated". We consider this to be a request by Korea for a specific suggestion on the implementation of the above recommendation under Article 19.1 of the DSU, which provides:

> In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 By virtue of Article 19.1 of the DSU the Panel has the authority to suggest ways in which a Member could implement the Panel's recommendation. That we have the *authority* under Article 19.1 of the *DSU* to make a specific suggestion does not mean that we must or should do so in a given case. As stated *supra,* we recommend that the United States bring its safeguard measure into conformity with its WTO obligations. Although the suggestion that is being requested by Korea could be *one* way that the United States could implement our recommendation, we consider that there may be various other ways in which the United States could implement the Panel recommendation. We do not consider that the suggestion requested by Korea is the only, or necessarily the most appropriate, way in which the United States could implement our recommendation. Accordingly, we decline Korea's request for a specific suggestion by the Panel on ways in which the United States may implement the recommendation made in this report.

ANNEX A

Third Party Submissions and Oral Statements

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ANNEX A - 1

THIRD PARTY SUBMISSION BY CANADA

(30 March 2001)

I. INTRODUCTION

1. This dispute concerns a safeguard measure imposed by the United States on imports of circular welded carbon quality line pipe (line pipe) effective as of 1 March 2000 (the measure).

2. This dispute was initiated by a request for consultations submitted by Korea on 13 June 2000. Consultations were held on 28 July 2000, but no mutually satisfactory solution was reached.

3. On 26 September 2000, Korea requested the establishment of a panel. The Dispute Settlement Body (DSB) established this panel on 23 October 2000, with the standard terms of reference. Pursuant to Article 10.2 of the DSU, Canada notified the DSB of its substantial interest in this matter and reserved its rights to participate as a third party to the dispute.

4. Canada welcomes this opportunity to participate as a third party in this proceeding and provide its views on Korea's claims regarding the exclusion of Canada from the application of the safeguard measure imposed by the United States.

5. Canada has had the opportunity to review those portions of the First Written Submission of the United States as it pertains to this issue and is fully supportive of the points made by the United States.[1]

II. EXEMPTION OF CANADA FROM THE US SAFEGUARD MEASURE ON LINE PIPE

6. Pursuant to the obligations of the United States under the *North American Free Trade Agreement* (NAFTA), Canada was exempted from the safeguard measure imposed by the United States as the United States International Trade Commission (USITC) found that imports of line pipe from Canada did not "contribute importantly" to the serious injury, as this term is defined in Article 802 of the NAFTA[2]. Article 802 of the NAFTA was incorporated into US law through Sections 311 and 312 of the NAFTA Implementation Act.[3] The USITC subsequently recommended

[1] First Submission of the United States, paras. 214-226.

[2] USITC Report, Investigation No. TA-201-70, Publication 3261, December, 1999 at I-33 USITC Report), submitted as Exhibit KOR-6. Article 802 of the NAFTA provides that "any [NAFTA] Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

(a) imports from a [NAFTA] Party, considered individually, account for a substantial share of total imports; and

(b) imports from a [NAFTA] Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."

[3] 19 U.S.C. 3371, 3372 (Supp. 1993).

that the President exclude Canada from any relief action.[4] Imports of line pipe from Canada were excluded from the measure.[5]

III. ARGUMENT

A. ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLES I, XIII AND XIX OF GATT 1994 DO NOT PROHIBIT A MEMBER FROM EXCLUDING A FREE TRADE AGREEMENT PARTNER FROM A SAFEGUARD MEASURE

7. Korea claims that the US decision to exclude imports from Canada from the application of the safeguard measure on line pipe is inconsistent with Article 2.2 of the *Agreement on Safeguards* and Articles I, XIII and XIX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) because the United States failed to apply the safeguard measure to all imports irrespective of source, as required by Article 2.2. Korea also claims that this failure contravenes the "most favoured nation" obligation reflected in Articles I, XIII and XIX of GATT 1994[6].

8. Canada submits that the last sentence of footnote 1 of Article 2.2 of the *Agreement on Safeguards*, which provides that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994" supports the view that regard must be had to the relevant GATT provisions in interpreting the *Agreement on Safeguards*. As indicated by the United States, under Article 31 of the Vienna Convention, the terms of footnote 1 must be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the *Agreement on Safeguards*.[7]

9. Canada agrees with the submissions of the United States that Articles XIX and paragraph 8 of Article XXIV of GATT 1994 read together justify an exclusion of a Member party to a free-trade area (FTA) from a safeguard measure imposed by another Member party to that same FTA. As noted by the United States, safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other.[8] Canada also agrees with the United States that to the extent that Article XIX, read in conjunction with other GATT 1994 articles, can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception.[9]

10. Canada maintains that this interpretation of the relevant GATT provisions is consistent with the interpretation of Article 2.2 of the *Agreement on Safeguards* and footnote 1 to that Article. As the Appellate Body confirmed in *Argentina – Safeguard Measures on Imports of Footwear*, GATT 1994 and the *Agreement on Safeguards* contain an "inseparable package of rights and disciplines" and meaning must be given to all the relevant provisions of these two equally binding agreements.[10] As Article XIX and XXIV:8 of GATT 1994 provide for the possibility of an exclusion of a free trade partner from a safeguard measure imposed by another Member party to that free trade agreement, in keeping with general principles of treaty interpretation, the *Agreement on Safeguards* must also provide for the possibility of such an exclusion.

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[4] USITC Report. The USITC also found that imports of line pipe from Mexico were not contributing importantly to the serious injury and recommended that the President exclude imports of line pipe from Mexico from any relief action.

[5] Imports of line pipe from Mexico were also excluded from the measure.

[6] First Submission of the Republic of Korea, para. 168.

[7] First Submission of the United States, para. 221, see also para. 214.

[8] *Id*., para. 216.

[9] *Id*, para. 217.

[10] WT/DS121/AB/R, December 14, 1999, para. 81.

IV. CONCLUSION

11. Accordingly, Canada respectfully submits that the exclusion of a free trade partner from a safeguard measure is not inconsistent with Article 2.2 of the *Agreement on Safeguards* or Articles I, XIII or XIX of GATT 1994.

ANNEX A-2

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(30 March 2001)

I. INTRODUCTION

1. The European Communities ("the EC") welcomes this opportunity to present its views in the proceeding brought by Korea over the consistency with GATT 1994 and the *Agreement on Safeguards* of the definitive safeguard measure imposed by the United States ("the US") on imports of circular welded carbon-quality line pipe.

2. The EC has decided to intervene as third party in the present case because of its trade interests and its systemic interest in the correct interpretation of provisions of the GATT 1994 and the *Agreement on Safeguards*, as well as in the correct application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the *DSU*").

3. As a general matter, it is the view of the EC that the safeguard mechanism should only be relied upon in exceptional circumstances and thus in *emergency* situations only, as the title of Article XIX GATT 1994 already sets out clearly. In the Appellate Body's words, "Article XIX is clearly, and in every way, an extraordinary remedy".[1] It should only be invoked when all of the strict requirements which are set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters. It is against this general background that the EC intends to make certain comments regarding the present case.

4. The EC will limit its submission to the **US request for preliminary ruling** and the issue of "**unforeseen developments**", and reserves its right to comment at the Third Party Session on other issues of legal interpretation which it considers to be of particular interest.

II. THE US REQUEST FOR A PRELIMINARY RULING ON ADMISSIBILITY OF CERTAIN EVIDENCE SHOULD BE REJECTED

5.. In its First Written Submission the US has requested the Panel to issue a preliminary ruling with regard to the admissibility of certain evidence submitted or referred to in Korea's First Written Submission, and which was allegedly not part of the record of the US investigating authorities (ITC).[2]

6.. The EC submits that the US request does not find support in, and is rather contrary to, the *Agreement on Safeguards* and unduly diminishes the rights conferred upon Members by the *WTO Agreement*. Accordingly, it respectfully requests the Panel to reject the US request.

7. In support of its request the US first relies on the fact that the information submitted by Korea was not in the ITC record.

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[1] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 14 December 1999, para. 86 ("*Korea – Dairy Products*"); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 14 December 1999, para. 93 ("*Argentina – Footwear*").

[2] US First Written Submission, paras. 278 ff.

8.. Nothing in the text of the *Agreement on Safeguards* or of the *DSU* limits a Member's right to make its own *prima facie* case.

9.. Specifically, this right is not qualified by any limit to the admissibility of evidence in any WTO provision or by any authorization to panels to reduce Members' right to make their case. In the absence of such an express limit, any ruling rejecting evidence as not admissible would diminish Members' rights under the *WTO Agreement*, contrary to Article 3.2 of the *DSU*.

10. The investigation record content cannot restrict a Panel's review of certain evidence in deciding a claim brought under the provisions of the *Agreement on Safeguards*.

11. On the contrary, the fact that such evidence is not on record may indicate that a violation exists if the record is omissive.[3] In *Korea – Dairy Products* the Panel made clear that the investigating authorities are called to evaluate all relevant information before it or that it should have been before it so as to comply with the requirements of the *Agreement on Safeguards*, notably Article 4.[4] That provision in particular, by requiring investigating authorities to evaluate "all relevant factors of an objective and quantifiable nature" makes clear that domestic safeguard proceedings are not purely adversarial, but are characterized by an inquisitorial element and require some initiative on the part of the investigating authorities.

12. This character of safeguard proceeding is also borne out by the prescriptions in Article 3.1 of the *Agreement on Safeguards* concerning the activities that the investigating authorities must perform, in particular the obligation imposed on them to "[set] forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

13. Furthermore, whether or not a WTO Member starting dispute settlement proceedings was represented and/or actively participated in the investigation can also not restrict the Panel's review of evidence submitted by the parties, and thus justify a Panel's ruling that certain evidence is inadmissible.

14. Participation of all interested parties, including WTO Members, in domestic proceedings is a right (sometimes referred to as "due process right"), normally also expressly provided for in domestic safeguard regulations, but certainly conferred by the *Agreement on Safeguards* (Article 3.1). The US itself acknowledges the existence of such a right.[5]

15. This right is completely distinct from and independent of the right of WTO Members to start dispute settlement proceedings where a violation of the *Agreement on Safeguards* is claimed.[6]

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[3] Cf. e.g. Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 21 June 1999 ("*Korea – Dairy Products*"), para. 7.81, where the Panel found the domestic investigation report to be omissive on one of the "injury factors" and therefore found that the investigating authorities had not complied with the requirements of Article 4 of the *Agreement on Safeguards*.

[4] *Korea – Dairy Products*, Panel Report, paras. 7.30, 7.31 and 7.55. Furthermore, in *US - Wheat Gluten* the Appellate Body clarified that if the competent authorities consider that a particular "other factor" not specifically listed in Article 4.2(a) of the *Agreement on Safeguards* may be relevant to the situation of the domestic industry, their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties (Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 22 December 2000, paras. 55-56 ("*US - Wheat Gluten*"). The situation described by the Appellate Body would therefore lead to an omissive record.

[5] US First Written Submission, para. 285.

[6] Similarly, in para. 114 of its Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Thailand – H-Beams"*, WT/DS122/AB/R, 12 March 2001), the Appellate Body noted that the obligations in Article 3.1 of the *Anti-Dumping Agreement*,

Specifically, the right to participate in domestic proceedings is not a prerequisite for to the right to resort to the dispute settlement system, nor does its non-exercise or partial exercise foreclose the right to resort to the dispute settlement system, including on issues which were discussed in domestic proceedings.[7]

16. In the absence of a specific limitation, a right under the *Agreement on Safeguards* - the right to participate in domestic proceedings - cannot be interpreted so as to restrict another one – the right to have violations of the *Agreement on Safeguards* reviewed in dispute settlement proceedings. This would however be the result if the US request were granted. Such a result, not the admission of evidence not on record, would be in open conflict with the principle of effective treaty interpretation, contrary to the US contention.[8]

17. It should further be noted that, as can also be inferred from the description in Article 3 of the *Agreement on Safeguards*, domestic proceedings focus on issues relating to domestic safeguard regulations (in this case, US regulations).

18. For example, if a WTO Member participating in a domestic proceeding were to object that a certain step is contrary to the investigating Member's obligations under WTO, this issue would not necessarily be taken into account by domestic authorities, whose normal task is to verify whether the conditions set out in domestic provisions for taking safeguard actions are met.

19. This in particular seems to be the case in the US. To the best of EC's knowledge there is no mention in US safeguard regulation of a duty to assess whether safeguard action would or would not be WTO-compatible (nor would the inclusion of a provision to this effect in a Member's safeguards rules be required under the *Agreement on Safeguards*).

20. The US authorities are obliged to apply section 201 of the Trade Act of 1974 and other statutory and regulatory standards, not to ensure conformity with WTO provisions. The EC would further recall that the *Uruguay Round Agreements Act* (*URAA*), by which the US accepted the *WTO Agreement* into domestic legislation, contains an express provision of the following tenor:

> "(a) RELATIONSHIP OF AGREEMENTS TO UNITED STATES LAW.–
>
> (1) UNITED STATES LAW TO PREVAIL IN CONFLICT. – No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

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relating to domestic proceedings, are distinct from those in Article 17.5-17.6 of the same agreement, relating to dispute settlement proceedings.

[7] The *Agreement on Safeguards* does not contain a provision of the kind of Article 17.5(ii) of the *Anti-Dumping Agreement*, which defines the scope for the Panel's review by referring to "the facts available in conformity with appropriate domestic procedures to the authorities of the importing Member."

[8] US First Written Submission, para. 286.

> (2) CONSTRUCTION. -Nothing in this Act shall be construed–
>
> (A) to amend or modify any law of the United States, (…)
>
> unless specifically provided for in this Act." [9]

21. This provision makes clear that there is no right under US legislation that US domestic authorities review compliance with WTO provisions and ensure their prevalence, quite the contrary. This further confirms that the rights accruing to WTO Members under the *Agreement on Safeguards* and other WTO provisions cannot be made dependent upon action before domestic authorities.

22. WTO Members' right to dispute settlement adjudication is moreover not subject to, and cannot be encroached upon by, the varying requirements of domestic regulations. This right guarantees effective equality of all Members in respect of safeguard obligations.

23. Nor are the "due process" rights of other "interested parties", including private parties, impaired by subsequent dispute settlement proceedings started by governments.[10] Dispute settlement proceedings are indeed an additional avenue to protect *inter alia* such rights.

24. The relevance of the evidence submitted by Korea to the present case, which is also questioned by the US[11], is of course a different issue, consideration of which indeed assumes that certain evidence is admitted before the Panel. The EC considers that the evaluation of the relevance of evidence is a matter for the Panel in the discharge of its obligation, under Article 11 of the *DSU*, to make an objective assessment of the matter before it.[12]

25. With regard to the appropriate standard of review, the EC agrees that the role of the Panel is not to engage in a *de novo* exercise. Instead, the Panel's review should determine whether the ITC had considered all relevant facts in its possession or which it should have obtained in accordance with the *Agreement on Safeguards* (including facts which might detract from an affirmative determination), whether these facts supported the ITC determination, whether the published report on the investigation contained adequate explanation of how the facts supported the determination made, and consequently whether the determination made was consistent with the US obligations under the *Agreement on Safeguards* and GATT 1994.

26. In other words, the Panel is not required to determine, *in lieu* of the investigating authorities, what would be the best possible decision to be taken under the circumstances of the case at hand, but rather whether the decision, as taken by the investigating authorities, trespassed the boundaries of WTO-consistency. As stated by the Appellate Body, under Article 11 of the *DSU*, panels are

> "… charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."[13]

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[9] *URAA*, Section 102 (a).

[10] US First Written Submission, para. 286.

[11] US First Written Submission, para. 278.

[12] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 117 ("*EC – Hormones*").

[13] *Korea – Dairy Products*, Appellate Body Report, para. 137 (italics in original, underlined added); restated in *US - Wheat Gluten*, Appellate Body Report, para. 150.

27. Assessing the relevance of the evidence submitted by one of the parties to the dispute is therefore also not amounting to a *de novo* review on the part of the Panel, contrary to the US contention.[14]

28. Accordingly, the EC respectfully submits that the US request to dismiss such evidence as inadmissible should be rejected.

III. THE US HAS NOT DEMONSTRATED "UNFORESEEN DEVELOPMENTS"

29. The EC concurs with Korea that no "unforeseen developments" leading to increased imports were identified and reviewed by the ITC in its report nor elsewhere in the record.

30. As stated by the Appellate Body in *Korea - Dairy Products* and *Argentina - Footwear*

> "the developments which led to [a foreign product] being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'." [15]

As to the requirements imposed upon the authorities of a country seeking to take safeguard action, the Appellate Body further found that

> "the first clause [in Article XIX:1(a) of GATT 1994] describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994." [16]

31. It follows that the ITC was under an obligation to *demonstrate* in its investigation that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions…".[17]

32. It is the view of the EC that such a *demonstration* requires a verifiable description, *i.e.* a determination in the record of the investigation, stating clearly that certain circumstances constitute unforeseen developments. This requires identifying

-circumstances which constitute developments leading to an import surge;

and

-circumstances which show that such developments were unforeseen.

33. Still in *Argentina – Footwear*, the Appellate Body found that :

> "Article XIX (…) establishes certain prerequisites for the imposition of safeguard measures." [18]

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[14] US First Written Submission, para. 283.

[15] *Korea – Dairy Products*, Appellate Body Report, para. 84; *Argentina – Footwear*, Appellate Body Report, para. 91.

[16] *Korea – Dairy Products*, Appellate Body Report, para. 85; *Argentina – Footwear*, Appellate Body Report, para. 92 (emphasis added).

[17] *Argentina – Footwear*, Appellate Body Report, para. 98 (emphasis added).

[18] *Argentina – Footwear*, Appellate Body Report, para. 83 (emphasis added).

34. The last two Appellate Body's findings just recalled make clear that the demonstration as a matter of fact cannot be made *ex post facto*, for example in a written submission in the framework of a dispute settlement procedure. This entails that the demonstration of "unforeseen developments" must be brought forward in the investigation report or other document of the domestic authorities forming the basis for the application of the measure. Thus, in *Korea – Dairy* products the Panel considered that, since it had to make an objective assessment of the factual considerations and reasoning of the Korean authorities at the time of the determination, its analysis had to be based on the investigation report.[19] Likewise, in *US – Lamb* the Panel found that there was no discernible conclusion on "unforeseen developments" in the investigation report and found a violation of Article XIX of GATT 1994.[20]

35. In addition, Article 3.1 of the *Agreement on Safeguards* requires the competent authorities to set out in their report "their findings and reasoned conclusions reached on all pertinent issues of fact and law". While claims that the substantive requirement of "unforeseen developments" is missing are properly brought and reviewed under Article XIX of GATT 1994, Article 3.1 of the *Agreement on Safeguards* constitutes "context" for the interpretation of Article XIX.

36. The EC has found no specific reference in the ITC Report to a determination setting out which "unforeseen developments" caused the surge in imports of line pipe.

37. The EC notes that in its First Written Submission the US mentions certain circumstances emerging from the investigation record that in its view constituted "unforeseen developments" relevant under Article XIX of GATT 1994.[21] These are:

-expectations of both importers and domestic producers that demand would continue to be strong

-misjudgement of the domestic market by domestic producers

-collapse of oil prices

-the East Asian financial crisis.

38. In the EC's view, the first three circumstances are certainly not "unforeseen developments" and are not "leading to" a surge in imports.

39. In the first place, it goes without saying that poor business judgment on the part of the domestic industry is not a justification for safeguard relief against fair imports, nor does it lead to a surge in imports.

40. Furthermore, the first three circumstances can all be linked to the cyclical nature of the line pipe sector, closely following the cyclical fluctuations in oil prices – a circumstance equally accounted for in the ITC Report investigation record.[22] Moreover, at most these circumstances account for a (downward) change in the domestic overall demand. This does not mean that they have any bearing on the trends in imports, notably upward trends, as required by Article XIX of GATT 1994 and recalled the Appellate Body.

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[19] *Korea – Dairy Products*, Panel Report, para. 7.59.

[20] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia ("US – Lamb")*, WT/DS177/R, WT/DS178/R, circulated 21 December 2000, para.7.31, 7.39, 7.43, 7.44.

[21] US First Written Submission, paras. 230-231.

[22] See ITC Determination, p. II-44, also referred to by Korea in its First Written Submission, footnote 62.

41. As to the "East Asian financial crisis", in the passage referred to by the US in its First Written Submission[23] it is accounted for as no more than a "feeling" of "a few producers" – immediately contrasted with another conflicting "feeling" of some other producer.

42. Thus, the series of factors, all included in the ITC Report, that the US managed to gather in just two paragraphs of its First Written Submission, at most proves the point that a conclusion on "unforeseen developments" is required. A list of disparate and possibly conflicting factors does not allow to discern clearly what development, if any, was really relevant to the domestic authorities' decision, or what really "demonstrated" the presence of "unforeseen developments". Investigating authorities cannot merely list and take stock of facts: they must also actively take a position. Otherwise, it would be sufficient to list a series of conflicting circumstances to meet Article XIX's "unforeseen developments" requirement. This is not what the Appellate Body meant by referring to a "demonstration".

43. Also, if no conclusion were required of the investigating authorities, the Panel would be authorized really to proceed to *de novo* review of the ITC determination and substitute its appreciation of the conflicting listed facts for the missing ITC appreciation.

44. In the light of the foregoing, the EC respectfully requests the Panel to uphold Korea's claim that the US failed to demonstrate "unforeseen developments" which led to increased imports, as required in Article XIX of GATT 1994.

[23] USITC Report, p. II-66, referred to in US First Written Submission, para. 231.

ANNEX A-3

THIRD PARTY SUBMISSION OF JAPAN

(30 March 2001)

As Japan has not yet exhausted its examination of the issues contained in the submissions of Korea and the United States, Japan would like to reserve the right to express its additional comments as the time of the Panel meeting.

I. INTRODUCTION

1. Japanese exporters of line pipe are subject to the safeguard measure at issue in this dispute. Like Korea, Japan believes that the measure and the safeguard investigation that preceded it were not in conformity with the obligations of the United States under the General Agreement on Tariffs and Trade 1994 herein after referred to as "GATT" and the Agreement on Safeguards ("the Safeguards Agreement").

2. Japan is concerned about the effect of the improper US actions in this case and also has systemic concerns about US safeguards practices in general.

3. Accordingly, Japan provides its views with regard to the following significant issues in this proceeding:

- the US remedy was not limited to the extent necessary to remedy the serious injury, as required by GATT Article XIX:1 and Article 5.1 of the Safeguards Agreement;

- the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement;

- the US International Trade Commission (the ITC) investigation did not establish the requisite increase of imports, provide objective evidence of serious injury or demonstrate a causal link between increased imports and condition of the US industry, as required by GATT Article XIX:1 and Article 2 of the Safeguards Agreement;

- the US incorrectly interprets the term "unforeseen developments" of GATT Article XIX; and

- GATT Article XIX and Article 2.1 of the Safeguard Agreement require an authority to base its determination on data from the "recent past," and this aspect of the determination is subject to review by a panel.

II. THE US REMEDY WAS NOT LIMITED TO THE EXTENT NECESSARY TO REMEDY ANY SERIOUS INJURY, AS REQUIRED BY GATT ARTICLE XIX:1 AND ARTICLE 5.1 OF THE SAFEGUARDS AGREEMENT

4. The Panel in *Korea—Dairy Safeguard* found that Article 5.1 of the Safeguards Agreement imposes a "very specific obligation": the level of the restriction imposed by a safeguard measure must be commensurate with the goal of preventing or remedying the serious injury.[1] The Appellate Body affirmed this finding.[2]

5. The remedy level imposed by the President was far more restrictive than that recommended by the ITC, which was based on detailed market and economic analysis. In stark contrast to the ITC's remedy recommendation, the President's remedy was unsupported by any analysis. Moreover, it was more stringent not only than the ITC's recommendation, but also than the restriction level requested by the US domestic industry.[3] Because the remedy level imposed by the President exceeds the level recommended by the ITC – the US authority that conducted the investigation – it cannot possibly be limited "to the extent necessary to prevent or remedy serious injury," as required by Article 5.1 of the SG Agreement as well as the same requirement set out in GATT Article XIX:1(a).

III. THE EXCLUSION OF CANADA AND MEXICO FROM THE REMEDY IS DISCRIMINATORY AND VIOLATES ARTICLE 2.2 OF THE SAFEGUARDS AGREEMENT

6. The MFN principle is one of the pillars of the GATT-WTO agreements. In the application of Safeguard measures, the MFN principle is also enshrined in Article 2.2 of the Safeguards Agreement, which states:

> Safeguard measures shall be applied to a product being imported irrespective of its source.

7. The United States did not impose the measure on all imports after a determination of serious injury based on examination of all imports. Rather, it applied the measure discriminatorily, excluding Canada and Mexico from its scope.

8. The United States claims, as it has in prior disputes, that footnote 1 of the SG Agreement authorizes it to exclude Canada and Mexico, the other members of the North American Free Trade Agreement (the NAFTA).[4] This argument should be rejected by the Panel. It is based on a tortured, incorrect textual analysis; also, it is inconsistent with the decisions of the Appellate Body in *Turkey—Textile*,[5] *Argentina—Footwear*[6] and *US—Wheat Gluten*.[7]

9. Footnote 1 provides that a customs union may apply a safeguard measure as a single unit where the determination of serious injury is based on conditions existing in the Customs Union, as a whole. But, footnote 1 permits no such special action by the members of a free-trade area. Moreover, even if it did, the US argument would fail because the US does not satisfy the two prerequisites set out by the Appellate Body in *Turkey—Textile*: (1) it cannot establish that the line pipe safeguard

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[1] *Korea—Dairy Safeguard*, WT/DS98/R (21 June 1999) at para. 7.100.

[2] *Korea—Dairy Safeguard*, WT/DS98/AB/R (14 December 1999) at para. 96.

[3] *See* Korea's First Submission at para. 145.

[4] US First Submission at paras. 214-226.

[5] *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) (*Turkey—Textile*) at paras. 42-58.

[6] *Argentina—Safeguard Measure on Imports of Footwear*, WT/DS121/AB/R (14 December 1999) (*Argentina—Footwear*) at paras. 99-114.

[7] *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (22 December 2000) (*U.S.—Wheat Gluten*) at paras. 93-100.

measure was introduced upon the formation of the NAFTA; and (2) even if it could, it cannot establish that the formation of the NAFTA would have been prevented if it had not been allowed to introduce the measure.[8]

10. Moreover, even if the US had met these requirements, its reliance on footnote 1 still would be misplaced. In *Argentina—Footwear*, the Appellate Body held that Argentina could not justify its departure from the non-discrimination obligation of Article 2.2 by relying on footnote 1 and Argentina's MERCOSUR membership.[9] The Appellate Body stated as follows:

> 106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State." On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentina authorities of the effects of imports from all sources on the Argentine domestic industry.
>
> 107. MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina. . . .
>
> 108. Therefore, at the time the safeguard measures at issue in this case were imposed by the Government of Argentina, <u>these measures were not applied by MERCOSUR "on behalf of" Argentina, but rather, they were applied by Argentina</u>. It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. As a result, we find that the Panel erred in assuming that footnote 1 applied, and we, therefore, reverse the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards*.[10]

11. Here, the US conducted an investigation and imposed a safeguard measure to protect the US market. As in *Argentina—Footwear*, even if NAFTA were a customs union (it is not), the safeguard measure was not "applied by a customs union <u>on behalf of</u> a member state."[11]

12. *Argentina—Footwear* clarifies that footnote 1 does not apply where a Member of a customs union applies a safeguard on its own behalf. The decision also clarifies that, when a customs union applies a safeguard, it can do so as a single unit where the determination of serious injury was based on conditions existing in the customs union as a whole. For these reasons as well, the US arguments based on footnote 1 must be rejected.

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[8] *Turkey—Textile*, para. 58.
[9] *Argentina—Footwear* at para. 108.
[10] *Id.* at paras. 106-107 (footnotes omitted; emphasis added).
[11] *Id.* at para. 114 (emphasis in original).

13. Finally, the US resort to the last sentence of footnote 1 is unavailing. First, as demonstrated above, footnote 1 applies to customs unions, not to free-trade areas. Thus, the US does not qualify for application of the last sentence: NAFTA is a free trade agreement and doesn't establish a customs union.

14. Moreover, even if the last sentence of footnote 1 were applicable, it says merely that nothing in the SG Agreement "prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." It does not say, as the U.S. vainly asserts, that the US is allowed to exempt its NAFTA partners from safeguard measures. As demonstrated by the discussion in the Analytical Index of the GATT, the issue of the relationship between GATT Articles XIX and XXIV had been discussed repeatedly during the history of the GATT, and the interpretation advanced by the US was never accepted.[12] Thus the last sentence of footnote 1 certainly was not an affirmation of the propriety of exemption of free trade agreement partners.

IV. THE US ITC INVESTIGATION DID NOT ESTABLISH THE REQUISITE INCREASE OF IMPORTS, PROVIDE OBJECTIVE EVIDENCE OF SERIOUS INJURY OR DEMONSTRATE A CAUSAL LINK BETWEEN INCREASED IMPORTS AND THE CONDITION OF THE US INDUSTRY, AS REQUIRED BY GATT ARTICLE XIX:1 AND ARTICLE 2 OF THE SAFEGUARDS AGREEMENT

15. In its decision in *Argentina—Footwear*, the Appellate Body clarified that strict compliance with each requirement relating to safeguard investigations is a prerequisite for imposing safeguard measures.[13]

16. Korea has demonstrated at paragraphs 184 through 311 of its First Submission that the ITC decision failed to meet three of the fundamental requirements set forth in Article 2 of the Safeguards Agreement. Japan will not reiterate at length the sound argumentation provided by Korea. Rather, it will summarize the essence of the ITC's failings.

17. First, the ITC failed to demonstrate that there was a sudden, sharp and recent increase in imports, as required by the Appellate Body in *Argentina—Footwear* in order to satisfy GATT Article XIX:1 and Article 2.1 of the Safeguards Agreement.[14] Indeed, the record establishes that imports declined during the twelve months prior to the ITC determination (the "recent past").[15] Moreover, the record shows that imports declined relative to domestic production from the last half of 1998 to the first half of 1999.[16]

18. Second, the ITC failed to demonstrate that the U.S. line pipe industry was seriously injured, as required by Article 4 of the Safeguards Agreement. The Appellate Body decision in *US—Wheat Gluten* requires that, to satisfy Articles 3.1 and 4.2(c) of the Safeguards Agreement, the administering authority must include in its report adequate reasoning in support of the serious injury determination.[17] The ITC failed to do so. As Korea demonstrates at paragraphs 214 to 262 of its First Submission, the findings and conclusions of the ITC Commissioners contain many inconsistencies and contradictions, and the ITC Report does not explain how the Commissioners reached their contrary conclusions.

19. Moreover, the ITC ignored evidence from the "very end of the period" that demonstrated that, by the time of its decision, the US line pipe industry already was recovering from its temporary

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[12] *Guide to GATT Law and Practice*, Volume II, pages 822-823 and 838-840 (WTO, Geneva, 1995).
[13] *Argentina—Footwear* at para. 93.
[14] *Id.* at para. 130.
[15] *See* Korea's First Submission at paras. 194-206.
[16] *Id.* at paras. 207-211.
[17] *US—Wheat Gluten* at para. 160.

downturn. A temporary downturn in performance from a period of peak performance does not establish extensive and substantial weakness of the US industry such as to justify an affirmative determination of serious injury.

20. Third, the ITC failed to demonstrate a causal nexus between increased imports and serious injury to the US line pipe industry, as required by GATT Article XIX:1 and Article 4.2(b) of the Safeguards Agreement. As Korea demonstrates at paragraphs 263 to 311 of its First Submission, there was no coincidence of trends between imports and the performance of the US industry. Price trends resulted from a decline in demand for line pipe in the United States, and there was no evidence that imports led prices down. In addition, the record evidence establishes that other factors, principally a decline in demand for line pipe by the US oil and gas industry, caused whatever injury the U.S. line pipe industry may have experienced. Thus, the causal nexus required by Articles 4.2(b) of the Safeguards Agreement does not exist.

V. THE US INCORRECTLY INTERPRETS THE TERM "UNFORESEEN DEVELOPMENTS" IN GATT ARTICLE XIX

21. The US asserts at paragraph 230 of its First Submission that Korea has conceded that the ITC investigation demonstrated the existence of unforeseen developments. As set forth below, the US assertion is flawed and is based on a misinterpretation of the term "unforeseen developments" in GATT Article XIX.

22. As the Appellate Body has clarified, the term "unforeseen developments" does not refer to whether a domestic industry expected the market conditions prevailing prior to imposition of a safeguard measure. Rather, the Appellate Body concluded as following in *Argentina—Footwear*:

> We note once again, that Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters or urgency, to be, in short, "emergency actions." And, such "emergency actions" 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.[18]

23. Thus, Article XIX refers to a Member's expectations with regard to the result of the effect of the obligations incurred by the Member.

VI. THE PANEL SHOULD REJECT THE US ATTEMPT TO INSULATE THE ITC INJURY DETERMINATION FROM REVIEW

24. One strategy used by the US in its First Submission is, whenever possible, to insulate aspects of the ITC investigation from review. Nowhere is this more apparent than at paragraph 70, where the US attempts to counter Korea's rational suggestion that the ITC should have examined the most recent data available to comply with GATT Article XIX and Article 2 of the Safeguards Agreement.[19]

25. The US suggests that Korea's arguments would require "the Panel to substitute its judgement for that of the USITC as to the appropriate period for assessing whether there were increased imports," and that this would constitute impermissible *de novo* review.[20] The US is incorrect. Korea argues, quite correctly, that given the plain meaning of GATT Article XIX and Article 2.1 of the

[18] *Id.* at para. 93.
[19] *See* Korea's First Submission at paras. 192-213.
[20] US First Submission at para. 70.

Safeguards Agreement, as interpreted by the Appellate Body,[21] the ITC finding, which ignored recent data, was improper.

26. Japan agrees with Korea and notes, in this regard, that the proper standard of review for safeguard actions is set out at Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and not, as the US implies, at Article 17.6 of the Agreement on Implementation of Article VI of GATT 1994. DSU Article 11 requires the Panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .."

27. Clearly, this is precisely what Korea has requested the Panel to do. Korea has demonstrated that an objective assessment inescapably leads to the conclusion that the ITC's treatment of the data violated GATT Article XIX and Article 2.1 of the Safeguards Agreement.

VII. CONCLUSION

28. Japan appreciates the opportunity to present its views to the Panel. Japan hopes that the Panel will share Japan's views that: (1) the remedy was not limited to the extent necessary to remedy serious injury; (2) the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement; (3) the determination by the ITC did not establish the requisite increase in imports, provide objective evidence of serious injury, or demonstrate a causal link between increased imports and the condition of the US industry; (4) the U.S. interpretation of the term "unforeseen developments" of GATT Article XIX is flawed; and (5) GATT Article XIX and Article 2.1 of the Safeguard Agreement require an authority to base its determination on data from the "recent past," and this aspect of the determination is subject to review by a panel.

[21] *See* Korea's First Submission at paras. 197-200.

ANNEX A-4

ORAL STATEMENT BY CANADA

(12 April 2001)

I. INTRODUCTION

The Government of Canada appreciates this opportunity to provide its views to the Panel on certain issues arising in this dispute. Canada reserved its right to participate as a third party in these proceedings because of its substantial interest in the matter, particularly with respect to the claim of Korea regarding the exclusion of Canada from the application of the safeguard measure on imports of circular welded carbon quality line pipe imposed by the United States.

We are fully supportive of the points raised by the United States in the portions of its First Submission pertaining to this particular issue. We maintain that Article 2.2 of the Agreement on Safeguards, read together with Articles I, XIII and XIX of GATT 1994, permit the exclusion of free trade agreement partners from the application of safeguard measures. We further maintain that Korea's claims to the contrary are unfounded and as such should be rejected by the Panel.

II. ARGUMENT

Korea raises legal claims under both GATT 1994 and the Agreement on Safeguards regarding the United States' decision to exclude imports of line pipe from Canada from the application of the safeguard measure. Korea asserts that, by so doing, the United States breached its obligations under Article 2.2 of the Agreement on Safeguards. Korea also claims that the United States contravened the "most favoured nation" obligation reflected in Articles I, XIII and XIX of GATT 1994.

Canada was exempted from the safeguard measure imposed by the United States as the United States International Trade Commission (USITC) found that imports of line pipe from Canada did not "contribute importantly" to the serious injury. This was done in accordance with US obligations under the North American Free Trade Agreement (NAFTA), more specifically Article 802.

For the reasons explained fully in our written submission, Canada asserts that neither the Agreement on Safeguards nor the GATT 1994 precludes members of a free trade area from excluding each other's imports from the application of their safeguard measures. Rather, Canada agrees with the United States' submission that Articles XIX and paragraph 8 of Article XXIV of GATT 1994 read together justify such an exclusion.

As noted by the United States, safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other. Canada also agrees with the United States that to the extent that Article XIX, read in conjunction with other GATT 1994 articles, can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception.

Canada further maintains that this interpretation of the relevant GATT provisions is consistent with the interpretation of Article 2 of the Agreement on Safeguards and footnote 1 to that Article. As the Appellate Body confirmed in *Argentina – Safeguard Measures on Imports of Footwear*, GATT

1994 and the Agreement on Safeguards contain an "inseparable package of rights and disciplines" and meaning must be given to all the relevant provisions of these two equally binding agreements. As Article XIX and XXIV:8 of GATT 1994 provide for the possibility of an exclusion of a free trade partner from a safeguard measure imposed by another Member party to that free trade agreement, in keeping with general principles of treaty interpretation, the Agreement on Safeguards must also provide for the possibility of such an exclusion.

III. CONCLUSION

Accordingly, Canada respectfully submits to the Panel that the exclusion of a free trade partner from a safeguard measure is not inconsistent with Article 2.2 of the Agreement on Safeguards or Articles I, XIII or XIX of GATT 1994.

ANNEX A-5

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(12 April 2001)

Mr. Chairman, distinguished Members of the Panel,

Thank you for providing the European Communities [EC] with this opportunity to present its views before you today.

1. This case raises several systemic issues relating to the interpretation of the Agreement on Safeguards as well as of the WTO Agreement's annexes at large. The EC will not repeat the arguments already brought to your attention in its written submission. Instead, it will take this opportunity to make some additional comments on other issues, notably

(a) acquisition of confidential information;

(b) exclusion of imports from FTA partners from the scope of the measure;

(c) causation.

I. CONFIDENTIAL INFORMATION

2. The review of the ITC determination is closely intertwined with the full availability of all relevant data on the ITC investigation record and which were thus "before the US authorities"[1] when they arrived at their conclusions.

3. The EC itself has had no access to the confidential data which Korea has requested the Panel to acquire. However, Korea's remarks i.e. in paras. 64-64 and 72-83 of its First Written Submission strongly suggest that certain data not accounted for in the publicly available version of the ITC determination may have been relevant to the actual decision of the domestic authorities.

4. The EC would recall that in *Thailand – Angles* the Appellate Body recognized that all facts – whether confidential or not – should be reviewable in dispute settlement if they have been available to the domestic authorities.[2]

5. The US objects by referring to the fact that it has not obtained permission for disclosure from the parties concerned and relies on Article 3.2 of the Agreement on Safeguards. However, failure to obtain authorization from the parties concerned is not dispositive.

6. Quite simply, the US cannot have it both ways. It cannot, on the one hand, put forward its failure to request authorization as a reason for its refusal to supply these data to the Panel and, at the

[1] Cf. Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea Dairy Products")*, WT/DS98/R, 12 January 2000, paras. 7.30-31; EC Third Party Submission, para. 11.

[2] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Thailand – Angles")*, WT/DS122/AB/R, 12 March 2001, para. 117.

same time, justify its measure without allowing appropriate review. The US is effectively asking the Panel a blank check as to the accuracy of the ITC investigation and conclusions. The Appellate Body has recalled that the standard of review under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU] requires a panel:

> "to *determine the facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to *examine and consider all the evidence* before it, not just the evidence submitted by one or the other party, and to *evaluate* the *relevance* and *probative force* of each piece thereof."[3]

The possible tensions between Article 3.2 of the Agreement on Safeguards and Article 13.1 of the DSU cannot read this duty out of the WTO texts.

7. A WTO Member – like Korea in this case – which is not in possession of the confidential information on the ITC record cannot by definition precisely indicate which confidential information should be disclosed. The same rationale underlying the authorization to draw adverse inferences – that is, the duty of cooperation under Article 13.1 of the DSU and the availability of evidence on one party only – justifies that the burden be on the US to convince the Panel that the information was not at all relevant to the determination.

8. Therefore, in the EC's view, to the extent that there may be some doubt that confidential information was relevant to the taking of the measure under review, the Panel should acquire the information which was available to the ITC – if necessary under specific arrangements and in forms agreed by the parties – and allow appropriate debate on it.

II. THE EXCLUSION OF IMPORTS FROM FTA PARTNERS FROM THE US SAFEGUARD MEASURE IS CONTRARY TO ARTICLE 2 OF THE AGREEMENT ON SAFEGUARDS

9. Korea argues that the US exemption from the safeguard measure violated MFN requirements established in Articles I, XIII:1 and XIX of GATT 1994 and in Article 2 of the Agreement on Safeguards. The US argues that it could legitimately exclude imports from its free trade agreements [FTAs] partners from the scope of its safeguard measure. It considers that Articles XIX and XXIV:8 of GATT 1994 read together allow this conclusion. In its view, this is borne out by footnote 1 to Article 2 of the Agreement on Safeguards.

10. The EC submits that the ITC determination and the exclusion of imports from US FTA partners from the measure is in clear violation of the principle of "parallelism" between the scope of a safeguard *investigation* and the application of safeguard *measures* established by the Appellate Body in *Argentina – Footwear*.[4] The Panel therefore can uphold Korea's claim on the basis of that principle, which applies in this case too, irrespective of the question as to the relationship between the Agreement on Safeguards and GATT Articles XIX and XXIV. To recall, when upholding such principle the Appellate Body found that:

> "we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself

[3] *Korea – Dairy* Products, Appellate Body Report, para. 137 (italics in original, underlined added); restated in Appellate Body Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (*"US – Wheat Gluten"*), WT/DS166/AB/R, 19 January 2001, para. 150.

4 Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (*"Argentina – Footwear"*), WT/DS121/AB/R, 12 January 2000, para. 111; see also Panel Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (*"US – Wheat Gluten"*), WT/DS166/R, 31 July 2000, para. 8.170.

> observed, is whether Argentina, *after including imports from all sources in its investigation* of "increased imports" of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, *was justified in excluding other MERCOSUR member States from the application of the safeguard measures*." [5]

The same principle was more recently applied by the Appellate Body in *US – Wheat Gluten*.[6]

11. Still in *Argentina – Footwear*, the Appellate Body noted that, given the product basis of the investigation in that case,

> "Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States." [7]

12. The facts of this case are strikingly similar to the ones at issue in *Argentina – Footwear*, on the basis of which the Appellate Body ruled. The ITC investigation was also based on imports from *all* sources, *including* imports from countries with which the US had concluded FTAs, like Canada and Mexico.

13. When describing the scope of the investigation, the ITC Report only identifies the product by its tariff and commercial characteristics.[8] On the other hand, there is no reference to the products' origin.

14. When looking at imports and finding that they had increased, the ITC referred to data concerning imports from all sources [9] – those which are contained in Table C-1 annexed to the ITC Report.

15. The assessment of trends in increased imports was of course one of the preliminary steps to take a safeguard measure, and notably preliminary to the assessment of "serious injury".

16. When further looking at the share of the domestic market held by US producers compared to the imports' market share, the ITC referred to the same comprehensive table.[10]

17. Again, when engaging in its causation analysis, the ITC looked at increased imports[11] and found that "the surge in imports and consequent shift in market share from the domestic industry to imports occurred at the same time that the domestic industry went from healthy performance to poor performance". This conclusion and its preceding analysis of increased imports were also based on Table C-1.[12]

18. The foregoing steps in the ITC investigation broadly correspond to those described in Article 2 and Article 4.2(a) and (b) of the Agreement on Safeguards. Both provisions must be fulfilled before a determination of "serious injury" can be made under the Agreement on Safeguards. Therefore, it is clear that the overall determination of increased imports and "serious injury" was made taking into account of *inter alia* the imports from Canada and Mexico.

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[5] *Argentina – Footwear*, Appellate Body Report, para. 109 (emphasis added).
[6] *US – Wheat Gluten*, Appellate Body Report, para. 100.
[7] *Argentina – Footwear*, Appellate Body Report, para. 112.
[8] USITC Report, p. I-7 – I-8; footnote 1 at p. I-3.
[9] USITC Report, p. I-14, referring to the total import value in Table C-1. This total includes imports from Canada and Mexico.
[10] USITC Report, p. I-18, footnote 98.
[11] USITC Report, p. I-23 ff.
[12] USITC Report, p. I-24, text at footnotes 145-147.

19. The fact that the ITC made a separate causation finding with respect to its FTA partners does not affect the foregoing conclusion. The analysis leading to the ITC determination is still based on imports from Canada and Mexico, and the measure does not "parallel" this fact.

20. Furthermore, the specific justifications given by the ITC to exclude NAFTA imports could have applied to other imports which were eventually subject to the measures. Exclusion of NAFTA imports had thus no other reason than origin.

21. Imports from Canada were excluded as not causing injury allegedly because of their limited amount.[13] However, imports from e.g. the United Kingdom were even less in quantity, but this did not shield those imports from being found to have caused injury, and thus from the reach of the measure.

22. As to imports from Mexico, they may have been in countertrend for one year (1998) – i.e. they may have decreased when the other imports increased. This however does not take away that their size was most significant – the first or the second foreign source[14] – over the overall period (1994–first semester of 1999) at which the ITC looked to make its determination.

23. At any rate, the unqualified terms in which the principle of parallelism was set out simply do not allow for distinctions of the type attempted by the ITC. The only relevant factor considered by the Appellate Body is whether the investigating authorities concluded that the requirements for the imposition of a measure were met by investigating certain imports, and by taking into account the trends and effects of those imports.

24. Like the Argentinean authorities, the ITC investigated imports from all sources and then excluded FTA partners imports from its measure. If imports from FTA countries were considered not to cause serious injury, it was only ex post, that is after they had served to come to an "increased imports" and a "serious injury" finding. Accordingly, a different solution from that arrived at in *Argentina – Footwear* is not warranted.

25. The EC would also recall that most recently in *US – Wheat Gluten* the Appellate Body applied again the principle of parallelism and found that the ITC could not have excluded imports from Canada from its safeguard measure because

> "it did not establish explicitly that imports from [all] sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards." [15]

This finding was made notwithstanding the fact that the Appellate Body recognized that the ITC had "examined the importance of imports from Canada separately". There is thus no difference with the present case.

26. Furthermore, contrary to what the ITC appears to suggest[16], the ITC overall finding of causation could certainly not have been the same if imports from Mexico and Canada had been excluded. On the basis of the facts on the record, and in particular the overall important size of imports from Canada and Mexico, it cannot be assumed that the injury findings would not have changed if those imports had been disregarded. Therefore, it cannot be concluded that the ITC methodology is *de facto* equivalent to observance of the principle of parallelism.

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[13] USITC Report, p. I-35.
[14] USITC Report, p. I-33.
[15] *US – Wheat Gluten*, Appellate Body Report, para. 98.
[16] USITC Report, p. I-26, footnote 168.

27. In view of the foregoing, the ITC's exclusion of imports from its NAFTA partners from the scope of its measure is unsupported.

III. THE ITC CAUSATION ANALYSIS DOES NOT CORRESPOND TO THE REQUIREMENTS IN ARTICLE 4 OF THE AGREEMENT ON SAFEGUARDS

28. The EC shares Korea's conclusion that the temporary downturn of the line pipe industry did not amount to a "significant overall impairment" and thus to "serious injury" as required by Article 4 of the Agreement on Safeguards.

29. However, even setting the issue of serious injury aside, there are three additional fundamental flaws in the ITC causation determination:

(a) lack of "coincidence in trends" between imports and the domestic industry performance;

(b) lack of appropriate "non–attribution" to imports of the effects of "other factors";

(c) "mis-attribution" of injurious effects to imports of specialty products.

III.1. NO COINCIDENCE IN TRENDS

30. First, in the period on which the ITC bases its findings on the "coincidence of trends", i.e. 1998 and the first semester of 1999, imports were actually *declining*, rather than increasing. This point is clearly made in Korea's First Written Submission[17] and the EC will not reiterate those arguments.

III.2. NO "NON-ATTRIBUTION"

31. Second, the test applied by the ITC to "other factors" neither corresponds to, nor satisfies, Article 4.2 of the Agreement on Safeguards and the analytical test developed by the Appellate Body in *US – Wheat Gluten.*

32. The Appellate Body developed a test in three steps: (1) the distinction of injurious effects by imports from those by other factors; (2) the attribution of such effects to increased imports and other relevant factors; (3) as final step, the determination of whether "the causal link" exists between increased imports and serious injury, involving a "genuine and substantial relationship".[18]

33. The first two steps reflect the requirements laid down in Article 4.2(b) of the Agreement on Safeguards. In particular, the Appellate Body required that the competent authorities attribute to imports and to all other factors the injury caused by them *before* finally assessing the relationship between increased imports and serious injury ("*the* causal link"). This "sequencing" is made clear by the Appellate Body's referring to the establishment of "the causal link" as the "*final step*". [19]

34. The Appellate Body itself clarified that the goal of examining "other factors" is to ensure the "non-attribution" to imports of injury actually caused by such factors:

> "Under Article 4.2(b) of the Agreement on Safeguards, it is essential for the competent authorities to examine whether factors other than increased imports are

[17] Korea's First Written Submission, paras. 266-272.
[18] *US – Wheat Gluten*, Appellate Body Report, para. 69.
[19] *US – Wheat Gluten*, Appellate Body Report, para. 69.

> simultaneously causing injury. If the competent authorities do not conduct this examination, *they cannot ensure that injury caused by other factors is not "attributed" to increased imports*." [20]

and, therefore, that such injury is

> "not treated as if it were injury caused by increased imports, when it is not".[21]

35. The same concern expressed by the Appellate Body also underlies the prescription, in Article 5.1 of the Agreement on Safeguards, to apply a measure only to the extent that it is necessary to remedy the "serious injury".

36. The obligation laid down in Article 5.1 is the logical extension of the requirement not to attribute the effects of other factors to imports under Article 4.2(b) of the Agreement on Safeguards. By the same token, Article 5.1 can only have its full meaning if the non–attribution of "other factors" has been made in the context of the investigation.

37. The way in which the Appellate Body applied its test to the ITC *Wheat Gluten* determination also confirms that "genuine and substantial relationship" has to be examined in the light of the "non-attribution" analysis.

38. The Appellate Body noted that the US authorities had not "adequately evaluated the complexity of this issue" before them (in that case, the "the relationship between the increases in average capacity, the increases in imports and the overall situation of the domestic industry").[22] It therefore concluded that the ITC had not demonstrated adequately that non-import factors had not been attributed, and therefore could not have established the existence of "'the causal link' Article 4.2(b) requires between increased imports and serious injury".

39. In the present case too, even when the US authorities assessed that certain factors other than imports were "less important than" increased imports, they did not draw the necessary and appropriate consequences, that is they did not proceed to the non–attribution, so that the focus of the analysis could then be shifted on the relationship between the imports and serious injury. Before that, a "genuine" relationship cannot be observed, because the relationship is still "intertwined" with the impact of other factors.

40. The EC would also recall that in *US – Lamb* the Panel proceeded to the same type of analysis indicated by the Appellate Body in *US – Wheat Gluten*, and found a violation of Article 4.2(b) because certain "other factors", though not considered to be "negligible", had not led to "non-attribution" by the ITC. [23]

41. In the EC's view the following "other factors" in particular were not properly analyzed by the ITC.

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[20] *US – Wheat Gluten*, Appellate Body Report, para. 91.
[21] *US – Wheat Gluten*, Appellate Body Report, para. 69.
[22] *US – Wheat Gluten*, Appellate Body Report, paras. 91 and 90.
[23] Panel Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (*"US – Lamb"*), WT/DS177/R, WT/DS178/R, 21 December 2000, paras. 7.277-7.279.

1. Trends in oil and gas industry

42. If any coincidence in trends of economic indicators resulted from the ITC investigation, rather than between imports and the industry situation this was between the oil and gas market and the line pipe industry. This has correctly been pointed out by Korea in its First Written Submission.[24]

43. The ITC recognized that the situation in the oil and gas industry clearly contributed to the serious injury.[25] Even the US producers recognized that demand in the oil, gas and energy market was a principal factor affecting demand in line pipe.[26]

44. However, the ITC did not draw the necessary conclusions, as required by the Agreement on Safeguards and by the Appellate Body. All can be found in the ITC Report is that the impact of this factor was not greater than that of imports – but no explanation as to how this important factor was "non–attributed" to imports.

45. In addition, the importance of this factor on the domestic industry situation should have induced the ITC to carry out an analysis of the type conducted by the Appellate Body in *US – Wheat Gluten* in respect of an "other" factor particularly important in that case, i.e. increased capacity. This would have been the way to take full account of the complexity of the relation between the trends in the oil and gas industry, the increases in imports and the overall situation of the domestic industry.[27]

2. Competition from other domestic producers (i.e. new market entrants)

46. The US industry was already in a situation of relatively low capacity utilization at the beginning of the investigation period. In spite of this, it steadily increased capacity.[28] Not only did it add 8 per cent between 1994 and 1998, as noted by the ITC in its determination.[29] In interim 1999, a similar increase occurred, presumably in view of the entry of two new producers on the domestic market.[30] This further increase was clearly not a negligible one and the ITC failed to properly analyze it to ensure its "non–attribution" to imports. The ITC only looked at the 8 per cent increase between 1994 and 1998 and merely concluded "competition among domestic producers was not a more important cause of serious injury". [31]

3. Production shift from OCTG products to line pipe

47. The ITC noted some shift form OCTG production to line pipe production, but considered that it was "*not clear* that they switched to line pipe … in substantial quantities".[32] The ITC nevertheless came to a finding,[33] which is confined to the statutory requirement that this factor did not constitute "a more important cause of the serious injury" than increased imports.

48. First of all, if the magnitude of this factor was not entirely clear, it was incumbent upon the ITC to shed light. In *US – Wheat Gluten*, the Appellate Body disagreed with the Panel that the domestic authorities

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[24] Korea's First Written Submission, paras. 291–294.
[25] USITC Report, pp. I-28 and II-11.
[26] USITC Report, p. II-45.
[27] *US – Wheat Gluten*, Appellate Body Report, para. 90.
[28] USITC Report, p. II-22, Table 5.
[29] USITC Report, p. I-30.
[30] USITC Report, pp. II-21, I-30.
[31] USITC Report, p. I-30.
[32] USITC Report, pp. I-30 – I-31.
[33] USITC Report, p. I-30.

> "need only examine "other factors" which are *clearly* raised before them as relevant by interested parties" [34]

and found that

> "the competent authorities must undertake additional investigative steps, when circumstances so require, in order to fulfil their obligations to evaluate all relevant factors." [35]

49. The ITC could certainly not have been spared from "non-attribution" to imports of the effects of another possible cause of serious injury without assessing its exact impact.

50. Moreover, since the ITC nonetheless proceeded to make a finding, and did not qualify such factors as "negligible", it should have made sure that the impact of these factors was not attributed to imports.

4. Decline in export markets

51. The ITC determined that US exports had dropped from 13.5 per cent of production in 1997 to practically negligible amounts.[36] This does not mean a negligible impact on the domestic market, and the ITC itself recognized that the downward trend in exports worsened the situation.[37] However, the ITC again concluded the decline of exports was not a more important cause than increased imports without taking any further step to ensure "non-attribution".

III.3. "MIS-ATTRIBUTION" OF INJURIOUS EFFECTS TO IMPORTS OF SPECIALTY PRODUCTS

52. The EC notes that in the course of the investigation it was pointed out that certain products included in the scope of the investigation – the high frequency induction ["HFI"] line pipe over 6 inches in diameter – were imported for a special application (deep water pipelines) in which they could not actually be replaced by the products made by the "domestic industry" identified by the ITC. It was further pointed out that there was no domestic production of such specialty products. [38]

53. Regardless of the fact that HFI products were found to be "like" the products made by the producers identified as the "domestic industry", in view of the aforesaid circumstances they could not at all have had a bearing on the situation of the "domestic industry" within the meaning of Article 4.2(a) of the Agreement on Safeguards. Since the ITC was aware of this different application, and of the absence of competition with the "domestic industry", it should have examined the impact of those specialty products on the domestic industry as another "relevant factor" under Article 4.2 of the Agreement on Safeguards.

54. As recalled, in *US – Wheat Gluten* the Appellate Body has called the Members' domestic authorities to examine other factors even when not "clearly raised". *A fortiori* they are called to evaluate them in cases, like the one in point, where the matter was clearly raised and before the competent authorities.

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[34] *US – Wheat Gluten*, Appellate Body Report, para. 56 (emphasis in original).
[35] *US – Wheat Gluten*, Appellate Body Report, para. 55.
[36] USITC Report, pp. II-22 – II-23, Tables 5 and 6. This percentage is obtained by relating production data in Table 5 and Export shipments in Table 6.
[37] USITC Report, p. I-31.
[38] USITC Report, p. I-9 and footnotes 20-21; p. II-10, 48-49.

55. Since the ITC did not perform the "non-attribution", or did not properly look into all relevant factors, it could not examine whether a "genuine and substantial relationship" existed between increased imports and serious injury.

56. In view of the foregoing, the ITC's s review of the "other factors" in the *line pipe* investigation was not consistent with Article 4.2 of the Agreement on Safeguards. Accordingly, the EC respectfully submits that the Panel should uphold Korea's claim.

ANNEX A-6

ORAL STATEMENT OF JAPAN

(12 April 2001)

1. Mr. Chairman, Members of the Panel, Japan welcomes the opportunity to present its views orally in this proceeding.

2. Japan's exporters of line pipe, like those of Korea, are subject to the US safeguard measure at issue in this dispute. Moreover, Japan has systemic concerns about US safeguards practices in general. I will now summarize Japan's views, some of which are expressed in greater detail in Japan's Third Party Submission.

3. First, the measure was not limited to the extent necessary to remedy any serious injury. The measure imposed by the US President, which was unsupported by any analysis, was far more restrictive than that recommended by the USITC, which was based on detailed market and economic analysis. Thus, the measure cannot possibly be limited "to the extent necessary to prevent or remedy serious injury," as required by Article 5.1 of the Safeguards Agreement and Article XIX:1(a) of GATT 1994.

4. Second, the exclusion of Canada and Mexico from the remedy is discriminatory and violates Article 2.2 of the Safeguards Agreement, which requires application of a measure "to a product being imported irrespective of its source."

5. Footnote 1 of the Agreement, upon which the US relies, does not apply in this dispute. The footnote applies only to customs unions applying a safeguard measure as a single unit. NAFTA is not a customs union. Moreover, even if footnote 1 applied to free-trade areas (which it does not), the safeguard measure at issue was not applied by NAFTA on behalf of the United States; the US applied the measure on its own behalf.

6. Third, the USITC investigation failed to satisfy the requirements of Article 2 of the Safeguards Agreement and Article XIX:1 of GATT 1994. The USITC investigation failed to: (a) establish a sudden, sharp and recent increase in imports; (b) provide objective evidence that the US line pipe industry was seriously injured; and (c) demonstrate a causal link between increased imports and any injury to the US industry.

7. Fourth, the United States incorrectly interprets the term "unforeseen developments" in Article XIX:1 of GATT 1994. The term does not, as the US claims, refer to whether a domestic industry expected the market conditions prevailing prior to imposition of a safeguard measure. Rather, it refers to a Member's expectations with regard to the consequences of trade liberalization (or, more precisely, the trade effects flowing from incurring new GATT obligations and lowering tariffs).

8. Finally, the Panel should reject the US attempt to insulate the USITC injury determination from review. The proper standard for review of safeguard actions is set out in Article 11 of the DSU, which requires the Panel "to make an objective assessment of the matter before it." Thus, the Panel should indeed determine whether the USITC erred in failing to examine the most recent data available.

ANNEX A-7

ORAL STATEMENT BY MEXICO

(12 April 2001)

I. INTRODUCTION

Distinguished members of the Panel:

I would like to thank you on behalf of Mexico for enabling us to explain our point of view with respect to the case at issue, and I take this opportunity to express our gratitude for the important work you are doing. The proper interpretation of the provisions governing the application and exclusion of safeguard measures in a free-trade area is of vital importance in providing security and predictability to the multilateral trading system. Mexico has a substantial interest in this case, both from the trade and the systemic point of view. We are concerned, *inter alia*, at Korea's peculiar interpretation (shared by Japan) of the way in which safeguard measures should be applied.

Before turning to the substance, I would like to express Mexico's deep concern at the fact that the working procedures of this Panel did not provide for translation into Spanish of the written submissions of the parties to the dispute or the third parties. Not only has this affected our rights as Members of this Organization, but it has presented us with a number of practical problems. We hope that in future dispute settlement procedures the rights of third parties to receive documents in what is an official WTO language will be safeguarded.

II. LEGAL ARGUMENTS

Concerning the arguments relating to the exclusion of Mexico and Canada from the application of the safeguard, although the United States has already provided a satisfactory reply, certain elements should be highlighted in order to help resolve the issue.

Firstly, as the United States mentioned, nobody is questioning the fact that the decision to exclude Mexico from the application of the safeguard was taken pursuant to the United States' obligations under the North American Free Trade Agreement (hereinafter referred to as NAFTA), more specifically Article 802 thereof.

Secondly, there are two basic principles governing the multilateral trading system: (i) Members of this Organization have the right to establish free-trade areas with a view to facilitating trade between the constituent customs territories; (ii) the other provisions of the GATT 1994, in particular the most-favoured-nation principle (see Articles I, XIII:1; and XIX), cannot prejudice the exercise of that right.

As we all know, Article XXIV:8(b) of the GATT 1994 defines a free-trade area as an area in which the constituent territories eliminate the duties and other restrictive regulations of commerce between them. Where an agreement establishing a free-trade area (as in this case with NAFTA) provides that safeguards shall not be applied to the products from the constituent territories, this is not only consistent with Article XXIV:8(b), but it is also in keeping with the purpose of that Article, which is to "facilitate trade". This approach was confirmed by the Appellate Body in *Turkey – Textiles* when it pointed out that Article XXIV of the GATT 1994 must be interpreted in the light of the fact that the purpose of a customs union (or free-trade area) was precisely to "facilitate trade".

Similarly, we observe that Article XIX is not among the restrictions which, according to Article XXIV:8(b) of the GATT 1994, may be maintained within a free-trade area where necessary. This means that the elimination of "other restrictive regulations of commerce" includes the elimination of the application of safeguard measures.

We note that Korea argues that the exclusion of Mexico from the application of the safeguard measure has prejudiced the other historical suppliers. Any prejudice to Korean exporters is in fact due to the surcharge applied to a percentage of their exports. The fact that the United States market should substitute Mexican and Canadian imports or domestic production for Korean imports or find substitutes for the product in question neither benefits nor prejudices Korean exporters.

At the same time, Japan argues that the requirements for invoking protection under Article XXIV of the GATT were not met. Here, we would simply like to make the point that what is being discussed is the authority to exclude the parties to NAFTA from the application of a safeguard, and not the imposition of the safeguard *per se*. Accordingly, we can affirm that (i) the establishment of the free-trade area did, indeed, provide for such exclusion and (ii) the failure to provide for the elimination of restrictive regulations of commerce such as safeguards would have adversely affected the establishment of a free-trade area.

I shall now turn to the issue of the last sentence of footnote 1 of the Agreement on Safeguards, and in this regard, I would like to make only two general remarks.

The first of these remarks is very simple: the last sentence of footnote 1 reads "Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of the GATT 1994." It does not say that the provision in question applies only to paragraph 8(a) (customs unions) and that it excludes free-trade areas (paragraph 8(b)). To maintain, as Japan has, that this footnote is applicable to customs unions only is tantamount to diminishing Mexico's rights under the Agreement on Safeguards, in violation of Articles 3 and 19 of the DSU.

Our second remark concerns the relationship between the Agreement on Safeguards and the GATT 1994. The interpretation whereby the rights conferred by Article XXIV of the GATT are applicable only to the provisions of that Agreement and do not extend to the Agreement on Safeguards is incorrect. As we know, the Appellate Body has made it clear that the GATT and the Agreement on Safeguards contain provisions of the same Agreement, the "WTO Agreement", and therefore represent "an inseparable package of rights and disciplines that must be considered in conjunction"; and "any safeguard action must conform with the provisions of Article XIX of the GATT 1994". This same interpretation has been upheld in respect of other WTO Agreements, confirming that rights under the GATT (in this case under Article XXIV) do not lose their effect when another agreement in the area of trade in goods is examined.

III. CONCLUSION

In view of the above considerations, we respectfully request the Panel to carefully examine the nature of the exclusion in the light of the purpose of Article XXIV of the GATT, and to confirm the interpretation that Members have the right, under Article XXIV, to exclude their partners in a free-trade area from the application of safeguard measures and that this right is valid under the Agreement on Safeguards.

ANNEX B

Parties' Answers to Written Questions

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ANNEX B-1

KOREA'S ANSWERS TO QUESTIONS FROM THE PANEL

(7 May 2001)

I. INTRODUCTION

Before responding to the Panel's questions, Korea would like to take the opportunity to note that on 1 May 2001, the Appellate Body released its decision in *US – Lamb Meat*. In Korea's opinion, that decision is quite helpful in evaluating the issues before the Panel in this proceeding. Due to the time constraints, Korea has not incorporated an analysis of that decision in its response to the questions posed by the Panel, although Korea believes that its positions are consistent with the views expressed by the Appellate Body. Korea has attempted, where possible, to incorporate references to the Appellate Body's decision in its Written Rebuttal, and Korea welcomes the opportunity to more fully explore the implications of this decision at the next session of the Panel.

(i) Increased imports

3. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough." (a) How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? (b) What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? (c) In the present case, could the US line pipe industry have filed a petition before it did? Please explain. (d) Could the ITC have reached its determination before it did? Please explain.

Answer

(a) How recent?

It is the position of Korea that the "recent" increase in import levels should be in the period immediately preceding the authority's decision. From this it can be concluded that the last one-year period is the "recent period" and a decline in the interim six-month period would constitute the most relevant evidence in the recent period.[1]

Korea's interpretation proceeds from the Appellate Body's admonition in *Argentina – Footwear* and *Korea – Dairy* that safeguard measures are reserved for emergency situations and thus the requirements of the SA must be construed strictly.[2] Only a conservative approach to the question

[1] A one-year period should be sufficient to evaluate whether a downward trend in imports (following an increase) is sustained such that imports are not "being imported ... in such increased quantities." See Article 2.1 of the SA.

[2] See Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R ("*Argentina – Footwear (AB)*") at para. 94 ("construing the prerequisites ... extraordinary nature must be taken into account.").

of the "recent period" can ensure that the increase in imports is "recent enough" to satisfy the requirements of Article 2.1 of the SA.[3]

The concept of "recent" is crucial to the gravamen of Article XIX of the GATT 1994 and the SA. The purpose of import measures under Article XIX and the SA is to remedy present or imminent serious injury – not past injury.

In this case, the legal implications of the texts of Article XIX of the GATT 1994 and of Articles 2.1 and 4.2(a) of the SA, read together with the interpretations of the Appellate Body in *Argentina – Footwear,* are as follows:

(a) "[I]s being imported ... in such increased quantities" refers to at the time the authority makes its decision. Here, the "recent" period is characterized by a sustained decline in absolute import levels which commenced in the second half of 1998 and continued through the end of the period of investigation, coupled with the decline in the level of imports relative to production in the six-month period immediately proceeding the ITC's decision. That was the present.

(b) It is not proper to analyze imports in 1999 by referring only to the same period one year earlier and ignoring the immediately preceding six months. Article 4.2(a) of the SA requires the consideration of all relevant factors concerning increased imports--including the "rate and amount." [4]

(c) Specifically, given the finding of the Appellate Body in *Argentina – Footwear* ("recent imports ... not simply trends ... during any other period of several years"),[5] the determination of what is "recent" cannot be several years. "Recent imports" are those that occurred in the last year of the period with the most recent trends being the most significant trends.

(b) Minimum time

Korea does not know the minimum time an industry would need to file a petition; likely, this would vary from case to case. However, the petition not only must demonstrate that imports were increasing, it also must satisfy all of the other conditions of Article 2 of the SA. Thus, it must show that the industry is significantly impaired ("seriously injured") or that serious injury is imminent and that the increase in imports is causally related to the serious injury of the industry. In this case, the petition was filed in June of 1999. By that time, imports had been declining for a 12-month period, two new US producers had emerged, and domestic capacity had increased by 25 per cent.[6]

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[3] See e.g., *Argentina – Footwear (AB)* at para. 130 (" ... the use of the present tense of the verb phase 'is being imported' in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary ... to examine recent imports. ... the phrase 'is being imported' implies that the increase in imports must have been sudden and recent."); see also para. 131.

[4] We do not have information on the amount of the relative decline in imports because it is confidential, but the United States permits the Panel (First Substantive Meeting) to do its own calculations of relative import trends. Given that US domestic production increased in the first half of 1999 (ITC Determination, Staff Report at II-20) and imports declined in the first half of 1999 (US 16 February Letter), imports declined relative to domestic production in the first half of 1999.

[5] *Argentina – Footwear (AB)* at para. 130 (emphasis added).

[6] See ITC Determination, Separate Views on Injury at I-46; ITC Determination, Dissenting Views on Injury at I-61, n.26; Exhibit 48A (Welded Line Pipe – Domestic Industry Capacity, Apparent Consumption and Export Shipments)(KOR-48A).

(c) When the petition could have been filed

With respect to whether the US line pipe industry could have filed a petition before it did, this question highlights the temporary nature of the decline in the line pipe industry factors. It also confirms that there was no coincidence of trends between increased imports and declining industry economic indicators and that import relief therefore was improper. When imports were increasing (first half 1998), industry indicators were uniformly and strongly positive. In fact, many indicators exceeded 1997 levels.[7] The industry was not suffering serious injury and imports were increasing together with domestic shipments. When those industry indicators declined in late 1998/first half 1999, so did imports. Then, after the first half of 1999, the industry indicators had already improved so any injury was no longer present at the end of the period.[8] Some illustrative scenarios can be posed:

(a) Instead of filing in June 1999, when subject imports had declined for 12 months, the industry could have filed in June 1998. Imports measured at that time would have shown an increase, but the domestic industry would have shown sustained and unprecedented growth, making an affirmative serious injury decision impossible.

(b) The industry could have filed after June of 1999, but the recovery of the industry would have been even more apparent than it already was. The US industry had to "rush to file" the case[9] due to the very temporary nature of the industry's downturn and the 12-month reversal of import trends in the second half of 1998 through the first half of 1999.

Although the US industry could have filed the petition earlier or later than they did, it actually does not matter in this case since the performance of the line pipe industry was dependent on demand in the oil and gas sector, not imports.

(d) Could the ITC have reached its determination before it did?

The Petition was filed on 30 June 1999 and the ITC's decision on injury was reached in October. Thus, there was only a three-month period between the filing of the petition and the decision of the ITC. The industry chose to file when it did even though the industry understood that its performance depended on the recovery of demand in the oil and gas sector and, thus, was tied to rising oil and gas prices and increased drilling activity. The industry's rebound was apparent before June 1999.[10] Oil prices began to recover after the first quarter of 1999[11], and the rig count recovered shortly thereafter.[12] The trends observed after the petition was filed confirmed that these trends would be sustained.[13] If there was any doubt in that regard, the ITC could have taken additional time to

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[7] See Exhibit 48A (KOR-48A); Exhibit 48F (Average Monthly US Shipments of Line Pipe) (KOR-48F).

[8] See generally Korea's First Written Submission paras. 252-62; Exhibit 48D (The Status Of The US Line Pipe Industry At The "Very End Of The Period")(KOR- 48D).

[9] See Preston Pipe & Tube Report, United States & Canada, Vol. 17, No. 6 (June 1999) at 1 (KOR-47).

[10] See ITC Determination, Staff Report, Figure 3 at II-46 (KOR-6).

[11] See id.

[12] See Exhibit 48B (Comparison of US Rotary Rigs in Operation with Domestic Shipments of Welded Line Pipe and Welded OCTG)(KOR-48B).

[13] "Natural gas and oil prices have increased since early 1999 ... and hence increased demand for line pipe." ITC Determination, Majority Views on Remedy at I-76-77 (KOR-6); "We note in this regard that natural gas and crude oil prices have increased since early 1999 and, consequently, drilling and production activity, as measured by the active rotary rig count, has improved." Id. at I-80. See also ITC Determination, Bragg and Askey Views on Remedy at I-91 (KOR-6) ("Commissioner Askey also notes that the recent upturn in

review the case, including collecting an additional period of data. Given the extraordinary nature of this remedy, it would have been appropriate to do so if the ITC had any doubts whether the decline in imports and/or the recovery of the industry were sustained.

4. Please comment on the US assertion that "Korea has failed to show, as a matter of law, that the period it proposed for assessing increased imports is mandated by the Safeguards Agreement or by the Appellate Body and panel decisions interpreting the Agreement." (para. 83, first US written submission)

Answer

Please see Korea's First Written Submission and Oral Statement, which establish that there is a very specific legal requirement regarding the proper period. Specifically, in *Argentina – Footwear*, the Appellate Body stressed that, when examining the question of increased imports:

(a) "[T]he relevant investigation period should not only end in the very recent past, the investigation period should be the recent past."[14]

(b) ". . . the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years--or, for that matter, during any other period of several years."[15]

(c) "[T]he 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.'"[16]

The Appellate Body clearly was establishing a requirement as a "matter of law" regarding what period and what increase must be shown. Unequivocally, "recent" cannot mean a period of "several years." Thus, the recent period, as a matter of law, is, at most, the last year of the period. The most recent data available is the most relevant--the six-month interim period, in this case.

The Appellate Body set the appropriate legal standard for increased imports in every case, not just for the facts presented in *Argentina – Footwear*. Paragraphs 129-131 of the Appellate Body's decision demonstrate that the Appellate Body upheld the Panel's conclusion that Argentina had not met the requirement of "increased imports," but rejected the narrow grounds of the Panel's determination and explained the proper legal basis for the analysis. The need for such a precise legal standard was justified by the Appellate Body on the grounds that Article XIX of the GATT 1994 is an extraordinary remedy dealing with fair trade, so "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account." [17] Clearly, it is the view of the Appellate Body that the extraordinary nature of Article XIX of the GATT 1994, dealing with "emergency action," informs the interpretation of all of the provisions of Article XIX and the SA.[18]

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the oil and gas industries, the line pipe industry's principal customers, should assist the domestic industry in its efforts to respond to competition from imports.").

[14] See *Argentina – Footwear (AB)* at para. 130, n.130 (emphasis in original).

[15] *Id.* at para. 130 (emphasis added).

[16] *Id.* at para. 131.

[17] *Id.* at para. 94.

[18] *Id.* at para. 93.

(ii) Serious injury

5. At para. 214 of its first written submission, Korea refers to alleged violations of inter alia SA Article 4.2(c). In the title to section IV.B.3, however, Korea refers to SA Article 4 more generally. With regard to SA Article 4, do the claims set forth in section IV.B.3(b) – (e) only relate to paragraph 2(c) of that provision? If not, please explain which claim (in section IV.B.3) relates to which element of SA Article 4.

Answer

The claims made in Korea's First Written Submission with respect to Article 4 of the SA are not limited to Article 4.2(c). We apologize for any lack of clarity.

Korea's claims with respect to Article 4 of the SA encompass Articles 4.1(a), (b) and (c), and, 4.2(a), (b) and (c). Specifically:

(a) Korea's claims at paragraphs 214-224 are based on Articles 3.1 and 4.2(c) of the SA and Article 11 of the DSU.

(b) Korea's claim at paragraph 225 is based on the preamble to the SA ("Emergency Action"), Article 11 of the SA and Article XIX of the GATT 1994.

(c) Korea's claims at paragraphs 226-244 are based on Articles 4.1(c) (definition of "domestic industry") and 4.2(a) of the SA (as indicated in paragraph 226), as well as Articles 4.2(a) and 4.2(b) of the SA with respect to the need to evaluate "all relevant factors" and to isolate the effects of "other factors" causing injury.

(d) Korea's claims at paragraphs 245-262 relate to the requirement to demonstrate serious injury, "significant overall impairment," in accordance with Articles 2.1, 4.1(a) and 4.2(a) of the SA.

(e) Korea's claims at paragraphs 312-317 related to the requirement to demonstrate "threat of serious injury" in accordance with Article 4.1(b), 4.1(c) and 4.2(a).

These constitute Korea's claims of the US violations.

(iii) The measure

6. Article 5.1 of the Safeguards Agreement refers to quantitative restrictions that "reduce the quantity of imports below the level of a recent period ... ." (a) Does a TRQ reduce the quantity of imports? Please explain. (b) If the second sentence of Article 5.1 is applicable to TRQs, why would a Member impose a TRQ instead of a simple quota?

Answer

(a) Yes, a TRQ does restrict the quantity of imports.[19] The distinction between a TRQ and an absolute quota is a difference of degree not kind. This question may best be addressed be referring to the ITC Majority's recommendation of a TRQ. A TRQ was recommended to reduce imports to a certain level unless purchasers sought specialty products not produced in the United States.[20] Following the requirement of

[19] See also Response to Question 9.
[20] See ITC Determination, Majority Views on Remedy at I-81 (KOR-6).

Article 5.1 of the SA, the ITC Majority recommended a TRQ with a quota element of 151,124 tons, which the Majority states would be "approximately equivalent to the average level of imports in 1996-98." [21] The 30 per cent tariff was expected to "discourage" additional imports.[22] The ITC concluded that restricting imports to this level would restore the industry to a "reasonable level of profitability."[23] Thus, a TRQ also reduces the quantity of imports.

(b) Concerning why a Member would impose a TRQ instead of a quota, we again refer to the ITC and the fact that the distinction between a TRQ and absolute quota is one of degree not kind. The ITC rejected a straight quota because it could severely restrict or eliminate imports of several specialty grades, where US demand had been "satisfied primarily by imports."[24] Thus, a Member might want to impose a TRQ when it wants a less restrictive measure than a straight quota but still wants to restrict quantities.

7. Korea's claim that the Line Pipe measure violates GATT Article XIX.1 and SA Article 5.1 because it is excessive appears to be based on its argument that the measure is more restrictive of imports than the ITC recommendation. How would Korea demonstrate that the Line Pipe measure is more restrictive than the ITC recommendation, taking into account all aspects of the measure and recommendation?

Answer

Korea's claims regarding the violations of Article XIX.1 of the GATT 1994 and Article 5.1 of the SA are not based exclusively on the argument that the measure is more restrictive than the ITC recommendation. First, the United States violated the requirements in Article 5.1 that quantitative restrictions should not reduce imports below the level of the last three representative years unless clearly justified. Second, the United States is obligated by Article 5.1 to make explicit findings in their decision that the measure is "necessary" regardless of the form of the measure. Korea does not agree with the US interpretation of *Korea – Dairy* and, in any event, Articles 3.1 and 4.2(c) of the SA require the same explicit findings. Third, in this case, the analytical basis for the President's remedy directly put into question whether the level of relief was more than necessary so the President had an obligation to address the issue. Article 5.1 places an affirmative obligation on the United States to ensure that the measure is limited to the extent necessary. The United States has produced no evidence to demonstrate that it complied with that obligation. These issues all relate to the amount of import relief imposed. Article 5.1 also requires that the form of the measure be the most suitable to achieve the objectives to prevent or remedy injury and facilitate adjustment. The United States also did not demonstrate that the form of the measure best met the objectives of Article 5.1, and therefore, is in violation of Article 5.1.

To answer the Panel's question, there is *prima facie* evidence that the measure was excessive based on the ITC Majority's conclusions regarding both the level of relief that is "necessary" and the level of relief which would be "excessive." The ITC Majority concluded that limiting imports to 151,124 tons at normal bound rates of duty would allow the industry to recover from serious injury. The ITC also considered that the 30 per cent duty level would "discourage" any imports except for certain specialty products.[25] Therefore, the ITC viewed its remedy recommendation, in its totality (quota plus duty), as an import restriction at the approximate level of 151,124 tons.

[21] *Id.* at I-82.
[22] *Id.* at I-81.
[23] *Id.*
[24] *Id.* at I-80.
[25] *Id.* at I-81.

The ITC Majority also concluded that market participation of imports at only 105,849 tons "would be excessive."[26] These conclusions were based on the findings in the ITC's Economic Memoranda which the United States had previously implied were the basis for the President's measure as well.

Neither Korea nor the Panel has the entire Economic Memoranda, so neither Korea nor the Panel knows the projected level of imports with a 9,000-ton quota and a 19 per cent tariff. Further, neither Korea nor the Panel knows: (i) whether the United States analyzed the projected level of imports under the TRQ measure actually imposed; or (ii) if it did, the results of the analysis. Further, it appears from the US Letter of 23 April that we will never know.[27]

What Korea does know is that any reasonable calculation of the quota portion of the measure imposed results in far less than 151,124 tons. We also know that the measure as a whole actually restricted imports to 78,671 tons during the first quota year March 2000-February 2001.[28] The Panel also can consider the following facts from the ITC's opinion which would indicate that very limited imports would enter at 19 per cent under the measure as constructed:[29]

(a) Total "in-quota" imports were projected to be approximately 63,000 tons, based on the fact that the ITC listed only seven significant suppliers other than Canada and Mexico. (Current US import data for March 2000-February 2001, show total "in-quota" imports of 64,067 tons.)[30]

(b) Very limited "out-of-quota" imports could be expected at the 19 per cent tariff level:

(i) The duty imposed was 6 to 10 times the level of the bound rate.

(ii) Each supplying country could supply 9,000 tons at bound rates. It could be presumed that the market would absorb these imports first (and those of Canada and Mexico) before the imports at the 19 per cent additional duty.

(iii) Two very significant suppliers were not controlled. (The actual data shows that Canada and Mexico now supply approximately 50 per cent of total imports.) The NAFTA exemption had a much more negative impact on other suppliers under the Presidential measure than it did under the measure recommended by the ITC. Under the ITC recommendation, it would have been only after imports of 151,124 tons entered that the preference for Canada and Mexico would have created a price advantage. Under the Presidential measure, the preference affects exporters after they reach 9,000 tons.

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[26] *Id.* at I-80.

[27] See US 23 April Letter, Response to Question 6.

[28] See Exhibit 49 (Chart 1: US Imports of Line Pipe (1999-2001); Chart 2: US Imports of Line Pipe (March 2000-February 2001) (KOR-49). One question for the United States is whether that level of import restriction is what the United States intended to achieve.

[29] See generally ITC Determination, Majority Views on Remedy at I-76-78 (KOR-6); Bragg and Askey Views on Remedy at I-88-90 (KOR-6).

[30] See Exhibit 49 (KOR-49).

(iv) Imported and domestic line pipe were highly substitutable.[31] Moreover, according to testimony before the ITC, consumers preferred domestic products.[32]

(v) The US industry had substantial unused capacity and US capacity exceeded consumption.

(c) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.[33]

(d) The only economic analysis done for the purpose of meeting obligations under Article 5.1 of the SA were the Economic Memoranda. From these analyses, the ITC Majority concluded that 151,124 tons at bound rates would reduce imports to a "sufficient" level. These appear to be the only economic basis for the level of restriction recommended by the ITC. The ITC recommendation--which appeared to be more in line with WTO rules--was rejected in favor of a remedy that did not comply with WTO rules.[34]

Thus, the pattern of imports resulting from the import restriction could have been and should have been anticipated. Total imports, excluding Mexico and Canada, equalled 78,671 tons during the first quota year – far below the 151,124 tons analyzed by the ITC as "necessary" and sufficient to remedy the injury.[35] In the absence of contrary analysis that: (i) the President concluded that a higher level of relief was "necessary" and not "excessive"; or (ii) the level of imports subject to the restrictions had been projected to equal or exceed 151,124 tons, the Panel can only conclude from the facts available that the measure imposed was greater than necessary to remedy the injury.

8. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused "serious injury or a threat thereof," how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer

The texts of Articles 4.1, 5.1 and 5.2(b) of the SA show that the nature and effect of a "serious injury" finding are not the same as those of a "threat of serious injury" finding. The different nature of these findings has specific implications for the measure that is imposed.

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[31] See US First Written Submission at para. 170.

[32] See Transcript of Hearing on Injury, Circular Welded Carbon-Quality Line Pipe, Inv. No. TA-201-70 (30 September 1999) at 145-147 (KOR-50).

[33] See Exhibit 49 (KOR-49).

[34] It is now unclear, based on the US Letter of 23 April, whether the measure imposed by the President was based on the economic assessment of the ITC. To the extent that the United States now claims that the Presidential Proclamation and Memorandum "form the entirety of the explanation of the decision to impose the line pipe safeguard measure," there is no economic support for the measure. See US 23 April Letter, Response to Question 6, p.(i).

[35] See Exhibit 49 (KOR-49).

First, in the case of serious injury, the industry must be in a state of significant overall impairment caused by increased imports. In contrast, for threat of serious injury, the increase in imports already must have occurred, but the industry is not yet in a state of significant overall impairment. These are mutually exclusive findings: an industry cannot simultaneously be and not be in a state of significant overall impairment.

For this reason (as well as others), the decisions of the ITC Majority (on serious injury) and the Separate Views on Injury (on threat of injury) are contradictory. Because the ITC failed to reconcile these contradictions and inconsistencies in its detailed analysis and findings and conclusions, its analysis and determination are insufficient under Articles 3.1 and 4.2(c) of the SA.

Article 5.1 of the SA applies this distinction between present and threatened serious injury to the safeguard measure, itself. The measure is to be imposed only "to the extent necessary" to "prevent" or "remedy" serious injury. A measure necessary to remedy injury that has already occurred and needs to be reversed would have a different objective and might be more restrictive than a remedy to keep the industry healthy. This interpretation is confirmed by Article 5.1, which also requires a Member to choose the measure "most suitable for the achievement of these objectives" (*i.e.*, prevent or remedy injury). Due to the difference in objectives, the measures should vary.

The ITC Commissioners in this case recognized that the remedy had to be tied to their injury findings. They also appear to have recognized that distinct remedies would be warranted based on whether the Commissioners found serious injury or only threat of serious injury. The ITC Majority, which made a finding of present injury, recommended a TRQ of 151,124 tons.[36] They determined that a limit at that quantity was sufficient to remedy the serious injury.[37]

In the Separate Views on Injury concerning threat, the Commissioners state that in considering the form and amount of the relief, "we took into account ... the threat of serious injury that we found to exist ... ." [38] The tariff increase they recommended was based on "estimates by Commission staff" that "indicate that our recommended remedy will result in increased revenues to the domestic industry through a combination of increased prices and sales volumes ... ." [39] In the Separate Views on Remedy, the Commissioners sought a "modest" price increase.[40] Because the United States has not supplied the ITC calculations in the Economic Memoranda, we do not know what level of imports was projected at that tariff level. We do know that it was above the level recommended by Petitioners[41] because the increases in price levels and revenue were projected to be smaller than those sought by Petitioners.[42]

Article 5.2(b) of the SA further shows that a measure to "remedy" serious injury and one to "prevent" injury differ. The departure referred to in that paragraph, to allocate quotas in "disproportionate" shares, is not permitted in the case of threat of serious injury. This confirms that the two findings support different measures.

This discussion highlights an important point that should be considered when examining the safeguard measure. The last sentence of Article 5.1 of the SA confirms that the form of the measure

[36] See ITC Determination, Majority Views on Remedy at I-81 (KOR-6).
[37] *Id.* at I-82.
[38] See ITC Determination, Bragg and Askey Views on Remedy at I-88 (KOR-6).
[39] See *id.* at I-92.
[40] See *id.*
[41] See *id.* at I-90.
[42] See *id.*

should be a function of the objective of the measure.[43] First, the Member should determine the level of imports (or the "amount" of the restriction) that is necessary to prevent or remedy the injury ("the objective"). This determination should be based on an analysis of the price and volume effects of certain levels of import restriction. The "amount" is likely to vary depending on the industry's condition (*i.e.*, significantly overall impaired or only threatened with such a condition). Only when the determination of "amount" is made, can the form of the measure (*e.g.*, a tariff, an absolute quota, or a TRQ) be determined based on which is most "suitable" to achieve the amount of import relief necessary to effectuate the objective (*i.e.*, "necessary" to remedy or prevent serious injury).[44]

In fact, this is the analytical approach of the ITC. The ITC first develops a number of scenarios to see what economic effects are produced on the industry's volumes and/or prices by various import restrictions.[45] After determining the appropriate level of imports (the "amount" of the measure) based on the volume and/or price effects to be realized, then the ITC selects the form of the measure that will best achieve that level of import restriction. In other words, the form of the measure is just a means to an end – a level of import relief that will have the desired effect on the industry.

Thus, an authority cannot ensure that a measure is limited to what is "necessary" without distinguishing between threat and present injury. Without exercising the intellectual discipline to determine whether serious injury either exists or is merely threatened, an authority cannot limit the measure to what is "necessary." That which is "necessary" to remedy what presently exists may not be necessary to avoid that which otherwise might exist in the future.

In conclusion, before applying a measure, an authority must distinguish between threat of serious injury versus serious injury, because the measure: (i) must only be imposed to the "extent necessary;" and (ii) must be tailored to meet very different objectives (it must be the "most suitable" measure). In this case, the President failed to indicate both which type of injury determination he was adopting and whether his remedy was intended to prevent or remedy serious injury. This is a violation of the provisions of Articles 3.2, 4.2(c) and 5.1 of the SA, which require a detailed analysis of the case as well as published findings and conclusions on all relevant issues of fact and law.

9. In Section F.2.b of its first written submission, the United States argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does Korea consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Answer

(a) Quantitative restrictions are a broader concept than quotas

Quotas are one form of quantitative restriction. There are other forms as well, which are specifically noted in Article XI of the GATT 1994, including "import or export licenses" and an all-encompassing category of "other measures."[46]

[43] See Article 5.1 of the SA ("Members should choose measures most suitable for the achievement of these objectives.").

[44] See *id.*

[45] See e.g., USA-9 (USITC Memorandum EC-W-070); USA-10 (USITC Memorandum EC-W-072); USA-11 (USITC Memorandum EC-W-073); USA-12 (USITC Memorandum EC-W-074).

[46] Many other forms of import restrictions, "other measures," have been found to fall within Article XI, including minimum price systems. They have been held to constitute "quantitative restraints" since the quantity

Article XI of the GATT 1994 defines quantitative restrictions (by excluding "other than duties, taxes, or other charges"). In addition, Article XIII.2 of the GATT 1994 provides for the manner in which all quantitative restrictions are to be imposed (normal distribution of trade). Specifically, in the case of quotas, Article XIII.2 of the GATT 1994 provides for the means by which quota amounts are to be fixed both on an overall basis (Article XIII.2(a)) and by supplier (Article XII.2(d)). There is no dispute that the term "quota" in Article XIII.2 includes both tariff-rate quotas and absolute quotas. There is no basis in the text of Article 5.2 of the SA to create a distinction between absolute quotas and tariff rate quotas.

(b) Tariff-rate quotas restrict quantities

TRQs, as a general matter, restrict the quantities imported even if they do not expressly ban imports above a certain level (straight quota). The distinction is one of degree, not one of kind. The fact that a certain level of imports is allowed at a bound rate of duty acts to restrict the amount of imports that will enter at the higher rate of duty because the market naturally prefers the "cheaper" imports and the remainder will enter only to the degree that the market is willing to absorb the higher rate of duty. Thus, the combined effects of both an increased duty of 19 per cent and 9,000-ton quota at normal duty levels must be analyzed.

When the combined effect of a quota at normal duty levels plus a tariff are analyzed, the restriction is not felt uniformly. Unlike a straight tariff, which affects each ton of imports across the board and, therefore, makes all imports equally competitive or uncompetitive, a 9,000-ton limit on each supplier creates a natural cost preference for "in-quota" imports, particularly when combined with a significant duty rate (19 per cent). In the absence of the Economic Memoranda, the actual effect of the President's import restriction is instructive. The 9,000-ton restriction acts as a virtual limit on imports (as noted, during the first quota year ending in February 2001, imports at the 19 per cent duty rate were limited to 14,604 tons for the entire year).[47] This is due to the two attributes of a TRQ which are inextricably related: the fact that each country has a 9,000-ton limit of supply at normal rates of duty and the fact that the tariff level on the remainder is 19 per cent. The combined effects of those two elements have significantly restricted imports.

(c) Object and purpose of the "quota" provisions

It is significant for the purpose of interpreting Article 5.2 of the SA and of the meaning of "quota" that it is the common nature of absolute quotas and TRQs that "non-discrimination" must be accomplished in a different manner than for tariffs. Applying a single tariff affects all suppliers equally and complies with Article I of the GATT. In the case of absolute quotas or tariff-rate quotas, in contrast, when quotas are assigned among suppliers, the effect would be to discriminate against traditional sources of supply if the same quota were given to every supplier. This would disrupt historical trade patterns. "Equal" quotas for historic suppliers with vastly different historic shares is discriminatory. MFN therefore is respected only by ensuring that historic shares are respected.

For this reason, Article XIII.2 of the GATT 1994 requires that import restrictions preserve traditional trade patterns. Specifically, for quotas that are assigned by supplier, there are specific rules for how that is to be achieved.[48] The rationale for doing so to preserve historical shares and avoid

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that can be sold below a certain price was limited and it was a restriction "other than duties, taxes, or other charges." See GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) at p. 321 (citing EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables).

[47] See Exhibit 49 (KOR-49).

[48] Article XIII:2(d) of the GATT 1994.

discrimination applies equally to absolute quotas and tariff-rate quotas and hence both are subject to the disciplines of Article XIII.2.

The same concept, prohibiting a discriminatory effect on suppliers, is contained in Article 5.2 of the SA. The conditions that must be present to depart from this requirement are specifically delineated in Article 5.2(b) and are quite strict. Finally, again, an analysis of the ITC Majority's TRQ recommendation demonstrates that the ITC understood that the requirements of Article XIII:2 of the GATT 1994 and Article 5.2(a) apply to TRQ's. The US representative at the First Substantive Meeting denied that the ITC's practice constituted the US practice. Of course, the United States also denied that the measure imposed is a TRQ. In fact, the US representative is wrong on both counts.

The United States cannot avoid the requirements of Article 5.2(b) of the SA in order to depart from Article 5.1(a) and, yet, discriminate among suppliers by calling its measure a "tariff."[49] The President's measure is discriminatory precisely because it does contain a quota element that fails to respect historic market shares.

10. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years." Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer

The decision of the Appellate Body in *Korea – Dairy* must be placed in its proper legal context. The issue before the Appellate Body in *Korea – Dairy* was whether Article 5.1 of the SA by its terms required a specific finding that the measure, in that case (as here) a quantitative restriction, was "necessary." The Appellate Body held that a quantitative restriction which reduced imports below the three-year representative period specified in Article 5.1 clearly had to be justified at the time of the decision and in the authority's recommendations on the application of the measure.[50] The Appellate Body then examined whether a quantitative restriction that set the level at or above the last three representative years also had to be justified. The Appellate Body concluded, "[i]n particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years ... .'"[51]

This is a logical conclusion given that Article 5.1 of the SA sets out a benchmark (the last three representative years) for what level of quantitative restriction is presumed "necessary." No specific reaffirmation of that fact was therefore needed. Only a departure from the benchmark required the explanation that the measure was "necessary."

While it is true that the Appellate Body rejected the broad language of the Panel with respect to the obligations of Article 5.1 of the SA, the holding did not extend past the question presented to the Appellate Body regarding the extent of the obligation to justify a quantitative restriction. The

[49] The departure provided for in Article 5.2(b) is not permitted in the case of a threat determination.

[50] See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) at para. 98.

[51] See *id.* at para. 99.

Appellate Body independently observed that the first sentence of Article 5.1 imposes a very specific obligation and that this obligation applies regardless of the particular form of the safeguard measure.[52] The legal issue concerning the obligation of the United States to provide a separate economic justification arises specifically because the President imposed a measure harsher than that justified by the ITC decision or underlying economic analysis. If the President takes action which is either the same as that recommended by the ITC or less restrictive, the underlying explanation and justification required by Articles 3.1, 4.2(c), and 5.1 of the SA might be met by the ITC analysis. That is not the case here. Where: (i) there are substantial indications that the measure taken is more restrictive than what was recommended; (ii) the ITC specifically observed what level of relief would be "excessive"; (iii) the President's announcement of the TRQ measure as a tariff with an exemption was intentionally confusing; and (iv) no explanation or reasoning comparable to that provided by the ITC or response to the analysis provided by the ITC has been provided, the United States has an affirmative obligation to explain why the measure is "necessary" and not "excessive."

If the United States has confidential data to demonstrate that the President's measure would not reduce imports below the 151,124-ton level defined by the ITC as "necessary" and sufficient, it should provide it. The evidence we do have--the actual performance under the President's remedy--confirms that the measure reduced imports to less than 80,000 tons during the first quota year, a level far below the "excessive[ly]" restrictive level of 105,124 tons.[53] Korea submits that, in the absence of an affirmative demonstration by the United States of its "intended level," the actual level of imports is the best evidence of the import target level of the measure. That level is excessive under any reading of the ITC Majority or Separate Views on Injury.

In any event, Articles 3.1 and 4.2(c) of the SA require the publication of the findings and conclusions of the competent authorities on all pertinent issues of fact and law. Since the President is clearly a "competent authority" under US law, and the findings of fact and conclusions of law with respect to serious injury or threat thereof must inform the decision of what safeguard measure to impose, the basis for the President's measure must also comply with Articles 3.1 and 4.2(c). The requirements are inextricably related.

(iv) Developing country exemption

11. At para. 181, Korea asserts that "the United States did not even attempt to determine which countries qualified for this exemption." Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

Answer

The administering authorities must assure that the measure is not "applied" to developing countries that meet the requirements of Article 9.1 of the SA. In the past, the United States has provided a list of countries that qualify for such treatment to make their exemption administratively feasible.

(v) Causal link

12. If oil and gas prices began to improve in April 1999, causing domestic shipments to increase (as alleged at para. 258 of Korea's first written submission), why didn't imports also increase at that time?

[52] See *id.* at para. 96.
[53] See Exhibit 49 (KOR-49).

Answer

Imports did not increase at the same time as domestic shipments in 1999, for the same reason that imports at the beginning of the market decline in 1998 did not decline as quickly as domestic shipments. Imports have a delayed reaction or a natural lag-time to changing market conditions such as a decline in demand. There is a period of months between the sales date when the material is ordered and the actual shipments and custom's entry.[54] It takes time for the "fall off" in customer orders to translate into fewer entries into the United States.

In the second half of 1998, subject imports declined, but not as rapidly as domestic shipments. In the first half of 1999, imports declined precipitously due to lower demand in the second half of 1998. As demand picked up in 1999, domestic shipments responded immediately and increased.[55] Imports lagged the recovery in the market.

13. At para. 258, Korea asserts that imports were declining as domestic shipments were increasing. At para. 272, however, Korea refers to "the coincidence in trends in imports and the domestic industry sales." If imports were declining as domestic shipments were increasing, how is there any "coincidence" in these two trends?

Answer

Korea wishes to clarify that the Panel is correct that there was no coincidence of trends between domestic shipments and imports at the end of the period in the first half of 1999. Imports continued to decline in the first half of 1999 while domestic shipments increased due to the recovery in oil and gas prices. Imports also had peaked in the first half of 1998 due to very strong demand factors.

It was unlikely given the past performance of imports that they would increase market share to the same levels since this effect was produced when the oil and gas industry's demand dropped suddenly and sharply in late 1998/1999 before imports had a chance to react. *Please see* Korea's response to the previous question regarding why imports tend to lag changes in demand conditions.

14. At para. 293, Korea states that oil prices collapsed in late 1998 and early 1999. However, at page 39 of the Japanese and Korean Respondents' Prehearing Brief, reference is made to "declines in the oil and gas market beginning in late 1997 and continuing through early 1999 …" (KOR-22). Please reconcile these statements regarding the date when the decline in the oil and gas market began.

Answer

The reference in the Prehearing Brief at pages 39-42 was to the antidumping petition that had been filed in the United States against imported oil.[56] That petition noted that the price of oil dropped from $19.76/barrel in October and November 1997 to $10.95/barrel in December 1998. Thus, the description in the Prehearing Brief was to the end-point/end-point analysis.

The observation concerning the "collapse in oil prices" in late-1998/early-1999 refers to the $10.95/barrel price in December 1998. That the nadir of oil prices occurred in December 1998 is

[54] See Posthearing Brief on Injury, at 14 (KOR-25).
[55] See US 16 February Letter.
[56] See Prehearing Brief on Injury (KOR-22).

apparent from Figure 3.[57] Finally, the correlation to subject merchandise was to the drilling rig count, which in turn was dependent on the prices of oil and natural gas.[58] During this period, the rig count reached its lowest point ever in April 1999.[59] Demand and, with it, the performance of the line pipe industry closely followed the rapid decline in the rig count in 1998.

(vi) Exclusion of Canada and Mexico

15. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer

We agree that the placement of Footnote 1 as a footnote to Article 2.1 of the SA rather than Article 2.2 is significant and confirms the reading of Footnote 1 as relating to the definition of a Member and to the proper modalities for safeguard investigations conducted by a Customs Union. It does not relate either to FTAs or to the MFN requirement.

16. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Answer

No. Article XI of the GATT 1994 measures and measures pursuant to Article XIX in the form of Article XI measures would have the same effect on trade. The emergency nature of safeguard measures also confirms that such measures are permitted.

[57] Normal Index of Monthly US Crude Oil and Natural Gas Prices, January 1994-June 1999, ITC Determination, Staff Report at p. II-46 (KOR-6).

[58] See, e.g., ITC Determination, Majority Views on Remedy at I-80 (concerning this correlation) (KOR-6).

[59] See Exhibit 48B (Comparison of US Rotary Rigs in Operation with Domestic Shipments of Welded Line Pipe and Welded OCTG) (KOR-48B).

ANNEX B-2

UNITED STATES' ANSWERS TO QUESTIONS FROM THE PANEL AND KOREA

(7 May 2001)

I. RESPONSES TO QUESTIONS FROM THE PANEL

Note: The United States previously provided early written responses to questions 6, 7, and 8 at the request of the Panel. This document contains a further elaboration on those earlier answers.

1a. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury?[1]

Response

1. Since a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, the nature of a safeguard measure depends primarily on the condition of the industry and its need for adjustment. The competent authorities' finding of serious injury or threat of serious injury is a legal characterization of the condition of the industry. Thus, there is likely to be a relationship between the finding of the competent authorities and the safeguard measure applied by a Member. However, it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure.

2. Article 4.1 of the Safeguards Agreement[2] defines serious injury as "a significant overall impairment in the position of a domestic industry," and threat of serious injury as "serious injury that is clearly imminent." Article 4.2(a) requires that the competent authorities base their findings in this regard on a consideration of the absolute and relative increase in imports, import market share, changes in the level of sales, production, productivity, capacity utilization, profits and losses, employment, and any other objective and quantifiable factor having a bearing on the situation of the industry. Since the evaluation occurs on an overall basis, an industry may be in a state of serious injury or threat of serious injury even if some factors viewed in isolation would suggest a healthy condition.[3] With so many factors, each of which may reveal varying degrees of negative or positive

[1] Question 1 consists of three related, but distinct questions. For clarity, we have divided the question and our response into three subsections.

[2] Unless otherwise specified all citations to an article using Arabic numerals reference provisions of the WTO Agreement on Safeguards ("Safeguards Agreement" or "SGA"), and all citations to an article using Roman numerals reference provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

[3] The Appellate Body concluded in *Argentina – Footwear* that "An evaluation of each listed factor will not necessarily have to show that each such factor is "declining". In one case, for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry." *Argentina – Footwear*, WT/DS121/AB/R, para. 139.

performance, there are a myriad of potential combinations that could demonstrate the existence of serious injury or threat of serious injury.

3. Similarly, safeguard measures imposed by a Member may take a variety of forms, including tariff increases, quotas, and TRQs at varying levels and for varying lengths of time. Thus, for any industry, a number of combinations of these elements could satisfy the Article 5.1 requirement not to apply a safeguard measure beyond the extent necessary.

4. In contrast to the diversity of potential industry situations and safeguard measures, the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment.

5. There is one limited circumstance in which the characterization of the industry's condition affects how a Member may structure a safeguard measure. Article 5.2(b) allows a departure from the Article 5.2(a) requirements for allocation of a safeguard measure in the form of a quantitative restriction. A Member may not invoke that provision if it has found that increased imports cause a threat of serious injury. However, this limitation becomes relevant only if a Member is seeking to allocate a quantitative restriction on terms different than those provided under Article 5.2(a). It does not affect the requirements of Article 5.1 in any way.

6. In short, it is the condition of the industry, as delineated by various relevant factors, that provides the benchmark against which a Member determines the extent to which to apply a safeguard measure. The broad characterization of that condition as present serious injury or threat of serious injury does not by itself change those factors and, therefore, will not change the nature of the safeguard measure applied by the Member.

b. If the competent authority finds that increased imports have caused "serious injury or a threat thereof", how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement?

Response

7. As an initial point, Article 5 does not require the competent authority to ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury." Article 5 places that obligation on the Member itself. In fact, the Safeguards Agreement creates a clear division of labour. Articles 3 and 4 reference the competent authorities seven times, charging them with conducting "the investigation to determine whether increased imports have caused or are threatening to cause serious injury." In that process, the competent authorities must conduct a hearing, evaluate relevant factors, and issue a report. In contrast, Article 5, entitled "Application of Safeguard Measures," does not reference the competent authorities *at all*. Its obligations apply exclusively to the Member itself. Nor does any other part of the Agreement require any action from the competent authorities in the formulation and application of a safeguard measure.

8. This marked difference in terminology between Articles 3 and 4 on the one hand and Article 5 on the other can only mean that the competent authorities bear responsibility for the investigation and determination of serious injury, while the Member alone bears responsibility for

compliance with Article 5. The first sentence of Article 3 reflects this dichotomy, stating that "[a] *Member* may *apply* a safeguard measure only following an *investigation* by the *competent authorities*."

9. Korea's arguments demonstrate confusion about the tasks performed by the USITC and the President with regard to a US safeguard measure. The USITC is the competent authority in the United States and, as such, determines whether increased imports are a substantial cause of serious injury, or the threat thereof, to the domestic industry. The President has no role in that process, and must accept the determination of the USITC.[4] In contrast, if the USITC makes an affirmative serious injury determination, it issues only a *recommendation* with regard to the application of a safeguard measure. The US notification under Article 12.1(b) typically identifies the majority recommendation as the proposed measure of the United States. However, the President retains complete freedom to modify that measure or disregard it completely. Thus, it is the President, and not the USITC, who bears the ultimate responsibility for ensuring that the safeguard measure is not applied beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment.

10. In deciding what remedy to apply, the President considers a large number of factors, which include:

- the determination of serious injury by the USITC;
- the recommendation and explanation of the USITC;
- the form and amount of tariff, TRQ, or quota that would prevent or remedy serious injury or the threat of serious injury;
- the extent to which industry workers benefit from other programmes;
- the industry's plans and existing efforts to adjust to import competition;
- the likelihood that the measure will facilitate adjustment;
- short- and long-term economic and social costs of the measure, as well as other factors related to the economic interest of the United States; and
- conditions of competition in the global and domestic markets, and how those conditions may develop while the measure is in effect.[5]

The President's consideration of these factors, especially identification of the form and amount of tariff, TRQ, or quota that would prevent or remedy serious injury or threat of serious

[4] Section 330(d) of the Tariff Act of 1930 provides that if the Commission is evenly split, with an equal number of Commissioners issuing affirmative and negative findings with regard to serious injury or threat of serious injury, the President must decide which group represents the determination of the Commission. In making this decision, the President does not gather additional evidence or make any determination of his own. He merely decides which of the existing determinations and underlying explanations is the determination of the US competent authority.

[5] Sections 203(a)(2) and 202(e)(5) of the Trade Act of 1974 list these factors. The USITC remedy recommendation is not part of the report of the competent authorities on the question of serious injury that is required by Article 4 of the Safeguards Agreement. Accordingly, that recommendation need not be made a part of the public report under the Safeguards Agreement, although the United States customarily includes the remedy recommendation there.

injury, ensures that the application of the safeguard measure does not exceed the extent necessary to prevent or remedy serious injury and facilitate adjustment.

c. Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Response

11. No. As we explained in segment a of this question and in paragraphs 37-42 of the US first oral statement, the benchmark for application of a safeguard measure is the condition of the domestic industry and its need for adjustment. A finding of present serious injury or threat of serious injury is merely a broad legal conclusion about that condition. By itself, that finding simply does not provide enough information about the industry to identify whether a particular measure would satisfy the requirements of Article 5.1. A Member must look instead to the underlying facts about the industry's condition and need for adjustment to delineate the extent to which it may apply a safeguard measure. Therefore, although competent authorities may choose to specify the condition of the industry as being present serious injury or threat of serious injury, such a choice is not necessary to comply with Article 5.1.

2. At para. 184 of its first written submission, the US asserts that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption". Would this mean that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9000 short ton exemption?

Response

12. On further reflection, it would be more correct to say that the only limit is the number of customs territories that take advantage of the 9000 ton exemption. For example, China and Russia, which are not WTO Members, are still eligible for the 9000 ton exemption. On the other hand, not all countries have line pipe production facilities, so the practical limit would be less than if all customs territories took advantage of the exemption.

3. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable". GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be "practicable", in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Response

13. Yes. Article XIII:2(a), read together with Article XIII:5, applies to situations in which a Member considering the application of a tariff quota cannot fix a quota representing the total quantity of special-duty imports. However, the resulting measure would not constitute a tariff quota because it would not meet the ordinary meaning of tariff quota – the "[a]pplication of a higher tariff rate to imported goods after a *specified quantity* of the item has entered the country at a lower prevailing

rate."[6] Using the terminology of Article XIII, such a measure would be an "import restriction," but without a specific name.

14. The text of Article XIII supports this conclusion. Paragraph 2(a) states that "[w]herever practicable, quotas representing the total amount of permitted imports ... shall be fixed." If a quota is not "practicable," the logical implication is that any measure that *is* practicable is not a quota. Paragraph 2(b) confirms this conclusion in stating that "[i]n cases in which quotas are not practicable, the restrictions may be applied by means of import licenses or permits *without a quota*."[7] Thus, any measure that is not "practicable" under Article XIII:2(a) is not a quota and, pursuant to Article XIII:5, is not a tariff quota.

4. In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does the US consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Response

15. "Quantitative restriction" and "quota," as used in Article 5 and elsewhere in the WTO Agreement, are not synonymous. "Quantitative restriction" is a general term covering any measure that restricts the quantity of imports into or exports from a country. "Quota" is a form of quantitative restriction that specifies the maximum quantity of imports into or exports from a country. In contrast, a TRQ is in essence a tariff. It does not restrict the quantity of imports as such because, as long as someone is willing to pay the requisite tariff, there is no limit to the quantity that they can import.

16. The use of these terms in the GATT 1994 supports this conclusion. Article XI is entitled "General Elimination of Quantitative Restrictions," and its first paragraph states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...

Thus, this paragraph provides a definition for the type of measure – a quantitative restriction – that is eliminated by Article XI. It specifies that quotas and import licenses that prohibit or restrict imports are forms of quantitative restrictions, and that both are prohibited.

17. Since the signature of GATT 1947, Article XI has never been understood to ban TRQs. In fact, when faced with the obligation under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative import restrictions into "ordinary customs duties," many Members complied by transforming quotas into TRQs. Moreover, a number of Members (including Korea) apply TRQs, indicating a belief, both widespread and current, that such measures comply with the requirements of the WTO Agreement.

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[6] Definition of "tariff quota," Dictionary of International Trade Terms, p. 157 (William S. Hein & Co., Inc. 1996) (emphasis added) (Exhibit USA-6). Paragraph 185 of the US first written submission provides a more detailed discussion of the ordinary meaning of "tariff quota."

[7] Emphasis added.

18. The established view that TRQs are not prohibited by Article XI has two important implications. First, neither a TRQ itself nor the quota element of a TRQ is a "quota" for purposes of Article XI. If they were, they would be prohibited. Second, since Article XI permits only import restrictions in the form of duties, taxes, and "other charges" (and certain types of quotas not relevant in this dispute), a TRQ must be a duty, tax or other charge for purposes of Article XI. As we explained in paragraphs 192-94 of our first written submission, Article XIII reflects the same understanding. Although the disciplines specifically reference "quantitative restrictions" and "quotas," Article XIII:5 adds that "[t]he provisions of this Article shall apply to any tariff quota." That addition would be unnecessary if a TRQ, or the "quota element" of a TRQ, were in fact a quota.

19. It also makes sense to view a TRQ as a duty, tax or other charge. A TRQ is nothing but a stepped tariff, with the cumulative volume of imports determining the level of tariff. It does not actually limit the quantity of imports as such.

20. This understanding extends to Article 5. The Safeguards Agreement contains nothing to suggest that longstanding GATT terms like "quota" and "quantitative restriction" as used in the Safeguards Agreement have meanings different than they do under GATT 1994. The appearance of the Article XIII:2(d) text in Article 5.2(a) suggests that it has the same meaning in the Safeguards Agreement and, thus, excludes TRQs because the Safeguards Agreement contains no equivalent to Article XIII:5.

5. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years". Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Response

21. The Appellate Body did not *infer* that there is no "justification" requirement for safeguard measures other than quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years. Rather, the ordinary meaning of the terms in Article 5.1 *compels* such a conclusion.

22. In *Korea – Dairy*, the Appellate Body rejected a panel's broad finding that Members that apply safeguard measures are required to explain in their recommendations or determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment.[8] The Appellate Body found that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.[9] Since the US safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the US safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment."

[8] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, para. 100 ("*Korea – Dairy (AB)*").

[9] *Ibid.*, para. 99.

23. It is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement.[10] If Korea were to meet its burden, the United States would then be obliged to bring evidence and argument to rebut Korea's *prima facie* case. In no event, however, would the United States be obliged to "justify" the US measure.

24. Korea has not begun to meet its burden on this issue. Korea's argument that the United States was required to "provide the required explanation" of its safeguard measure[11] is in essence an improper attempt to shift the burden of proof under Article 5.1 to the United States. Its approach in this regard is reminiscent of the Panel's conclusion in *Hormones* that the SPS Agreement allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body rejected the panel's conclusion on the grounds that:

> [i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation ... [12]

25. Like Article 5.8 of the SPS Agreement, Article 5.1 "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation." Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim." Korea has not done so. Therefore, the United States has no obligation to produce evidence to establish that the line pipe safeguard is consistent with Article 5.

6. In their oral presentation the US asserted that the President's decision on the safeguard measure relied on the same data and information as the ITC recommendation. Can the US also confirm that there were no other documents prepared after the ITC's recommendation that formed the basis for the President's decision on the measure even if those documents relied on the same data and information before the ITC?

Response

26. Documents prepared after the ITC's recommendation were pre-decisional memoranda to the President from his staff, and to the US Trade Representative from her staff. The pre-decisional memoranda are privileged communications under US law, which means that they are presumptively protected from release to anyone, even in the context of domestic judicial proceedings.

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[10] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997) p. 16 (stating that it "was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption."). *Ibid*., p. 17 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the presumption that the mere assertion of a claim might amount to proof ... ").

[11] Korea's first written submission, para. 147.

[12] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, para. 102.

27. There are several reasons that such documents are presumptively protected from release under domestic law. First, such memoranda typically provide various reasons for and against a particular outcome, which the decisionmaker might – or might not – adopt in the final decision. As such, they are part of the decision-making process, akin to rough drafts of the decision. The release of such materials could create confusion as to the actual basis for a decision, and place the decisionmaker in the position of addressing grounds for decision that he or she actually rejected as invalid.

28. Second, pre-decisional memoranda typically contain advice on the relative merits of various arguments, including arguments that might be raised against a particular conclusion. If such memoranda were available after the taking of a decision, government decision-makers and their advisors would not feel free to debate alternative approaches in complete candour in their private deliberations. Without candid discussions, the quality of the final decision would inevitably suffer.

29. Third, under US law, there is a special privilege attached to communications between the President and his advisors. The US courts have explained that this rule is necessary to guarantee the candour of presidential advisors and to provide the President and those who assist him with the freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express publicly.

30. In short, the Presidential proclamation and published memorandum form the entirety of the explanation of the decision to impose the line pipe safeguard measure. To the extent that the pre-decisional memoranda contain the same reasoning and conclusions as the proclamation and published memorandum, they are redundant. To the extent that pre-decisional memoranda contain reasoning different from that in the proclamation and published memorandum, that reasoning was considered and not adopted by the President. It forms no part of his decision.

7. At para. 267 of its first written submission, the US submits that "any problems experienced by Geneva resulted in part from the difficulties it experienced in line pipe sales ... ". What "part" or proportion, of Geneva Steel's "difficulties" could be directly attributed to its line pipe operations? Please explain, and provide supporting documentation.

Response

31. It was not necessary for the USITC or Geneva Steel to apportion the difficulties reflected in its data because the USITC collected financial information from Geneva Steel (and 14 other US line pipe producers) *specifically regarding their line pipe operations*.[13] As noted in the USITC Report, Geneva Steel did not produce other products in the facilities where line pipe was made.[14]

32. It is further clear from the record before the USITC that declines in line pipe operations had a significant overall effect on Geneva Steel's operations and, more importantly, for the US domestic industry as a whole. At the hearing in the injury phase of the USITC investigation an executive from Geneva Steel confirmed that line pipe "is an essential part of our business from an overall margin perspective," and that Geneva lost half of its volume of line pipe sales between 1997 and 1998.[15]

[13] USITC Report, p. II-25.

[14] USITC Report, p. II-25. Any allocations that had to be made by the US line pipe producers in order to report financial data specific to their line pipe operations were based on their sales of end products or on other generally accepted accounting principles. *See* USITC Report, p. I-31 (explaining that increases in per unit overhead and SG&A were allocated in proportion to their sales of end products or on other acceptable allocation methodologies).

[15] Transcript of Injury Phase Hearing (30 September 1999), p. 52 (Ken Johnson, Geneva Steel).

8. Commissioner Crawford found that the Lone Star's allocation of extraordinary charges had a "marked impact on SG&A for the company and for the industry as a whole, reducing the level of operating income to $10.8 million in 1998". Did the remaining Commissioners address this specific finding by Commissioner Crawford? If so, how? What would the level of operating income have been absent the allocation of this extraordinary charge?

Response

33. It is not the practice of USITC Commissioners to address factual findings made by other Commissioners. Moreover, the separate views of any dissenting Commissioner are not part of the determination of the competent authorities for purposes of either Article 3 or Article 4 of the Safeguards Agreement. Accordingly, the United States submits that such dissenting views are of no legal consequence and, therefore, irrelevant to the Panel's consideration of whether the determination of the competent authorities is consistent with the US obligations under the WTO Agreement.

34. Although the Commissioners whose views constituted those of the competent authority in this investigation thoroughly reviewed the industry financial data,[16] none of them found that Lone Star's allocation of these charges was "extraordinary" or had a "marked" impact on the industry's selling, general, and administrative expenses. Indeed, those Commissioners explicitly found that the domestic producers, without exception, allocated increases in overhead and SG&A expenses on the basis of acceptable allocation methodologies.[17] Furthermore, those Commissioners concluded that not any one firm, but "a significant number of firms in the industry were unable to carry out their domestic line pipe operations at a reasonable profit."[18] We also note that, aside from the legal irrelevance of her finding, even Commissioner Crawford acknowledged that the first half of 1999, which did not include the mentioned Lone Star allocation, was "a difficult period" for the US industry.

35. Although we are unable to disclose the exact level of industry-wide operating income absent Lone Star's allocation of charges (because to do so would disclose confidential business information of Lone Star), we can assure the Panel that adding the Lone Star charge would not increase the industry's 1998 aggregate operating income of $ 10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one percentage point.

9. At footnote 75 of the ITC's determination (page I-16), reference is made to data at page II-31 of the staff report. What is the equivalent reference in the non-confidential version of the staff report? In note 75, reference is also made to the "two of the largest firms". Does this reference include Geneva Steel and/or Lone Star Steel?

Response

36. The equivalent reference in the non-confidential version of the staff report is to page II-25. The two firms referred to in note 75, whose questionnaire responses (including allocations) were verified by the USITC are California Steel and Lone Star Steel.[19]

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[16] *See, e.g.*, USITC Staff Report at I-16, n.75.

[17] USITC Report, p. I-31.

[18] USITC Report, p. I-19. The undisputed facts relied on by the USITC show that in 1998, ten of 14 domestic producers reported either reduced operating income as compared to 1997 or had operating losses. USITC Report, p. I-18. Five of the 14 reporting domestic producers operated at a loss in their line pipe operations in 1998. *Ibid*. In interim 1999, this number had doubled, with ten of the 14 reporting producers operating losses. *Ibid*.

The two Commissioners who found threat of serious injury likewise found it significant that in interim 1999 a majority of firms in the domestic industry sustained operating losses. Report at I-41.

[19] USITC Report, p. II-25.

10. Under the US system for imposing safeguard measures, what are the "competent authorities" within the meaning of Article 3.1 of the Safeguards Agreement? Do they include the President of the United States? If not, why not? In the present case, please specify precisely where the "reasoned conclusions" – within the meaning of Article 3.1 – are to be found. Do they include conclusions of the President of the United States?

Response

37. Pursuant to Article 4.2(a) of the Safeguards Agreement, the determination of serious injury is to be made by the competent authorities. Under US law, the only competent authority for making serious injury determinations is the USITC.[20] Therefore, the US President is not the competent authority for purposes of either Article 3 or Article 4 of the Safeguards Agreement.[21] Accordingly, the President's decision concerning the measure is not part of the report to be prepared by the competent authorities pursuant to Article 3.1 of the Safeguards Agreement.

38. The last sentence of Article 3.1 provides that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions ... ." This provision highlights that the competent authorities' published report must include only the findings and conclusions reached by the competent authorities (in US cases, the USITC), and not any findings or conclusions reached by the Member (in US cases, the President). The language of the last paragraph of Article 4.2(c) likewise supports this view. It provides that:

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

The "reasoned conclusions" of the USITC on "all pertinent issues of fact and law" in the line pipe safeguards investigation are found in the portions of the USITC Report labelled *Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* and *Separate Views on Injury of Chairman Lynn M. Bragg and Commissioner Thelma J. Askey*. These Views, which explain the USITC's findings, reasoning and conclusions appear on pages I-7 through I-54 of *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261 (December 1999). Neither these Views nor any other part of the USITC Report include the conclusions of the President of the United States.

11. With regard to note 21 of the US first written submission, what is the relevance of the US statement that "capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguards Agreement ..." Does the US consider that the Panel is precluded from making any findings regarding the ITC's treatment of capacity and capital expenditure, simply because they are not mentioned in Article 4.2(a)?

Response

39. As the United States explained in the argument section of its first written submission,[22] the USITC met its obligations under SGA Article 4.2(a) to evaluate *all* relevant factors of an objective

[20] By comparison, US law provides for two "investigating authorities" – the USITC and the US Department of Commerce – within the context of the Antidumping and SCM Agreements.

[21] *See* Section 202(b)(1)(A) of the Trade Act of 1974, which states that the USITC shall conduct safeguards investigations, and section 201(a), which describes the action which the US President is required to take if the USITC determines that the prerequisites for applying a safeguards measure have been met.

[22] US first written submission, paras. 85, 119.

and quantifiable nature having a bearing on the situation of the industry. The USITC evaluated not only the enumerated factors, but various other factors, including capacity and capital expenditures. Based on its evaluation of these two particular factors, however, the USITC placed limited weight upon the data gathered about them, for independent reasons explained with respect to each.

40. With respect to capital expenditures, the USITC found that reported data did not reflect current industry conditions because capital investment projects in the industry generally involve long lead times, to allow for project approval, obtaining financing, installation, and start-up operations. As an example, the USITC noted one case where a line pipe producer bought land in 1993, began commercial discussions on a new mill in 1995, started placing equipment orders in 1997, and began commissioning the mill in mid-1999.[23]

41. With respect to capacity, the data showed that the overall decline in capacity utilization far outpaced the slight increase in capacity.[24] In considering the weight to place on the capacity data, the USITC found that the modest increase in domestic capacity over the period investigated was considerably less than the growth in consumption, and that this slight increase in capacity was reasonable in view of the growing consumption.[25]

42. The United States does not consider that the Panel is precluded from making any findings regarding the USITC's treatment of capacity and capital expenditures. To the contrary, the Panel should find that the USITC met its obligations under SGA Article 4.2(a) in its evaluation of these "other" industry factors.

12. Leaving aside the factual circumstances of the present case, does the US consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Response

43. No. The United States does not consider that improvements in domestic industry performance at the end of the relevant period of investigation would necessarily be inconsistent with a finding of present serious injury. Both the degree and nature of the improvement would be relevant to whether serious injury exists at the time of the injury determination. Certainly, an industry that is currently seriously injured could see improvement in certain factors and still continue to experience serious injury overall. On the other hand, there also may be circumstances in which the recovery of an industry is so significant that despite having suffered serious injury at some point during the investigatory period, such injury is no longer in evidence at the end of the period of investigation.

13. At para. 134 of its first written submission, the US asserts that "Korean respondents failed to place on the record objective and quantifiable information as to the extent to which imports from Korea of dual-stencilled line pipe were used in standard pipe applications". Did the USITC seek such information for itself?

Response

44. The USITC sought information on this question during the hearing conducted in conformity with Article 3.1 of the Safeguards Agreement. However, the source for the allegation that much dual-stencilled line pipe was used in standard pipe applications was not able to quantify the amount used. As explained below, any reliable quantitative information was for all practical purposes unobtainable

[23] USITC Report, p. I-20 n.122, I-42.
[24] USITC Report, p. I-17.
[25] USITC Report, p. I-30.

because distributors do not typically know how the pipe that is sold will be used, and even when they might be able to infer the nature of the use by the identity of the purchaser, such information is not routinely recorded.

45. It might be helpful for the Panel to understand the context in which the issue of dual-stencilled line pipe from Korea arose. The issue was first raised by the Korean and Japanese respondents in their prehearing brief in the injury investigation before the USITC. These respondents claimed that most imports of dual stencilled line pipe imported from Korea into the West Coast of the United States were sold for standard pipe applications. They based this claim in large part on an affidavit from a former executive with several West Coast distributors, who estimated that 70-80 per cent of imports of dual-stencilled line pipe imported from Korea into the West Coast were sold for standard pipe applications. These respondents also claimed that selected questionnaire responses of domestic producers and distributors supported their theory.[26]

46. The executive who provided the affidavit testified at the USITC's injury hearing. The exchange between the USITC Commissioner and the witness on this point was as follows:[27]

> COMMISSIONER KOPLAN: Thank you, Let me ask you this, Mr. Smith. Your estimate of 70 to 80 per cent; is it possible that it could have been 60 to 70 per cent?
>
> MR. SMITH: Absolutely.
>
> COMMISSIONER KOPLAN: Okay. Is it possible that it could have been, possible now, that it could have been 50 to 60 per cent?
>
> MR. SMITH: Well, there is no way of actually knowing without tabulating every sale.
>
> COMMISSIONER KOPLAN: Right.
>
> MR. SMITH: Most distributors don't keep track of where their material goes, and unless you're an on-hands manager reviewing the invoices daily, on a daily basis, and knowing who the customer is, where it's going, and if you have some interest, knowing what kind of a projects it's going to, can you build this type of information.
>
> COMMISSIONER KOPLAN: And I appreciate your candour on that. What I'm hearing you say is that the figure could be substantially off the mark.
>
> MR. SMITH: Absolutely.

47. As this exchange makes clear, there was no practical way of knowing what proportion of Korean dual-stencilled line pipe was actually sold for standard pipe applications. Such information could have been gathered only if all distributors had kept records of the intended application of the line pipe involved in each sale, and this is information which the distributors did not keep.

48. In their posthearing brief in the injury investigation before the USITC, the petitioners contested the claim that large amounts of Korean dual-stencilled line pipe were sold in the standard pipe market. They pointed out that certain questionnaire responses contradicted this claim. They also stressed that the witness for the Korean respondents had admitted at the hearing that his estimates

[26] Prehearing Brief of Japanese and Korean Respondents (24 Sept. 1999), pp. 66-70. Exhibit USA-23.
[27] Transcript of USITC Injury Hearing (30 September 1999), p. 216, Exhibit USA-24.

were not based on any concrete or quantifiable data and might well not be accurate. The petitioners also claimed that this witness was not reliable because he had no experience in the line pipe business; his experience was limited to the standard pipe market.[28]

49. Finally, the record reflects that the greatest absolute and percentage increases in the volume of imports from Korea occurred in shipments to the Gulf Coast area of the United States, which comprises the largest US geographic market for line pipe. Shipments of Korean pipe to the Gulf Coast increased from 16,430 to 68,810 tons between 1997 and 1998 whereas total shipments of line pipe to the United States from Korea increased from 76,671 to 158,099 tons during the same period.[29] Korea has not claimed, and there is no record evidence suggesting, that dual-stencilled pipe was shipped to the Gulf Coast.

14. Did the ITC undertake any quantitative analysis (such as regression analysis, and/or elasticity analysis) regarding the impact of other factors such as the oil and gas crisis, and declines in the domestic industry exports?

Response

50. The USITC did not formally prepare an econometric analysis in order to quantify the exact impact of each of various factors on the domestic industry. The United States observes that there is nothing in the Safeguards Agreement that requires competent authorities to prepare or consider a quantitative analysis of that sort. Nor has the Appellate Body, in its numerous reviews of panel reports addressing Members' safeguard actions, ever suggested that such an analysis is necessary.

51. Notwithstanding the lack of any requirement for precise quantification of effects, the USITC did in many respects consider and rely on quantitative record data and economic or financial analyses in distinguishing the effects of possible other causes from the effects of increased imports. As an initial matter, USITC staff prepared a preliminary elasticity analysis for the Commission's consideration in making its injury determination.[30] The demand, supply and substitutability estimates provided in that analysis provided a background for the USITC's consideration of the factors affecting the conditions in the industry.

52. As appropriate to its consideration of the various factors possibly having an impact on the industry's condition, the USITC carefully scrutinized the quantitative data, and compared the indicators affected by imports to the indicators affected by other factors. Thus, in distinguishing the effects of reduced oil and natural gas drilling and production activities, the USITC compared the 1994 through June 1999 data on apparent consumption (which reflected declines in demand due to the reduction in these "gathering" activities) to the industry financial data for the same period. These data showed that the demand in interim 1999 was comparable to the level during the period 1994 through 1996; yet, after suffering slight operating losses in 1994, the industry's financial performance in 1995 and 1996 was healthy. Based on this comparison, the USITC was able to conclude that the reduction in the level of demand in 1998 and 1999 was not of a magnitude that would be expected to generate the severe financial losses suffered by the industry in 1998 and 1999.[31]

53. The USITC also looked at the market share data in relation to demand, and found that imports increased their market share at the domestic producers' expense, at the same time that oil and natural gas drilling declined. All other things being equal, the USITC found that the decline in demand for a standardized product like line pipe should impact all sources of supply in roughly proportional

[28] Posthearing Brief of Petitioners (6 Oct. 1999), pp. 15-19. Exhibit USA-25.
[29] USITC Report, Table D-2.
[30] USITC Report, pp. II-42-51.
[31] USITC Report, p. I-28.

amounts.[32] The USITC looked further to quantitative information to test respondents' explanation that imports have longer lead times than domestic product and therefore allegedly respond more slowly to a decrease in demand. The monthly import data examined by the USITC disproved respondents' theory because these data showed high levels of imports for the months which according to respondents' argument should have reflected orders taken in late 1998 and early 1999, when drilling activities were at their lowest.

54. Further to its analysis of the impact of the reduction in oil and gas drilling and production activities, the USITC considered the timing of that reduction in relation to the data for the various relevant industry performance indicators. The USITC found that the most significant difference in market conditions in interim 1999 as compared to the 1994 through 1996 period (when apparent consumption was at levels comparable to 1999) was the market presence of imports, which in 1999 accounted for double the market share they held during 1994-1996.[33]

55. Based on its analysis of the corresponding data for the various industry performance indicators, the USITC concluded that the reduction in exploring and drilling activities mainly affected demand aspects, whereas the increases in imports and import shares correlated to price declines. The USITC also analysed the price data on a product-specific basis.[34] These data indicated that price declines appeared to be across the board and not to affect disproportionately those line pipe grades that are typically used in oil and gas drilling applications.

56. Finally, the USITC looked to the financial variance analysis to confirm its conclusion that the substantial decline in domestic prices caused by the increased imports, rather than reduced shipment volumes caused by the decline in demand, were mainly responsible for the industry's dismal financial performance.[35]

57. In addition to relying on the data to address the impact of the reduction in exploration and drilling activities, the USITC likewise evaluated quantitative information where appropriate to address other possible causes of injury. In considering the impact of competition among domestic producers, the USITC compared the data on industry capacity to the data on domestic consumption, and found that the increases in capacity were reasonable in light of the growth in consumption from 1994 to 1998.[36]

58. With respect to the impact of declines in export markets, the USITC examined the data on domestic producers' exports against domestic production and import data. Finding that the increase in imports in 1998 was considerably larger than the decline in exports, the USITC concluded that any impact on the domestic industry from a drop in exports was dwarfed by the impact of the rise in imports.[37]

15. In para. 104 of its first submission the US responds to Korea's argument that the industry was not injured as shown by an increase in capital expenditure during the POI. Would the US also comment on Korea's argument made in Para 250 of its first submission that during the POI two new producers began operations in 1998 and 1999?

[32] USITC Report, p. I-29.
[33] USITC Report, p. I-28.
[34] USITC Report, p. I-29.
[35] USITC Report, p. I-29, n.180.
[36] USITC Report, p. I-30.
[37] USITC Report, p. I-31.

Response

59. It is correct that two new line production facilities began operations, one in 1998 and the other in early 1999.[38] The United States does not agree with Korea's argument in paragraph 250 of its first written submission that the addition of these production facilities was inconsistent with the USITC's conclusion that the domestic industry was seriously injured or threatened with serious injury. Both the Commissioners finding serious injury and those finding a threat thereof noted that capital investments in this industry involve long lead-times.[39] Plants brought on-line in 1998 and early 1999 would have reflected investment decisions and commitments made well before the surge in imports in 1997 and 1998. Indeed, the USITC found that the entry of new facilities was reasonable in light of the growing consumption through 1998.

16. In para. 109 of its first submission the US explains that the $25-$30 price increase referred to by Korea could just as likely compensate for rising raw material costs following the imposition of anti-dumping duties on hot-rolled steel. Were all imports of hot-rolled steel affected by the anti-dumping measure? What was the coverage of the US measure or measures on hot-rolled steel? Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures? Furthermore, at para. 22 of its first written submission, the US refers to a "decline in the price of hot-rolled carbon steel." Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.

Were all imports of hot-rolled steel affected by the anti-dumping measure?

Response

60. First, the United States must emphasize that Korea clarified at the first substantive meeting of the panel that the so-called "price increases" that it originally referenced, and that the United States consequently also characterized as price increases in its first written submission, were actually announcements of intended price increases by a US producer. There is no evidence in the record that the announced attempts to increase prices were in fact successful.

61. While not all imports of hot-rolled steel were subject to antidumping orders, all imports of hot-rolled steel, including fairly traded imports, presumably were affected by those orders. The objective of antidumping measures is, of course, to eliminate injury to the domestic industry caused by the subject imports that were found to be sold at less than normal value. The orders accomplish this by providing for the imposition of an antidumping duty in the amount of the margin of price discrimination. By increasing the price at which the subject imports are sold, the antidumping duties are intended to reduce or eliminate the market-wide price suppression or depression that had been occasioned by the dumped imports. Once the unfairly traded imports are either priced appropriately or leave the market, the prices of not only domestic hot-rolled steel, but also of fairly traded imports of hot-rolled steel would be expected to increase.

What was the coverage of the US measure or measures on hot-rolled steel?

Response

62. The antidumping duty measures imposed in July and August of 1999 covered imports of hot-rolled steel from Japan (subject to antidumping duties), and Brazil and Russia (subject to suspension agreements providing for minimum prices, in the case of Brazil, and minimum prices and quantitative

[38] USITC Report, p. II-11.

[39] USITC Report, p. I-20 n. 122 (Commissioners finding serious injury), p. I-42 (Commissioners finding threat of serious injury).

export limits, in the case of Russia). The scope of the antidumping duty order on imports from Japan and of the suspension agreements affecting imports from Brazil and Russia was as follows:

> certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.
>
> Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.
>
> Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: 1) iron predominates, by weight, over each of the other contained elements, 2) the carbon content is 2 per cent or less, by weight, and 3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:
>
> 1.80 per cent of manganese, or
> 1.50 per cent of silicon, or
> 1.00 per cent of copper, or
> 0.50 per cent of aluminum, or
> 1.25 per cent of chromium, or
> 0.30 per cent of cobalt, or
> 0.40 per cent of lead, or
> 1.25 per cent of nickel, or
> 0.30 per cent of tungsten, or
> 0.012 per cent of boron, or
> 0.10 per cent of molybdenum, or
> 0.10 per cent of niobium, or
> 0.41 per cent of titanium, or
> 0.15 per cent of vanadium, or
> 0.15 per cent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this investigation:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including e.g., ASTM specifications A543, A387, A514, A517, and A506).

- SAE/AISI grades of series 2300 and higher.

- Ball bearing steels, as defined in the HTSUS.

- Tools steels, as defined in the HTSUS.

- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 per cent.

- ASTM specifications A710 and A736.

- USS abrasion-resistant steels (USS AR 400, USS AR 500).

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 0.90% max; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; Width = 44.80 inches maximum; Thickness = 0.063-0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000-88,000 psi.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.16%; Mn, 0.70-0.90%; P, 0.025% max; S, 0.006% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.25% max; Ni, 0.20% max; Mo, 0.21% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 1.30-1.80%; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; V (wt.), 0.10% max; Cb, 0.08% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.15% max; Mn, 1.40% max; P, 0.025% max; S, 0.010% max; Si, 0.50% max; Cr, 1.00% max; Cu, 0.50% max; Ni, 0.20% max; Nb, 0.005% min; Ca, Treated; Al, 0.01-0.07%; Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

- Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, containing 0.9% up to and including 1.5% silicon by weight, further characterized by either (i) tensile strength between 540 N/mm² and 640 N/mm² and an elongation percentage ≤26% for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm² and 690 N/mm² and an elongation percentage of ≤25% for thicknesses of 2mm and above.

- Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012% maximum phosphorus, 0.015% maximum sulphur, and 0.20% maximum residuals including 0.15 per cent maximum chromium.

- Grade ASTM A570-50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.[40]

Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures?

Response

63. As indicated above, no. All suppliers of hot-rolled steel were affected by the anti-dumping measures regardless of whether such imports were subject to the measures themselves. The USITC's report accompanying the1999 investigations shows that 61 per cent (7.0 million of 11.4 million tons) of 1998 imports of hot-rolled steel were from Brazil, Russia and Japan, and therefore became subject to the antidumping duty orders or suspension agreements.[41]

Furthermore, at para. 22 of its first written submission, the US refers to a "decline in the price of hot-rolled carbon steel." Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.

Response

64. Paragraphs 22 and 109 of the US first written submission discuss prices in the domestic market at different times during the period of investigation. Paragraph 22 explains that the USITC considered (pp. I-31-32 of the USITC Report) whether declines in raw material costs accounted for the decline in line pipe prices, in particular *the 1998 and interim (January-June) 1999* decline in the price of hot-rolled carbon steel. (The USITC found that the line pipe price declines could not be attributed to a decline in raw material costs.) Paragraph 109 refers to *announced* price increases, and to the imposition of antidumping measures, in August 1999. With respect to these later events, the USITC stated:

> We are persuaded that, to the extent any such announced price increases may have "stuck" in the marketplace, they are attributable in significant part to anticipated increases in raw material costs by domestic producers.[42]

65. Moreover, the record of the USITC injury investigation closed before the announced effective date of anticipated increases, and therefore there is no evidence in the record that the price increases occurred.

17. According to the US, the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Why does the US consider that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

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[40] *Antidumping Duty Order; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 34778 (US Dept. of Commerce, 29 June 1999), Exhibit USA-26.

[41] Exhibit USA-27.

[42] USITC Report, p. I-48 n. 88. (*Views of Chairman Bragg and Commissioner Askey*).

Response

66. The degree to which FTA partners must eliminate safeguard measures among themselves depends on the overall package of trade liberalization that accompanies the formation of the FTA. If that package meets the requirements of Article XXIV:8(b) without the elimination of safeguard measures, the FTA partners have the option of eliminating safeguard measures, but are not required to do so. However, if the elimination of safeguard measures is necessary to meet the requirements of Article XXIV:8(b), the FTA partners *must* do so. In this regard, the authority to apply safeguard measures to FTA partners is no different from any other restrictive regulation of commerce that applies on an MFN basis.

67. To create an FTA consistent with Article XXIV, the parties must satisfy the Article XXIV:8(b) definition of an FTA as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

This text does not require the elimination of *all* duties and other restrictive regulations of commerce. Some restrictive regulations, if they fall within the enumerated exceptions, may be applied "where necessary." The remaining restrictive regulations must be eliminated on *substantially* all trade. As the Appellate Body explained in *Turkey – Textiles*,

> Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision. It is clear, though, that "substantially all the trade" is not the same as *all* the trade, and also that "substantially all the trade" is something considerably more than merely *some* of the trade.[43]

68. Therefore, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering "substantially all trade"), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may* also eliminate safeguard measures. This is by far the most likely scenario. We included the possibility that safeguard measures "must" be eliminated to cover all eventualities. For example, if the elimination of duties and other restrictive regulations that the FTA parties accept does not cover substantially all trade, they *must* eliminate restrictive regulations that they had intended to retain, which could include safeguard measures. However, this is not a likely scenario.

18. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Response

69. A treaty, and especially a multilateral agreement, reflects a series of compromises and trade-offs. No one signatory's "logic" will necessarily prevail in this process. Under customary rules of

[43] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 48 (22 October 1999).

interpretation of international law, the text of the treaty determines the rights and obligations of the signatories. Whether a later interpreter can derive an underlying "logic" from the text does not change the explicit rights and obligations. In this case, the text of Article XXIV:8 differentiates between Article XI measures and Article XIX measures, thereby authorizing differential treatment of the two.

70. It is always speculative to attempt to reconstruct the logic of the negotiators of a treaty. In this case, we can conclude that the difference in treatment is logical because Articles XI and XIX permit the imposition of quantitative restrictions for different reasons. Article XI permits three types of quantitative restriction: temporary export prohibitions to prevent critical shortages of food or other products; import or export prohibitions necessary for classification, grading, or marketing of commodities in international trade; and import restrictions on agricultural and fisheries products necessary to enforce domestic controls on the production of agricultural and fisheries products. And of these, some are no longer permitted as a result of the Agreement on Agriculture. Article XIX allows the suspension of obligations (which could include imposition of a quantitative restriction otherwise inconsistent with Article XI) to the extent necessary to remedy serious injury caused by increased imports. Accordingly, the drafters agreed that FTA partners could retain the quantitative restrictions permitted under Article XI where those measures were necessary, but did not make the same provision for quantitative restrictions permitted under Article XIX.

71. One logical conclusion is that the basis for a quantitative restriction affects its permissibility in the context of an FTA. FTA parties have an unqualified right to apply those quantitative restrictions permitted under Article XI among themselves where necessary. One might view the GATT 1994 as allowing the application among FTA partners of measures permitted under Article XI because they may be necessary for implementation of particularly important national policies or programmes. In contrast, an FTA party's authority to include FTA partners in quantitative restrictions under Article XIX must be balanced against other restrictive measures of trade in meeting the Article XXIV:8 threshold. Presumably, this treatment evinces the importance of achieving the elimination of restrictive regulations on substantially all trade.

72. We note that there is nothing unusual in this treatment. Articles XI and XIX both permit the maintenance of quantitative restrictions that would otherwise be prohibited, but under different conditions. Article XXIV:8 follows the same approach, placing different prerequisites on application of an Article XI quantitative restriction in the context of an FTA than on application of an Article XIX quantitative restriction.

19. In Turkey – Textiles (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue".[44]

(a) In this regard, please explain how the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act.

[44] This question consists of two related, but distinct questions. For clarity, we have divided the question and our response into two subsections.

Response

73. Under the North American Free Trade Agreement ("NAFTA"), the parties introduced a multitude of rights and obligations removing many restrictive regulations of commerce – tariffs, customs fees, safeguards laws, and others. These rights and obligations, including the safeguard exemption, were conceived as a package and introduced as a package. Together they resulted in the elimination of restrictive regulations of commerce on substantially all trade among the three NAFTA parties, thus forming the basis for the creation of a free trade area. Failure to accept these rights and obligations would have meant inability to become a party to the NAFTA, preventing the NAFTA from entering into force, and thus would have prevented the formation of the free-trade area created by the NAFTA.

74. In *Turkey – Textiles*, the Appellate Body interpreted the chapeau to Article XXIV:5 to determine the conditions under which a Member could assert Article XXIV as a defense for a WTO-inconsistent measure affecting the rights of third parties that is introduced as part of the creation of a customs union:

> we note that the chapeau states that the provisions of the GATT 1994 "*shall not prevent*" the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union.[45]

The Appellate Body found further that the chapeau "indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions ... only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed." It noted that this text "cannot be interpreted without reference to the definition of a 'customs union.'"[46]

75. However, *Turkey – Textiles* dealt primarily with a measure applied to non-members of the customs union. The Appellate Body did not indicate the conditions under which a Party could assert Article XXIV as a defense with regard to a measure liberalizing *internal trade* among customs union members. Thus, its reasoning is not germane in this dispute, which involves a measure – the exclusion from safeguard measures – that was part of the NAFTA trade liberalization package.

76. In any event, the *Turkey – Textiles* analysis establishes that Article XXIV invalidates Korea's claim that the NAFTA safeguard exemption is inconsistent with Articles I, XIII, and XIX.[47] In line with the Appellate Body's reasoning, the analysis begins with the definition of an FTA, which Article XXIV:8(b) describes as an area in which "duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade among the parties." Article XXIV:8(a)(i) contains similar language with regard to customs unions. The *Turkey – Textiles* report indicated that the terms "offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph."[48]

77. The ordinary meaning of Article XXIV:8(b) provides the necessary guidance. The text contains a direct object (duties and other restrictive regulations), a verb (eliminate), and a prepositional phrase (on substantially all trade) modifying the direct object. The direct object is both plural and conjunctive, indicating that the obligation (to eliminate) applies to the direct object, namely, the duties and restrictive regulations of commerce on substantially all trade, *in the aggregate*. The text does not contain language indicating that the obligation applies separately to each duty or

[45] *Turkey – Textiles*, para. 45.
[46] *Ibid.*, paras. 46-47.
[47] Korea's first written submission, para. 168.
[48] *Turkey – Textiles*, para. 48.

restrictive regulation. Thus, compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated.

78. In light of this definition, the parties will be prevented from forming a free trade area if they cannot accept the elimination of the group of duties and restrictive regulations of commerce on substantially all trade that they have agreed upon. This would occur if they were not allowed to accept the elimination of any one of the duties or regulations.

79. The NAFTA parties conceived of the various types of duties and restrictive regulations of commerce that they would eliminate as a group and negotiated over them at the same time. At no point did the parties indicate that failure to accept any particular obligation would prevent the formation of the free trade area. As part of the package of trade liberalization, they agreed to NAFTA Article 802, which eliminated each party's authority to apply safeguard measures on imports from the other party that did not contribute importantly to serious injury. Section 311 of the NAFTA Implementation Act effectuated this obligation as a matter of US law.

80. If the GATT 1994 were interpreted to prohibit the Article 802 safeguard exemption, it would unravel the package of trade liberalizing rights and obligations agreed upon by the NAFTA parties. Therefore, Article XXIV permits the exclusion of Canada and Mexico from the line pipe safeguard notwithstanding Article II.

(b) If the formation of NAFTA would have been prevented but for the safeguards exemption, why are NAFTA members not automatically excluded from safeguard measures imposed by other NAFTA members?

81. Under the NAFTA, the Article 802 conditional exemption from safeguards measures formed part of the final balance of concessions and obligations to which the parties agreed. That package went well beyond liberalizing substantially all trade, so a partial exemption was permissible. If that particular package were not accepted, the formation of the free-trade area created by the NAFTA would have been prevented.

82. During negotiations, the parties did not agree to completely eliminate their authority to take safeguard measures against each other. If they had, it is possible that they would have changed other elements of the liberalization package to maintain the balance of concessions and other obligations. On the other hand, they may not have achieved agreement on that basis. It is the view of the United States that the possibility of a different outcome to the NAFTA negotiations is too speculative to form the basis for any conclusions with regard to the measures that the parties actually adopted.

20. The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the US consider that the Appellate Body's finding does not apply to the last sentence of footnote 1? Please explain.

Response

83. The Appellate Body's exact finding was that:

> The ordinary meaning of the *first sentence* of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State."[49]

It reached this conclusion in response to a panel's analysis based on the *first* and *third* sentences of footnote 1.[50] At no point did either the panel or the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote. Consequently, the Appellate Body's finding does not provide any guidance for the Panel's interpretation of the last sentence.

21. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Response

84. The fact that footnote 1 appears in Article 2.1 is relevant in that it establishes a context for the footnote. However, Korea was wrong in asserting that the footnote is applicable to Article 2.1 alone. By its terms, the footnote says that "Nothing in this *Agreement* ..." (emphasis added). If the footnote applied only to Article 2.1, it would have said "Nothing in this paragraph ..." Therefore, the insertion of footnote 1 into Article 2.1 instead of Article 2.2 has no effect on the interpretation of the relevant text – the last sentence of footnote 1. In fact, it is equally relevant that paragraph 2.1 forms part of Article 2, which includes Article 2.2. Thus, any relevance ascribed to the location of footnote 1 would suggest that it applies equally to all of Article 2, and not just the paragraph within which it appears.

85. Under the customary rules of interpretation of international law, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[51] Thus, the ordinary meaning of the terms is the primary basis for interpreting a treaty, with context and object and purpose informing the application of the ordinary meaning. The location of a provision within a particular paragraph (such as paragraph 1 of Article 2) may be relevant in providing context, but the article in which the provision is located and other articles in the agreement and other agreements may also provide context for the provision.[52]

86. Paragraphs 221-225 of the US first written submission discuss the ordinary meaning of the last sentence of footnote 1 – that nothing in the Safeguards Agreement affects a WTO Member's right to exclude FTA partners from safeguard measures. The location of the footnote 1 in Article 2.1, which specifies the prerequisites for a Member to apply a safeguard measure, does not change that meaning. Specifically, footnote 1 is appended to the word "Member," suggesting that it amplifies the meaning of that word. The first three sentences of footnote 1 serve this role, defining the terms in which a customs union, acting as a WTO Member, may take a safeguard measure on its own behalf or on behalf of a member of the customs union.

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[49] *Argentina – Footwear*, WT/DS121/AB/R, para. 106 (emphasis added).

[50] *Ibid.*, para. 102.

[51] These customary rules of interpretation are reflected in Article 31 of the *Vienna Convention on the Law of Treaties*.

[52] For example, in *EC – Bed Linen*, the Appellate Body treated Article 2.4 of the Antidumping Agreement as context for the interpretation of Article 2.4.2. In *US – Wheat Gluten*, the Appellate Body treated Article 3.1 SGA as context for the interpretation of Article 4.2(b). *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 1 March 2001, para. 59; *United States – Definitive Safeguard Measures on Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, paras. 52-53 ("*US – Wheat Gluten (AB)*").

87. However, the text of the last sentence of footnote 1 indicates that it has a broader reach than the first three sentences. It opens with the phrase "[n]othing in this Agreement," thus setting out an interpretation applicable to every other provision in the Agreement, and not just the word "Member" in Article 2.1. Where each of the first three sentences address "customs unions" and "member states" specifically, the last sentence does not mention them at all. Instead, it cites to a provision – paragraph 8 of Article XXIV – covering both customs unions and FTAs. Thus, the text of footnote 1, last sentence, indicates that it applies beyond the limited purpose of clarifying the meaning of the term "Member." Having dealt with one particular aspect concerning customs unions, it made sense to speak to the overall issue of the effect of the Safeguards Agreement on customs unions and the clearly related issue of FTAs. The last sentence is a clarification that neither the preceding sentence nor any other language in the Safeguards Agreement disturbs the relationship between safeguard measures and customs unions or FTAs that is set out in GATT 1994. This was a controversial subject that the negotiators never sought to resolve in the Safeguards Agreement.[53]

88. The location of footnote 1 within Article 2.1 is not the sole context for its terms. Articles 2.1 and 2.2 together form Article 2, which is entitled "Conditions." Article 2.2 states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." This text establishes that Article 2 addresses not just the identity of the Member applying a safeguard measure and the conditions for doing so, but also the identity of the Members *subject* to the measure. This context reinforces the conclusion that footnote 1, like the Article in which it appears, provides the basis for determining what Members are subject to a safeguard measure.

89. In short, it is relevant that footnote 1 is inserted into Article 2.1. It is also relevant that Article 2.1 is paired with Article 2.2 in a single article addressing the conditions for application of a safeguard measure. The ordinary meaning of the text of the footnote is dispositive. For the reasons discussed above and in the US first written submission, these interpretative guides together establish that nothing in the Safeguards Agreement affects a Member's ability to exclude FTA partners from safeguard measures.

22. At para. 230 of its first written submission, the US asserts that the collapse in oil prices was not expected. At what point in time is the US referring to in making this statement? In other words, <u>when</u> was the collapse in oil prices not expected, or unforeseen?

<u>Response</u>

90. The relevant point of inquiry for unforeseen developments is the time at which the Member undertook an obligation, including a tariff concession. In *Felt Hats*, a GATT 1947 working group found that the United States had demonstrated that it met the unforeseen developments requirement because "the effect of the circumstances indicated above," (a marked change in hat fashions) "and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947," when the United States made a tariff concession on hats.[54] There is no question that the decrease in oil prices that occurred in the latter part of the investigation period in *Line Pipe* was not foreseen at the time that the United States entered into its Uruguay Round tariff reduction commitments, and certainly not at the time of preceding tariff concessions. Indeed, the decrease in oil prices was unexpected almost up to the time it began.[55]

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[53] *Guide to GATT Law and Practice*, vol. 2, pp. 838-840 (WTO 1995).

[54] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, 27 March 1951, para. 12.

[55] US first written submission, para. 230.

(v) Causal link

23. Did the ITC demonstrate that the oil and gas crisis was not a more important cause of injury than increased imports, as it claimed, or did the ITC simply demonstrate that the oil and gas crisis did not account for the totality of the injury suffered by the domestic industry? In other words, did the US simply demonstrate that the industry would still have suffered injury, irrespective of the crisis in the oil and gas industry? If so, is this sufficient to distinguish the injurious effects of the increased imports from the injurious effects of the oil and gas crisis? Please explain.

Response

91. In its Report, the USITC provided a detailed and meaningful explanation of its finding that the oil and gas crisis was not a more important cause than increased imports.[56] In its causation analysis, the USITC first undertook a thorough analysis of the relationship between the increased imports and the factors bearing on the situation of the industry.[57] As explained in the United States first and second written submissions, the USITC found that imports had significant adverse price effects on the domestic industry. In turn, these adverse price effects resulted in a significant loss of sales, market share and revenue on the part of the domestic industry, as well as a decline in other key indicators of the industry's health, such as capacity utililization and employment.[58] The USITC concluded that imports were an important cause of injury, *i.e.*, that there was a causal link between the imports and the serious injury.

92. As a second step in its causation analysis, the USITC examined other possible causes for the purposes of addressing the "substantial cause" requirements of the US statute. It conducted its examination of the effects of other possible causes, including mainly the oil and gas crisis, against the background of its finding in the first instance of a causal link between the increased imports and the serious injury the domestic industry was suffering. The USITC did not merely determine that there was at least some injury being caused to the industry by factors other than the oil and gas crisis. Rather, the USITC compared the effects of the changes in demand caused by the oil and gas crisis to the effects caused by the imports. It found that, of the two principal factors affecting the industry, the increased imports were more responsible for the serious injury. In so doing, the USITC assured itself that any effects caused by the changes in demand did not sever the causal link between the increased imports and the serious injury.

93. Accordingly, the USITC examined the effects of reductions in oil and gas drilling on line pipe demand and compared such effects to those of the increased imports.[59] As an initial matter, the USITC found that it was not clear that line pipe demand was as closely tied to oil and gas drilling activities as respondents had contended.[60]

94. To the extent line pipe demand was tied to drilling activities, the USITC found that the trends in apparent consumption (which reflects demand), unlike the import trends, did not track the financial experience of the domestic industry.[61] Consumption in interim 1999, when the industry was at a financial low point, was comparable to consumption in the period 1994 through 1996, when the industry's financial performance was healthy. The USITC explained that the most significant

[56] USITC Report, pp. I-27-30.
[57] USITC Report, pp. 23-26.
[58] USITC Report, p. I-26.
[59] The United States has already set out some of the quantitative details of this comparison in our response to the Panel's question number 14.
[60] USITC Report, p. I-27.
[61] USITC Report, p. I-28.

difference in market conditions between interim 1999 and the 1994 through 1996 period was the import market presence and in particular the doubling of import market share.

95. Further, the USITC explained that the substantial price declines in 1998 and interim 1999, which correlated to increases in imports, could not be attributed to declines in oil and gas drilling and production activities.[62] The USITC noted that the decrease in line pipe prices that occurred during the post-1998 period was across the board.[63] It was not limited to those line pipe grades used for drilling, as would be expected if the industry slowdown had been caused by a reduction in demand from the oil and gas industry.[64] The USITC further found that the questionnaire responses supported the conclusion that imports, and not reduction in demand, played the major role in the decline in domestic line pipe prices in 1998 and interim 1999.[65] Thus, the USITC found that as the imports played as or more important a role in the domestic industry's poor performance than the reduced oil and gas drilling. As such, the oil and gas crisis did not sever the causal link between the increased imports and the serious injury.

24. Is a determination that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry sufficient to demonstrate a genuine and substantial relationship of cause and effect between the increased imports and the serious injury suffered by the domestic industry? Does such a determination ensure that none of the injurious effects caused by the crisis in the oil and gas industry have been attributed to increased imports? Please explain.

Response

96. As discussed above, the USITC did not merely find that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry. Rather, the USITC found that there was a direct, *i.e.* "genuine and substantial," causal link between the significant increase in imports, the prevalent price depression that followed this increase, and the consequent deterioration in the industry's financial condition. In confirming this causal relationship, it found that of the two principal factors affecting the industry, the increased imports played a larger role.

97. Since the USITC did not base its causation conclusion on a finding that the injury field was not completely occupied by the oil and gas crisis, the US response must consider this question to be a hypothetical one. Under SGA Article 4.2(b), a competent authority would always have to find, as an affirmative matter, that there was a causal link between increased imports and serious injury. Merely eliminating other possible causes without independently confirming this causal relationship would not appear to be sufficient to meet this requirement. Assuming that this link is established, there could be some factual circumstances, such as where there is only one possible cause of injury other than the imports, in which a finding that the alternative cause was not responsible for all injury would be sufficient to meet the SGA's causation requirements. In other circumstances, this approach might not suffice.

[62] USITC Report, pp. I-29-30.

[63] USITC Report, p. I-29. Domestic producers were steadily losing market share for all types of line pipe products to foreign producers.

[64] USITC Report, p. I-29.

[65] USITC Report, p. I-30 and n. 186.

98. The United States notes that the Appellate Body has emphasized that the method and approach WTO Members choose to carry out the non-attribution process is not specified by the Safeguards Agreement.[66]

25. Did the ITC find that injury was caused by "other factors" in addition to the decline in the oil and gas industry? If so, how did the ITC ascertain that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury?

Response

99. As explained in response to Panel question number 23, the USITC's conclusion that there was a genuine and substantial causal link between the increased imports and the serious injury starts with its analysis of the adverse effects the imports had on the industry's condition. In particular, in this case, the USITC found that the increased imports caused significant price depression, which in turn resulted in lost sales, market share and revenues for domestic producers and lost jobs for their workers. Thus, the USITC established that there was a causal link between the increased imports and the industry's poor performance. The USITC then examined other actual or alleged causes of injury to the industry. In comparing the weight of those causes to that of the imports, the USITC distinguished the effects of each alternative cause from the effects caused by the imports. The USITC explained that it did not attribute injury caused by other factors to the imports.[67]

100. In addition to the reduction in oil and gas drilling, the USITC examined five other possible causes of injury alleged by respondents. It found that the evidence did not bear out respondents' allegations that the increases in the domestic producers' per-unit overhead and SG&A were caused by misallocation of declines in production of other pipe products. As explained in the United States written submissions and response to Panel question 8, the USITC concluded that the domestic producers had not mistakenly or disproportionately attributed their overall per-unit allocated overhead and SG&A expenses.[68]

101. The USITC also examined whether a decline in interim 1999 prices for the main raw material – hot-rolled carbon steel – caused the line pipe price declines which had triggered the domestic industry's financial downturn. It determined that declining costs did not cause the price declines,[69] and that with respect to costs, it was not misattributing the price effects caused by the imports. In its Report, the USITC explained that the questionnaire data showed that overall raw material costs remained stable through 1998, and therefore declines in raw material costs could not have been an alternative cause of the 1998 price declines. Although the data showed declines in raw material costs in interim 1999, these lower costs were for the most part (all but 5 per cent) offset by increased labour and other factor costs, thereby balancing the cost of goods sold. In addition, the USITC noted that there were indications of increases in raw material costs, particularly for hot-rolled steel, in the latter half of 1999. Based on this reasoned examination of the evidence, the USITC found that the decline in raw material costs in interim 1999 was not causing injury to the domestic industry, and certainly was not causing the price declines found to be attributable to the increased imports.

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[66] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 180 ("*US – Lamb Meat (AB)*").

[67] USITC Report, p. I-30.

[68] USITC Report, p. I-31.

[69] USITC Report, pp. I-31-32.

102. The USITC examined the effects of each of the other four possible alternative causes, and did not attribute injury caused by any of them to the imports.[70] Addressing competition among domestic producers, the USITC found that such competition had always been a factor in the market, and that it did not explain the severe decline in domestic prices and shipments that occurred toward the end of the period investigated. The USITC further found that although the addition of two new facilities in 1998 added to capacity, the 8 per cent increase in capacity was reasonable and moderate in comparison to the 23 per cent growth in consumption from 1994 through 1998.

103. The USITC also examined the effects of changes in the oil country tubular goods ("OCTG") market that caused domestic producers to shift production out of OCTG to line pipe. The USITC found that this factor was actually another form of increased intra-industry competition because its effect would be to increase production, and therefore supply, of line pipe.[71] As noted, the USITC found that domestic competition had always been a factor but had not caused prices depression and shipment declines such as those caused by the imports. Furthermore, the USITC found that any switch from OCTG to line pipe would have been in relatively small quantities.

104. The USITC next examined the decline in export markets in 1998 and interim 1999. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have also affected the producers' bottom line, those effects were not attributed to imports because, as the USITC found, the impact of the increased imports dwarfed the decline in exports.[72]

105. Thus, the USITC distinguished the effects of each of the alternative causes and found that none of the other factors severed the causal link it had found to exist between the increased imports and the serious injury. The USITC's thorough explanation of this analysis in its Report demonstrates that the USITC based its serious injury determination upon the existence of a genuine and substantial relationship of cause and effect between the increased imports and the serious injury.

26. Does the Line Pipe measure "appl[y]" (within the meaning of Article 9.1 of the Safeguards Agreement) to developing countries?

Response

106. The line pipe safeguard does not apply to any developing country Members that account for less than three per cent of total imports. Article 9.1 of the Safeguards Agreement states that safeguard measures shall not "be applied" against imports from a developing country Member under the circumstances set forth in that article. The ordinary meaning of the terms provides no guidance on how a Member may meet the Article 9.1 requirement, thus leaving the decision to the Member. In the present case, the United States met the requirements of Article 9.1 by permitting the first 9,000 short tons from any supplier country to enter the United States free of additional duty. Since the US measure permits the first 9,000 short tons of imports from each supplier country to enter free of additional duty, the measure is not "applied" against any developing country Member's imports unless and until the 19 per cent additional tariff takes effect. This would occur only if imports from a particular developing country Member exceeded 9,000 short tons in a given remedy year.

107. When the United States constructed its remedy, historical import patterns indicated that permitting each supplier country to enter 9,000 short tons of line pipe free of additional duty would ensure that the remedy would not apply to any developing country Member with a 3 per cent or lower

[70] *See* USITC Report, p. I-30.
[71] USITC Report, pp. I-30-31 & n.190.
[72] USITC Report, p. I-31.

share of total imports.[73] Accordingly, the US measure would not "be applied" to the imports of any developing country Member eligible for exclusion under the terms of Article 9.1. If the US expectations were to prove mistaken, the affected developing country Member would be fully within its rights to raise its concerns with the United States directly or under the auspices of the WTO. They do not need Korea to enforce their rights for them.

108. It is important to recall that Korea, as the complaining Member, has the burden of demonstrating a lack of compliance with Article 9.1. Notably, while Korea makes generalized assertions about the US approach to this issue,[74] it has failed to identify a single developing country Member whose imports are being subjected to the 19 per cent additional tariff. Korea's claim on this issue is purely speculative.

27. With regard to para. 227 of the US first written submission, does the 9,000 short ton exemption guarantee that developing country Members accounting for 3 per cent or less of total subject line pipe imports into the US will not be subject to the Line Pipe measure? What if the volume of subject line pipe imports (especially from Canada and Mexico) increases to such an extent that a developing country Member could export more than 9,000 short tons to the US, and still remain at or below the 3 per cent threshold?

Response

109. The Panel's question appears to be based upon the erroneous premise that the United States is under an obligation to "guarantee" at the time of imposition that the measure will never – under any hypothetical eventuality – apply to a developing country Member with less than a 3 per cent share of imports. In actuality, Article 9.1 states that a safeguard measure shall not be "applied" against a developing country Member's imports "as long as" the Member's import share does not exceed 3 per cent. Korea has pointed to no evidence suggesting that the United States is applying (or will apply) the safeguard measure to any particular developing country Member in contravention of Article 9.1.

110. Moreover, as the United States noted above, historical import patterns demonstrate the unlikelihood that any developing country Member would export more than 9,000 short tons of line pipe to the United States in a single year and yet remain below a three per cent share of total imports. The Panel's question appears to assume – without basis – that the United States would take no action to address such a situation in the extremely unlikely event that it were to occur. If the Panel's hypothetical does occur, and if the United States takes no action, then the affected developing country Member will be able to exercise its rights as it chooses.

111. Finally, the Panel's question anticipates a surge in the volume of imports from Canada and Mexico. US law protects against the possibility that imports from excluded free trade agreement partners will surge to fill demand previously filled by third country imports. If the President were to determine that a "surge" in imports of Canadian or Mexican line pipe was undermining the effectiveness of the line pipe safeguard measure, he could include those imports within the measure.[75] US law defines the term "surge" as "a significant increase in imports over the trend for a recent

[73] Only in the surge year of 1998 did imports rise to a level at which 9000 short tons would represent less than 3 per cent of total imports, and only by a small degree. Since the imposition of the measure was expected to lead to a reduction in overall imports, the exemption for the first 9000 short tons will always represent more than 3 per cent of total imports.

[74] *See* Korea's First Written Submission at paras. 180-183.

[75] 19 U.S.C. § 3372(c) (attached as US Exhibit-28).

representative base period."[76] Thus, any appreciable increase in imports of Mexican or Canadian line pipe could subject those imports to inclusion in the US safeguard measure.

(vii) Increased imports

28. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough." How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Response

How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure?

112. The United States submits that this question cannot be answered in the abstract as the answer may depend on the industry involved, including any relevant business cycle, as well as other considerations peculiar to the circumstances of a particular safeguard investigation. Accordingly, the United States will address this question in the context of the current dispute.

113. As earlier indicated, an increase in the absolute volume of imports as well as an increase in the volume of imports relative to domestic production occurred in 1998, the last full year of the five year investigatory period established by the USITC in its line pipe safeguard investigation. Indeed, the annual increase in both the absolute volume of imports as well as the increase relative to domestic production was the greatest in 1998. A comparison of data for interim 1999 with those for the comparable period of 1998 indicates a continuation of the increase in imports relative to domestic production. Since the increase in import volume occurred in the last full year of the investigatory period as well as (in the case of relative import levels) in the last partial year for which the USITC had data prior to its determination of serious injury, there can be no question that the increase in imports was sufficiently recent to satisfy the requirements of the Safeguards Agreement.

What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports?

114. The Safeguards Agreement does not contain any requirements for the timing of a petition. The amount of time that a domestic industry might reasonably need to file a petition following a sudden increase in imports could vary greatly, depending upon factors such as the resources of the domestic industry and the complexity of the potential case. An industry that is faced with a sudden increase in imports might also decide to wait to see whether the situation improves. In light of the many variables involved in the timing of the filing of a petition, we do not believe it would be appropriate to provide a generalized answer as to the minimum period of time that an industry would need to file a petition.

In the present case, could the US line pipe industry have filed a petition before it did?

115. We are not in a position to speculate regarding the circumstances surrounding the domestic line pipe industry's decision to file its petition, and the preparation of its petition.

[76] 19 U.S.C. § 3372(c)(3).

Could the ITC have reached its determination before it did?

116. By statute, the USITC makes its injury determination within 120 days after a safeguards investigation has been initiated. This time is required for: the collection of data from industry participants, the analysis of this data by the USITC staff, the submission of briefs by parties, a hearing, and the evaluation of the case by the USITC Commissioners.

29. The US argues in para. 66 of its first submission that a comparison of "mismatched" interim period could create distortions because of seasonal changes in market conditions. Does the US therefore, believe that line pipe is a seasonal product? If line pipe is not a seasonal product why is it necessary to compare "matched" interim periods, as opposed to the immediately preceding interim period?

Response

117. The USITC traditionally examines a five- year time period, unless circumstances peculiar to a specific industry warrant otherwise, and collects annual data for each year in the investigatory period. In addition, the USITC routinely gathers partial year data for any interim period occurring at the end of the investigatory period. Collection of data for this interim period allows the USITC to have information available to it on the most current period possible. The USITC's approach is entirely reasonable and certainly not inconsistent with the Safeguards Agreement.[77] Indeed, the Agreement is silent regarding the period of investigation to be used in evaluating the impact of increased imports and does not require that import trends be analysed in time increments of any particular duration (*e.g.,* monthly, quarterly, annually.)

118. The availability of data for the latest interim period is useful for analysis, however, only if the USITC also has available data of a comparable kind for a comparable earlier period. To ensure the availability of such data, information is also collected by the USITC for the same calendar year segment in the last full year of the investigatory period that corresponds to the calendar segment included in the interim period, *e.g.* one, two, or three calendar quarters as the timing of the investigation permits. The selection and consideration of data for these corresponding interim periods is predicated on two reasonable principles. First, the use of a uniform analytical approach in all investigations establishes an objective and predictable methodology that is not susceptible to manipulation or distortion. Recognizing the efficacy of a general rule, the Commission also chose a rule which served a second function. The reliance on comparable time periods in each year ensures to the extent possible that any variation in industry data that might be occasioned by sales or production cycles, or other conditions unique to a particular industry, not result in a distortion in the analysis conducted by the competent authorities. Thus, this general approach is undertaken by the USITC regardless of whether there are seasonal or other issues involved. While production of line pipe does not appear to follow any particular seasonal cycles, industries using line pipe may sometimes be affected by weather conditions and be less likely to conduct pipe laying and other activities in those seasons of the year that are less conducive to their operations.

119. Thus, in its line pipe investigation, the USITC followed its long-standing methodology of examining imports on a calendar year basis with additional data collected for interim periods (in this case the first six months of 1999 compared to the first six months of 1998).

[77] The United States notes that its practice in this regard appears to be similar to Korea's practice. *See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, paras. 7.62, 7.64, 7.65, 7.67, 7.78, 7.84 ("*Korea – Dairy (Panel)*").

II. US RESPONSES TO ADDITIONAL ORAL QUESTIONS POSED BY THE PANEL AT THE FIRST SUBSTANTIVE MEETING

Response

Did imports increase by a greater percentage from 1996-1997 than 1997-1998?

120. In absolute quantities, the increase in imports was greater between 1997-1998 than between 1996-1997 (110,000 vs. 95,000 tons). In percentage terms, the rate of increase in imports was greater in the 1996-1997 period than in the 1997-1998 period. On an absolute basis imports increased by 67 per cent from 1996 to1997, and by an additional 44 per cent from 1997 to 1998.[78] Imports relative to US production rose from more than 17.2 per cent in 1996, to more than 23.2 per cent in 1997, to more than 42 per cent in 1998.[79] Thus, the relative level of imports as a percentage of US production increased by the greatest rate between 1997-1998.

121. Whether viewed on an absolute basis or relative to domestic production, the increase in imports was greater between 1997-1998 than between 1996-1997. The Safeguards Agreement requires only that the imports have increased either in absolute terms or relative to domestic production. Line pipe imports increased both relative to domestic production as well as in absolute terms, and the rate at which imports increased greatest was between 1997 and 1998.

Does the Safeguards Agreement distinguish serious injury and threat of serious injury for any purpose?

122. Articles 4.1(a) and (b) of the Safeguards Agreement provide separate definitions for "*serious injury*" and "*threat of serious injury*." Other than this, the Safeguards Agreement does not distinguish between serious injury and threat. The *injury* component of the two definitions is the same, with the differences between the two being a matter of timing: *threat* is defined as *serious injury* that is "*clearly imminent*." Under the Safeguards Agreement, competent authorities must evaluate the same enumerated factors set out in Article 4.2(a) in all injury investigations. Unlike the Antidumping and SCM Agreements, the Safeguards Agreement does not specifically list additional factors that competent authorities must consider in addressing threat.[80]

123. The only specific legal consequence that flows from the fact that a safeguard measure is predicated on serious injury as opposed to a threat of serious injury in found in Article 5.2.[81] In addition, any difference in condition of the industry that may be reflected in the individual determinations, however, is to be considered in the decision regarding the safeguard measure itself.

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[78] *See* Table 1 to the letter from United States Re: Panel's Request for Information (16 February 2001) ("February 16th Letter").

[79] *See* USITC Report, p. II-20, Table 4. The percentages of imports relative to domestic production given above are derived by subtracting the percentage for "US Imports from Japan" from the "Total US Imports" percentage in Table 4. Because imports from Japan did not consist entirely of Arctic grade or alloy line pipe, this adjustment overcompensates for the exclusion of these two types of pipe. Accordingly, the percentages of imports relative to domestic production shown above are understated.

[80] Antidumping Agreement Article 3.7, SCM Agreement Article 15.7. *See Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report WT/DS132/R, 28 January 2000 at ¶ 7.131.

[81] Article 5.2(a) specifies that a Member who allocates a quota among supplying countries shall seek agreement as to the allocation from other Members having a substantial interest in the supplying the product concerned, or a lot the quota based upon the proportions supplied by the Members during a previous representative period. Article 5.2(b) permits members to depart from the provisions of subparagraph (a) under certain conditions, but provides that such a departure "shall not be permitted in the case of threat of serious injury."

Is it possible to find serious injury and threat of serious injury at the same time?

124. Under US law each USITC Commissioner who makes an affirmative determination must base that determination on either serious injury or threat thereof. An affirmative determination of the USITC (*i.e.*, of the competent authority) may be based on serious injury or threat thereof and there certainly are circumstances in which it would be possible to reach a conclusion either that the industry was either currently seriously injured or threatened by serious injury. Since a finding of threat of serious injury requires that the injury be imminent, the temporal difference between current serious injury and threat of serious injury is not likely to be substantial.

III. RESPONSES TO QUESTIONS FROM KOREA

1. The United States argues that the Agreement on Safeguards ("SA") contains no requirement for a Member to use economic analysis to determine the level of a safeguard measure (US Submission at para. 178). The United States also argues that import volume after the safeguard measure is inadmissible in the panel proceedings (Id. at para. 176). If neither ex ante nor ex post analysis is allowed as the United States argues, then, in the US view, how could a Panel analyse a Member's compliance with its obligations under Article 5.1 of the SA?

Response

125. As the Appellate Body explained in *Korea – Dairy*, except in the limited circumstances described in Article 5.1, the Safeguards Agreement does not require a Member to adopt a justification for a safeguard measure at the time it takes the measure.[82] By the same token, it is not precluded from providing a justification of the measure at that time. If the measure becomes subject to dispute under the DSU, the Member may issue a justification in those proceedings or elaborate upon an earlier justification. In short, the Safeguards Agreement is silent as to *when* a Member needs to justify its safeguard measure. In this regard, safeguard measures are like any other measure taken by a Member in that there is no need to explain consistency with the WTO Agreement unless another Member presents a *prima facie* case that the measure is inconsistent.

126. As we explain above, the Safeguards Agreement does require that the measure be based on *information* available at the time of the decision to take the measure. Therefore, regardless of when a Member justifies a measure, it must rely on the body of information available at the time of the decision to take the measure. Similarly, a Member claiming that the decision is inconsistent with GATT 1994 and the Safeguards Agreement must base its claim on that body of information, as must a Panel evaluating the measure in the context of a dispute.

127. The United States also notes that Korea's question distorts the US position. The US observation that the Article 5 does not *require* an economic analysis does imply that an *ex ante* analysis is "not allowed." The Safeguards Agreement does not require an explanation of the basis for a safeguard measure in general, or the use of economic analysis in that explanation. Therefore, a Member retains the discretion to explain a safeguard measure whenever it considers appropriate, using whatever type of analysis it considers appropriate.

128. By the same token, the US view that the Panel may not consider post-decision *evidence* in evaluating the decision to take a safeguard measure does not imply that *ex post* analysis is "not allowed." As we have stated in response to this question, the Panel may not consider after-the-fact evidence (such as import statistics for the period after application of the line pipe safeguard). It is required to consider ex post explanations and argumentation.

[82] *Korea – Dairy (Panel)*, WT/DS98/AB/R, para. 103.

2. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Response

129. The NAFTA requires parties to exclude each other from safeguard measures under certain conditions. Parties may include each other in safeguard measures only under the conditions specified in Article 802 of the NAFTA. The United States also wishes to call Korea's attention to its response to question 17 from the Panel.

3. Is it the position of the United States that the provisions of Article XXIV of the GATT 1994 apply to its exemption of Mexico and Canada from the safeguard measure on line pipe independently of whether Footnote 1 of the SA applies to US safeguards actions under NAFTA?

Response

130. In its first written submission, Korea claimed that the exclusion of Canada and Mexico from the line pipe safeguard was inconsistent with Articles I, XIII:1, and XIX of the GATT 1994.[83] Article XXIV:5 states that "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a ... free-trade area ... ." Thus, Article XXIV prevents the alleged inconsistencies with all the referenced provisions of the GATT 1994. Footnote 1 simply makes clear that the Safeguards Agreement does not alter this.

4. Is it the position of the United States that Article XIX measures, and thus Article 5 safeguard measures, are permitted between free trade members and thus do not prevent the formation of a free trade area under Article XXIV?

Response

131. The United States wishes to direct Korea's attention to its response to questions 17-21 from the Panel.

5. The United States states that the indexed data provided in its February 16th letter can be used to calculate relative import trends (Id. at para. 261). Therefore, using the indexed data, please calculate the percentage of imports relative to production for the following period:

1997 1998 1st half of 1998 2nd half of 1998 1st half of 1999

Response

132. What the United States said in paragraph 261 of its first written submission is that "the panel can analyse the relationship between production and subject imports based on non-confidential production data in the USITC Report and the indexed data in the February 16th Letter." This can be done in the following manner:

[83] Korea's first written submission, paras. 167-173 and 179.

	1994	1995	1996	1997	1998	Interim 1998	Interim 1999
US production (absolute data)[84]	635,815	770,011	694,663	881,946	669,876	412,872	282,247
US production (indexed data)[85]	100.0	121.1	109.3	138.7	105.4	100.0	68.4
Total imports (indexed data)[86]	100.0	64.5	70.4	96.4	142.0	100.0	81.3

133. The United States explained at the first panel meeting that it has no objection to the Panel relying on the data showing the ratios of total US imports to US production in Table 4 on p. II-20 of the USITC Report, adjusted to exclude all imports from Japan. These adjusted ratios were provided in the United States' letter to the Panel dated April 23, 2001. As the United States explained in that letter, because not all imports from Japan consisted of Arctic-grade or alloy line pipe, such an adjustment understates the true levels of relative imports.

6. The United States repeatedly asserts that imports relative to production reached "their highest level of the entire five-and-a-half year period of investigation" in interim 1999. Id, at para. 54; see id , also at paras 8.75. 117. Isn't it correct that imports reached their highest level relative to production in the period July-December 1998? If the United States disagrees that imports relative to production were higher in the second half of 1998 than the first half of 1999, please explain with specific reference to the actual figures for those periods.

Response

134. Imports relative to domestic production reached their highest level in interim 1999, *out of all periods for which data were collected* in the period of investigation. The USITC did not collect segregated data for the second half of 1998. Indeed, doing so would have been inconsistent with its longstanding practice. Following that practice, the USITC in this investigation collected data for each calendar year for the past five full years – 1994 through 1998 – and through the most recent quarter of the year in progress, in this case January through June 1999.[87] Also consistent with this practice, the USITC asked questionnaire respondents to provide segregated 1998 data for the comparable period to interim 1999. Again consistent with its routine and unbiased approach used in virtually all investigations, the USITC, in evaluating the data (including import data), compared the interim periods to confirm trends that were otherwise indicated from the data.[88] Thus, the USITC collected and evaluated the data in a neutral and objective manner, consistent with Article 4.2(a) of the Safeguards Agreement.

135. Notwithstanding the objective approach taken by the USITC, Korea suggests that the Safeguards Agreement somehow required the competent authority to deviate from its usual practice in this particular investigation. Korea's preferred methodology is no more mandatory than a comparison of quarterly import data. Korea's suggested approach, and not that taken by the USITC, is result-oriented and inconsistent with the SGA's objectivity requirements.

[84] USITC Report, p. II-20, Table 4.
[85] USITC Report, p. II-20, Table 4.
[86] United States' 16 February 2001 letter to the Panel, Table 1.
[87] *See, e.g.*, USITC Report, pp. C-3-4, Table C-1.
[88] The United States has explained in both its first and second written submissions the reasons for its long-standing practice of comparing the latest interim period (in this case, January-June 1999) to the same calendar segment of the preceding year (in this case, January -June 1998).

7. Please confirm whether the United States continues to maintain that the public import data and the confidential import data follow the same trends, with specific reference to imports in the periods January-June 1998, July-December 1998, and January-June 1999.

Response

136. The USITC stated that "the adjusted data follow similar trends as the unadjusted data presented in Table C-1 of the report."[89] As explained in response to Question 6 above, the USITC did not collect data for the July-December 1998 period. Therefore, the USITC and the United States were not referring to any comparisons involving the July-December 1998 period, when they stated that public and confidential data followed similar trends.

8. Is it the position of the United States that it does not have to explain and distinguish whether imports increased absolute or relative to production? Doesn't Article 8.3 of the SA apply only in cases in which the increase in imports is absolute? If so, how can it be that a Member can be exempt from explaining the basis of its finding?

Response

137. The United States has not taken any position on whether a Member must "explain and distinguish whether imports increased absolute or relative to production." The question is not relevant in this case, because imports increased on both an absolute and a relative basis.

(Serious Injury)

9. Korea notes that the Majority ITC Opinion frequently makes reference to the industry performance by distinguishing between the periods of the first and second half of 1998 (see, e.g., ITC Determination. Majority Views on Injury at I-22). Yet, the United States maintains in its submission that the United States only looks at "full years." Is it the US position that import data should be looked at only on a yearly basis but that factors of injury can be looked at on the basis of half-year periods? What it the basis in the SA for this distinction?

Response

138. Korea's characterization notwithstanding, the USITC looked at the injury factors for the purposes of addressing serious injury solely based on a year-by-year analysis. This is apparent from a review of the USITC's discussion of the serious injury factors on pages I-16 through I-20 of its Report. In its findings and conclusions about both the general overview of the line pipe industry and each individual factor, the USITC focused its analysis on year-by-year comparisons starting with 1994 and ending with interim 1999.

139. In addressing increased imports and the existence of a causal link between the increased imports and the serious injury, the USITC conducted an analysis parallel to that described above. That is, the USITC evaluated the absolute volume, ratio of imports to domestic production and imports' market share, and average unit values on a year-to-year basis and by comparison of interim 1999 with interim 1998.[90]

[89] USITC Report, p. I-14 n.62; *see also* US first written submission, para. 4.

[90] USITC Report, pp. I-14-15, I-23-24. As is also its usual practice, the USITC evaluated price comparison data on a quarterly basis, which examination showed similar trends to those found for average unit values. USITC Report, p. I-25.

140. The United States is puzzled by Korea's statement the USITC majority "frequently" makes references to the industry's performance by distinguishing between the first half of 1998 and the second half of 1999. In fact, Korea's reference apparently is to two statements the USITC made in its Report in which it noted that the industry's poor health began in particular in the second half of 1998. The USITC made this point in response to arguments raised by the respondents. The Korean and Japanese respondents argued that "the effect of the oil and natural gas price declines on the gathering segment was sufficiently powerful to produce an overall decline in the apparent consumption of line pipe in the second half of 1998."[91] Upon consideration of this argument, the USITC found that both the substantial increase in low-priced imports, as well as decreases in demand for line pipe resulting from the oil and gas crisis, contributed to the domestic industry's poor health beginning in the second half of 1998.[92] In explaining why the imports were the greater contributing factor of the two, the USITC stated that the patterns of correlation between apparent consumption and the industry's financial condition indicated that the reduced level of demand in the second half of 1998 "would not be expected to generate the severe financial losses suffered by the industry in the second half of 1998 and first half of 1999, and that other factors therefore must account for this very different level of industry performance."[93]

141. Thus, the USITC referred to the conditions in the second half of 1998 in response to respondents' arguments concerning conditions during that period. The USITC did not base its injury determination upon a comparison of half year data, as Korea urges the USITC should have been required to do with respect to import data.

10. For purposes of its remedy recommendation, the United States relies on the fact that the domestic industry admitted that demand for line pipe was growing by the time of the ITC determination (Id. at para. 175) Does the United States agree that this fact should have been considered by the ITC in its injury determination as well? If not, why not?

Response

142. The statement relied on for the comment in paragraph 175 was not on the record of the USITC injury investigation.[94] As discussed in the US second written submission, the USITC can base its serious injury determination only on evidence that was before it during the injury investigation. Consistent with the DSU Article 11 standard of review and Articles 3 and 4 of the Safeguards Agreement, the Panel likewise cannot consider extra-record evidence in reviewing the competent authority's injury determination. In fact, the evidence in the record of the injury investigation showed that apparent consumption declined during the first half of 1999.[95] We also note that the referenced statement in the US submission does not say that the demand was growing "by the time of the ITC determination," and that the actual reference is to a prediction that line pipe consumption would grow in 2000.

(Threat of Serious Injury)

11. The United States argues in para. 56 that the difference between a finding of serious injury and one of threat thereof is a matter of degree and timing. The United States also argues that the SA does not require the competent authorities to choose between serious injury or the

[91] USITC Report, pp. I-21-22 (emphasis added), *citing* Japanese and Korean Respondents' Posthearing Brief at 29.

[92] USITC Report, p. I-22.

[93] USITC Report, p. I-28.

[94] The comment cites to USITC remedy recommendation at I-77, which in turn cites to Petitioners' Posthearing Brief on Remedy.

[95] *See* USITC Report, p. I-23.

threat thereof (Id. at para. 57) Does the United States argue here that the SA does not establish the different conditions and the different legal effect for serious injury on the one hand and the threat thereof on the other hand? For example, could the United States have applied the provisions of Article 5.2(b) of the SA on the basis of a "serious injury or threat of serious injury" finding?

Response

143. The United States has addressed the first question in its response to the oral questions posed by the Panel at the first substantive meeting. As to the second question, the United States has not taken action pursuant to Article 5.2(b), and therefore the question is not relevant to this dispute.

(Causation)

12. The ITC record shows that it was fully aware that the situation in the oil and gas industry was a major cause of decline in the US line pipe industry. In the questionnaire prepared by the ITC (ITC Determination at II-66-68), why did the ITC not include the situation in the oil and gas industry as a choice of answers?

Response

144. Korea's question presumes that the USITC was fully aware, *before* it gathered information in this investigation of the causes of any declines in the US industry.[96] In the *Line Pipe* investigation, the USITC asked producers to rate the factors other than imports that were adversely affecting the domestic industry and similarly asked importers and purchasers to rate factors that were affecting prices. Accompanying the questions, the USITC provided an objective list of factors derived from the USITC's generic questionnaire as well as an opportunity to identify other factors. Thus, the USITC asked these questions in unbiased terms rather than by prompting the questionnaire recipients with prejudged answers, as Korea would have preferred. In this way, the USITC assured that its investigation was objective and therefore in compliance with the SGA Article 4.2(b) requirement that the competent authority base its injury determination on *objective* evidence.

145. What is more, many firms that responded to the questionnaires in fact took the opportunity to mention "other" factors. In fact, the responses indicated that a number of purchasers were aware of the overall importance of the oil and gas drilling and production activities, but, as the USITC found, the purchasers consistently identified *imports* as the major cause of the sharp decline in line pipe prices.[97] Further, the USITC did not ignore the importance of the oil and gas crisis as a cause of injury, and in fact exhaustively discussed that factor in its determination.

13. In para. 114, the United States argues that the ITC ensures "that injury caused by <u>any or all other factors together</u>, is not sufficient to sever the causal link." (Emphasis added). The US standard is that an increase in imports is a cause which is "important and not less than any other cause." How does this standard ensure that "all other factors <u>together</u>" are not sufficient to sever the causal link? Doesn't US law require comparison of imports to other causes <u>singly</u>, not together?

[96] The United States notes that the Korea's statement exaggerates the findings the USITC reached even at the end of the investigation: the USITC did not find that the oil and gas crisis was the major cause of the decline in the US pipe line industry, and particularly did not find a causal relationship between the oil and crisis and the price declines in the domestic line pipe market.

[97] USITC Report, pp. I-26 & n.163, I-30 & n.186.

Response

146. As an initial point, the United States notes that the consistency of the US statute with the Safeguards Agreement is not within the terms of reference in this dispute. Accordingly, insofar as Korea is asking this question to challenge the standards set by US law, the question is not relevant to this dispute.

147. What is relevant to this dispute is that the United States has shown that the USITC's *Line Pipe* causation analysis meets the requirements of the Safeguards Agreement. Both in its written submissions and in its responses to Panel questions numbers 23 and 25, the United States has explained how the USITC's causation analysis assured that there was a substantial and genuine causal relationship between the increased imports of line pipe and the serious injury, and that the effects of other factors were not attributed to the imports and did not sever the causal link. The United States has also shown in its written submissions and responses to Panel questions that it meaningfully explained this analysis in its Report.

148. As demonstrated in this case, the USITC conducted a multi-step causation analysis. First, it determined that the increased imports were an important cause of serious injury, *i.e.*, that there was a definite causal link between the imports and the injury. Only after having found this causal link in the first instance did it proceed to test the genuineness and substantiality of this causal relationship and in doing so ensured that it was not attributing the effects of other causes to the imports. It makes no difference under the Safeguards Agreement whether the USITC examined one other possible cause or numerous other possible causes, so long as it found that the causal relationship between the increased imports and the serious injury remained intact (or, in terms of the US statute was a substantial cause) when evaluated against any other cause.

149. The Appellate Body has twice held that Article 4.2(a) of the Safeguards Agreement does not require that increased imports "alone", "in and of themselves", or "per se" must be capable of causing injury.[98] Rather, the Appellate Body has recognized that other factors may be contributing "at the same time" to the situation of the domestic industry.[99] Further, "where there are several causal factors," the competent authority meets the causation requirements and assures non-attribution by separating and identifying the effects of the different factors.[100] As described above and in our response to Panel questions 23-25, the USITC met these requirements. The Safeguards Agreement requires no more, and any suggestion by Korea to the contrary is not supported by the Agreement or by the Appellate Body reports interpreting the safeguards causation standard. Indeed, the Appellate Body has emphasized that the method and approach Members use to carry out the process of separating out the effects of other causal factors is not specified by the Agreement.[101]

14. In paragraphs 238-239, Korea characterized Commissioner Crawford's views concerning the impact of Lone Star on the performance of the industry in 1998 as follows:

> **238. In the case of Lone Star Steel, Commissioner Crawford observed that the company allocated to line pipe certain production-specific costs for items which appear to have been unrelated to the production and sales of line pipe. The description of these items is treated confidentially by the ITC so their exact nature or overall effect is not known to Korea.**

[98] *US – Lamb Meat (AB)*, paras. 169-171; *Wheat Gluten (AB)*, para. 79.
[99] *US – Lamb Meat (AB)*, para. 166; *US – Wheat Gluten (AB)*, para. 67, n.19..
[100] *US – Lamb Meat (AB)*, paras. 183-184.
[101] *US – Lamb Meat (AB)*, para. 181.

> **239. Commissioner Crawford, however, concludes that this misallocation resulted in a substantial reduction in the level of operating income in the industry as a whole, particularly for the second half of 1998, and for reasons wholly unrelated to the conditions of competition in the pipe industry, much less imports of line pipe.**

At paragraph 101, the United States claims that Korea "Misquotes" Commissioner Crawford. According to the United States:

> **In connection with charges incurred by Lone Star Steel, Commissioner Crawford stated that the domestic industry's operating income "may be somewhat misleading." Commissioner Crawford did not conclude that Lone Star had "misallocated" charges, or that this resulted in "a substantial reduction in the level of operating income in the industry as a whole," as Korea claims.**

What Commissioner Crawford actually said, in full, was as follows:

> **I note that the 1998 operating income on the record may be somewhat misleading. In 1998, Lone Star allocated *** of charges for *** (primarily a reduction in operating its *** in favour of ***). The results of this decision appear to have been felt most keenly in the second half of 1998. This decision had a marked impact on SG&A for the company and for the industry as a whole, reducing the industry's level of operating income to $10.8 million in 1998. ITC Determination at I-13 (emphasis added).**

With specific reference to paragraphs 238 and 239 of Korea's written submission, please indicate where Korea "misquoted" Commissioner Crawford. Secondly, since Commissioner Crawford appears to suggest that these charges should not have been allocated to line pipe, and that the result of the allocation was to lower the operating income of both Lone Star and the industry as a whole for reasons having nothing to do with imported line pipe, please provide the confidential version of her statement or explain how paragraphs 238 and 239 of Korea's written submission are not accurate representation of her statement.

Response

150. The United States used the term *misquoted* to avoid using the more accurate term *misrepresented*. Korea did so in two ways in paragraph 239 of its first written submission. First, Commissioner Crawford nowhere concluded that Lone Star had "misallocated" charges, as Korea asserts. Second, Commissioner Crawford nowhere concluded that this resulted in "a substantial reduction in the level of operating income in the industry as a whole," as Korea asserts.

151. In its response to Panel question number 8, the United States has explained that adding the Lone Star charge at issue would not increase the industry's 1998 aggregate operating income of $10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one percentage point. Thus, contrary to Korea's assertion in paragraph 239 of its first written submission, the Lone Star charge did not result in a "substantial reduction in the level of operating income in the industry as a whole." This can be seen by comparing the industry operating income in 1997 to what it would have been in 1998 if the Lone Star charge were reversed to the full extent of the parameters identified above:

	1997	1998	1998 (adjusted by reversing Lone Star charge to full extent of parameters given)
Operating Income	$34,662,000	$10,768,000	$12,922,000
Operating Income Ratio	8.1%	2.9%	3.9%

Source: 1997 and 1998 data are from USITC Report, P. II-27, Table 9.

152. As this chart makes clear, if the Lone Star charge were reversed to the full extent of the 20 per cent/one percentage point parameters, the domestic industry's operating income and operating income ratio would still have declined precipitously (by 63 per cent) from 1997 to 1998. Finally, it should be noted that the five Commissioners finding serious injury and threat thereof did not conclude that the Lone Star charge was improperly allocated to line pipe production.

153. Further, we note again that no matter how often Korea quotes from Commissioner Crawford's views, they have no legal consequence to this dispute because they do not constitute the findings of the competent authority.

15. The United States argues that Korea "received notice of the measure" on 11 February 17 days before the date the measure was scheduled to take effect (US Submission at para. 234). Korea learned of the measure through a press release on February 11. There was no other separate prior notification. The United States also argues that Korea could have had Article 12.3 consultations after the press release and before the effective date of the measure (Id. at para 238). Is there any record that the US Government has ever modified a trade defense measure after the measure was announced through a press release issued by the President of the United States and before the effective date?

Response

154. Prior to the *Line Pipe* case, the United States had imposed safeguard measures under the WTO Agreement three times. In none of those cases did the United States change the announced measure prior to its implementation.

155. The United States questions the relevance of Korea's question. This dispute involves the US decision with regard to the line pipe safeguard. We are not aware that the President's actions with regard to earlier safeguard measures indicated his potential response to consultations in the *Line Pipe* case. In this regard, it is highly relevant that another Member did engage in consultations between the announcement and implementation of the line pipe safeguard.[102]

156. Insofar as Korea considers that the President's past practice might support its view that it "had no meaningful ability to discuss the actual remedy proposed before it was imposed," that argument is irrelevant. Article 12.3 obligates the United States to "provide an adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned ... " *Korea's* opinion that consultations would not be "meaningful" does not affect the question of whether the *United States* met this obligation. Indeed, it is hard to see how a Member could comply with Article 12.3 if another Member's pessimism about a successful outcome of consultations by itself established an inconsistency with that provision.

[102] US first written submission, para. 238, n. 265.

Table X-1

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 1-2, by quarters, January 1994 – June 1999

Period	Product 1				Product 2			
	United States		Imports		United States		Imports	
	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)
1994: Jan.-Mar.	$478	5,158	---	---	$472	4,304	$***	***
Apr.-June	485	5,730	$***	***	472	5,405	***	***
July-Sept.	496	5,038	***	***	477	4,654	***	***
Oct.-Dec.	517	4,854	377	160	488	4,469	***	***
1995: Jan.-Mar.	536	4,824	371	716	512	4,072	***	***
Apr.-June	522	5,475	***	***	514	4,247	***	***
July-Sept.	503	4,005	---	---	511	4,062	***	***
Oct.-Dec.	493	4,004	***	***	506	5,052	***	***
1996: Jan.-Mar.	471	3,505	---	---	487	4,240	***	***
Apr.-June	482	6,149	***	***	489	6,841	***	***
July-Sept.	494	4,454	407	594	499	5,403	456	1,765
Oct.-Dec.	507	5,370	***	***	500	6,151	455	1,862
1997: Jan.-Mar.	528	4,866	432	379	532	4,187	470	1,806
Apr.-June	545	4,479	***	***	547	5,220	429	2,312
July-Sept.	549	7,449	469	929	547	2,514	470	2,317
Oct.-Dec.	552	5,016	***	***	560	2,928	457	2,809
1998: Jan.-Mar.	543	4,507	***	***	558	4,427	475	1,741
Apr.-June	533	6,795	***	***	528	2,756	440	2,186
July-Sept.	509	2,333	443	900	490	1,970	421	1,638
Oct.-Dec.	480	2,618	***	***	455	2,022	402	3,718
1999: Jan.-Mar.	422	2,426	***	***	440	3,364	376	2,068
Apr.-June	394	3,977	***	***	414	3,008	339	3,650

Note: "---" indicates that no reported data and "***" indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.
Source: Compiled from data submitted in response to Commission questionnaires.

Table X-2

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 3-4, by quarters, January 1994 – June 1999

Period	Product 3				Product 4			
	United States		Imports		United States		Imports	
	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)
1994: Jan.-Mar.	$457	6,254	$424	2,089	$466	3,576	$426	181
Apr.-June	463	7,699	436	620	477	4,120	453	503
July-Sept.	473	5,589	***	***	485	6,976	461	538
Oct.-Dec.	482	5,598	444	2,036	506	6,702	465	1,143
1995: Jan.-Mar.	509	6,354	439	2,830	511	4,290	470	824
Apr.-June	510	5,984	471	3,710	515	2,716	***	***
July-Sept.	531	6,555	481	1,338	503	4,385	495	498
Oct.-Dec.	497	5,472	***	***	489	3,929	***	***
1996: Jan.-Mar.	531	6,882	***	***	478	4,709	***	***
Apr.-June	519	8,208	484	854	491	8,066	***	***
July-Sept.	536	7,418	445	1,401	483	7,529	***	***
Oct.-Dec.	535	6,932	465	2,370	490	5,328	***	***
1997: Jan.-Mar.	519	3,797	463	1,524	504	6,943	***	***
Apr.-June	536	5,528	444	2,059	507	6,678	***	***
July-Sept.	548	3,026	457	2,661	551	9,569	***	***
Oct.-Dec.	535	5,185	466	2,548	516	4,878	486	242
1998: Jan.-Mar.	544	4,169	474	1,370	530	6,339	***	***
Apr.-June	504	6,663	456	2,822	506	4,536	426	528
July-Sept.	496	4,605	416	2,650	441	1,920	***	***
Oct.-Dec.	448	2,383	417	4,243	466	1,929	407	678
1999: Jan.-Mar.	398	3,617	370	1,772	399	2,418	***	***
Apr.-June	383	4,828	339	2,889	375	2,706	377	468

Note: "---" indicates that no reported data and "***" indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.
Source: Compiled from data submitted in response to Commission questionnaires.

Table X-3

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 5-6, by quarters, January 1994 – June 1999

Period	Product 5				Product 6			
	United States		Imports		United States		Imports	
	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)	Price (*per ton*)	Quantity (*tons*)
1994: Jan.-Mar.	$460	2,018	$435	588	$494	3,276	---	---
Apr.-June	452	5,942	415	620	494	3,736	---	---
July-Sept.	460	4,990	438	614	504	2,616	---	---
Oct.-Dec.	477	3,158	438	1,967	511	4,444	$***	***
1995: Jan.-Mar.	516	4,104	***	***	500	4,090	---	---
Apr.-June	508	5,232	499	1,994	497	3,092	---	---
July-Sept.	507	5,618	497	377	497	3,032	***	***
Oct.-Dec.	516	4,350	490	353	497	3,008	---	---
1996: Jan.-Mar.	482	5,991	458	230	480	1,578	---	---
Apr.-June	484	6,059	473	566	487	5,312	---	---
July-Sept.	445	9,999	445	1,232	494	5,372	---	---
Oct.-Dec.	481	7,127	467	950	516	2,500	***	***
1997: Jan.-Mar.	476	2,301	502	1,396	522	3,576	***	***
Apr.-June	442	8,986	440	866	510	4,448	---	---
July-Sept.	468	6,578	468	418	513	4,754	---	---
Oct.-Dec.	455	12,843	453	1,039	507	6,326	***	***
1998: Jan.-Mar.	459	12,661	491	1,447	525	8,527	***	***
Apr.-June	449	17,285	448	1,468	530	5,423	---	---
July-Sept.	429	11,239	450	2,008	498	2,749	---	---
Oct.-Dec.	404	3,140	393	1,392	483	2,544	***	***
1999: Jan.-Mar.	385	1,886	393	1,273	382	2,648	---	---
Apr.-June	347	10,174	317	1,111	379	4,732	***	***

Note: "---" indicates that no reported data and "***" indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.
Source: Compiled from data submitted in response to Commission questionnaires.

ANNEX B-3

CANADA'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

I. QUESTIONS TO CANADA

(i) Exclusion of Canada and Mexico

Q1. [CANADA ONLY] Canada argues (para. 9) that "safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other". If that is the case, why does the NAFTA allow for the imposition of safeguard measures between NAFTA members if certain conditions are met?

Reply

1. Canada agrees with the position of the United States that the fact that XIX is not among the enumerated articles in Article XXIV:8(b) means, by implication, that safeguard measures generally must be made part of the elimination of "restrictive regulations of commerce" under an FTA. This does not mean, however, that safeguard measures between members of an FTA are prohibited. The manner in which the NAFTA safeguard exclusion operates is consistent with this position because Article 802 provides, as the general rule, that such measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA.

Q2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

2. Although potentially a different argument than that put forward by Canada, the fact that both Article XIX safeguard measures and Article XI measures can take the form of quantitative restrictions may provide another basis for the conclusion that in certain circumstances safeguard measures may be allowed between members of an FTA.

Q3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue". Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

Reply

3. NAFTA reflects a complex balancing of many elements, including its safeguards provisions, which were part of NAFTA at the time of its entry into force, that make up the substantive obligations that are found in the final text of the agreement. As noted above, Article 802 provides, as the general rule, that safeguard measures are not to be taken against another NAFTA party. However, consistent with Article XXIV:8(b), Article 802 allows for such measures in limited circumstances.

Q4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Is it possible that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Reply

4. As stated in answer to question #1, Canada agrees with the position of the United States that the fact that XIX is not among the enumerated articles in Article XXIV:8(b) means, by implication, that safeguard measures generally must be made part of the elimination of "restrictive regulations of commerce" under an FTA. This does not mean, however, that safeguard measures between members of an FTA are prohibited. The manner in which the NAFTA safeguard exclusion operates is consistent with this position because it provides, as the general rule, that these measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA.

Q5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Reply

5- In Canada's view, the Appellate Body's comments found at paragraph 106 of its report in *Argentina*-Footwear apply only to the first three sentences of footnote 1, which specifically refer to customs unions and the actions taken by member State of a customs union. The last sentence in footnote 1 does not specifically mention customs unions and thus properly understood applies to both customs unions and free trade areas.

Q6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply

6. With respect to the last sentence of Footnote 1, Canada notes that by its wording this sentence applies to the whole of the *Agreement on Safeguards*. Thus its placement has no bearing on the its interpretation and the fact that it is meant to inform the interpretation of the whole of the Agreement.

7. Canada's submissions in this matter addressed the issue of Canada's exclusion from the safeguard measure in question. Therefore Canada has no comment at this time with respect to questions 7-13 posed by the Panel.

II. QUESTION FOR MEXICO AND CANADA FROM KOREA

Q14. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Reply

8. As indicated in Canada's answers to the Panel's first three questions above, consistent with NAFTA Member's WTO obligations, NAFTA Article 802 provides, as a general rule, safeguard measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA, which are determined on a case-by-case basis.

ANNEX B-4

EUROPEAN COMMUNITIES' ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

THESE QUESTIONS ARE INTENDED TO FACILITATE THE WORK OF THE PANEL, AND DO NOT IN ANY WAY PREJUDGE THE PANEL'S FINDINGS ON THE MATTER BEFORE IT

(i) Exclusion of Canada and Mexico

1. [CANADA ONLY] Canada argues (para. 9) that "safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other". If that is the case, why does the NAFTA allow for the imposition of safeguard measures between NAFTA members if certain conditions are met?

2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

1. See further discussion in the reply to question 4.

3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue". Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Is it possible that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

General remarks

2. The EC would reiterate what it has already submitted to the Panel in its Oral Statement, i.e. that it is not necessary for the Panel to decide in this proceeding about the relationship between Article XXIV and Article XIX of *GATT 1994*.[1] The point in dispute in these proceedings is whether in the Line Pipe investigation the ITC exclusion of imports from Canada and Mexico from the scope of the safeguard measure was correct. The EC would also urge the Panel not to decide in general terms on the relationship between Article XXIV and Article XIX because the question raises complex issues that cannot be fully debated in the course of these proceedings.

3. The Panel's decision on this point does not however require a decision on the issue of principle of whether an FTA member may or must, under Article XXIV of GATT, legitimately exclude its FTA partners from the scope of a safeguard measure.

4. Indeed, the facts of the case are such that they allow the Panel to decide on the basis of the previous Appellate Body reports, notably the report in *Argentina – Footwear*.[2] In that case, the investigating authorities had included imports from customs union partners in the investigation, and had even made a "serious injury" finding based i.a. on those imports. Notwithstanding this, they had eventually excluded those imports from the reach of the measure.

5. Confronted with that factual situation, the Appellate Body in *Argentina – Footwear* recognized that there must be a "parallelism" between the product scope of an investigation and on the other hand the product scope of a safeguard measure. Moreover, it found that, since this parallelism had been broken by Argentina, then this was also contrary to the requirement of Article 2.2 of the *Agreement on Safeguards*:

> "112. While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:
>
> > Safeguard measures shall be applied to a product being imported irrespective of its source.
>
> As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States." [3] [underlined added]

[1] EC Oral Statement, paras. 9-27.

[2] For a recent example where the similarity with a previously reviewed case led the Appellate Body to decide in the same way see *United States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 170. The Appellate Body also reviewed a case of breach of parallelism between the scope of the investigation and the scope of a safeguard measure in *United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, 22 December 2000.

[3] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear*"), WT/DS121/AB/R, 14 December 1999, para. 112.

6. Thus, the Appellate Body has clearly indicated that the parallelism, and notably the inclusion of investigated imports from all sources within the scope of the measure, is also required by Article 2.2 of the *Agreement on Safeguards*. Therefore, *a contrario*, at least whenever this parallelism is not respected, Article 2.2 will also be violated.

7. As pointed out by the EC in its Oral Statement[4], in the case under review the ITC investigated imports from i.a. Canada and Mexico and even took account of these imports to arrive at the general determination of "serious injury". Nevertheless, it eventually excluded Canadian and Mexican imports from the scope of the safeguard measure.

8. Given the close similarity between the situations in the *Argentina – Footwear* and *US – Line Pipe* investigations, the same conclusions drawn by the Appellate Body in *Argentina – Footwear* apply in the present case. Accordingly, already on that basis, and without entering into the general issue of the relationship between Article XXIV and Article XIX of *GATT 1994*, the Panel should find in favour of Korea and conclude that the US, by failing to respect the parallelism between investigation and measure, has breached Article 2.2 of the *Agreement on Safeguards*.

Reply to questions 2 and 4

9. The EC does not believe that the imposition of safeguard measures between FTA partners is inconsistent with the concept of an FTA. The EC further considers that the US argument that the absence of a reference to Article XIX in Article XXIV:8(b) entails that WTO Members must exclude their FTA partners from the scope of safeguard measures they take is flawed in two fundamental ways.

10. In the first place, the US defence is not relevant to the present case. Article XXIV:8 of *GATT 1994* is by nature a definitional provision, which sets out the conditions to qualify as an FTA, and does not, by itself impose obligations on WTO Members:[5] in particular, it does not impose an obligation to exclude FTA partners from protective measures nor the hypothetical conditions under which such exclusions may be granted. Moreover, the express mention in Article XXIV:8(b) of the maintenance of certain restrictive measures between FTA partners refers to restrictions which are WTO-compatible (since that provision refers to measures "permitted under Articles XI, XII, XIII, XIV, XV and XX").

11. The legal basis for the prohibition of (and thus the obligation to eliminate) WTO-inconsistent restrictive measures is found (even for FTA partners), not in Article XXIV:8(b), but in all the relevant provisions of *GATT 1994*. In other words, there is no specific need to regulate in Article XXIV:8(b) the elimination of WTO-inconsistent measures between FTA partners, as this obligation is already laid down with effect for the whole WTO membership in other GATT provisions.

12. An analysis under Article XXIV:8(b) therefore assumes that the restrictive measure under review is WTO-consistent. Thus, an analysis of whether the exclusion of FTA partners from a safeguard measure is legitimate should be conducted by the Panel only after it has reviewed the other claims against the US investigation and measure on Line Pipe and only if the Panel has concluded that the other claims are unfounded (that is, the Panel has concluded that the ITC investigation and measure are consistent with all the requirements for imposition of safeguard measures, both in Article XIX of *GATT 1994* and in the *Agreement on Safeguards*, claimed by Korea to have been

[4] EC Oral Statement, paras. 12-19.
[5] The same distinction is drawn by the Appellate Body in *US – Lamb*, para. 133.

violated). In the EC's view, since the US safeguard action against line pipe imports is WTO incompatible in different respects, such an analysis is clearly not allowed in the present case.[6]

13. Even assuming, *arguendo*, that the US safeguard measure on Line Pipe were otherwise WTO-compatible, and thus the US argument were relevant, the second flaw in such argument is that it is both unsupported and not compatible with the general purpose and design of the relevant provisions of *GATT 1994*.

14. Perhaps the most appropriate approach to the issue is to start by addressing the definition of FTAs in *GATT 1994*. That definition is found in para. 8 (b) of Article XXIV, pursuant to which:

> "(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." [emphasis added]

15. One could recall what the Appellate Body observed in *Turkey – Textiles*: [7]

> "Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a "customs union". It requires the constituent members of a customs union to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them."

Similarly, Article XXIV:8(b) lays down the standard for internal trade between members of an FTA and requires that an FTA (a) eliminate restrictive trade regulations and (b) that elimination covers substantially all trade between members.

16. One can further refer to what the Appellate Body observed in respect of the "substantially all the trade" clause when appearing in Article XXIV:8(a):

> "Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision.[14] It is clear, though, that "substantially all the trade" is not the same as *all* the trade".[8]

> "[14] Panel Report, para. 9.148."

17. Thus, the clause "substantially all the trade" as interpreted by the Appellate Body already entails that an absolute obligation to eliminate all restrictive measures is not imposed by Article XXIV:8(b) of *GATT 1994*. Therefore, inasmuch as an FTA remains within the outer limit of

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[6] The EC is aware that in *Turkey – Textiles* the Appellate Body found that WTO-inconsistent measures may be maintained by a customs union in respect of trade with third parties if certain conditions are met (Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/AB/R, 22 October 1999, para. 58). In the EC's view, to the extent that these findings can be applied to the present case, the conditions dictated by the Appellate Body are not fulfilled by the US measure since it was neither taken upon the formation of NAFTA nor has it been shown to have been necessary for such formation.

[7] Appellate Body Report, Turkey – Textiles, para. 48.

[8] Appellate Body Report, Turkey – Textiles, para. 48.

"liberalization of substantially all the trade", the remaining trade which is not liberalized may arguably remain so as a result of the application of safeguard measures.

18. This conclusion is further corroborated, under the circumstances of the present case, by the fact that the contracting parties to NAFTA themselves have not made the mutual exclusion from safeguard measures an absolute obligation. Instead, in Sec. 802(1) of the NAFTA Agreement they have provided for the possibility of inclusion in certain circumstances.[9] If there were an absolute obligation to exclude partners (*quod non*), then whenever this provision is applied NAFTA partners would themselves violate Article XXIV.[10]

19. Likewise, if the US argument was taken literally and all safeguards were to be eliminated between FTA partners as a condition for the establishment of the FTA, then also bilateral safeguard clauses, such as that laid down in Sec. 801 of the NAFTA Agreement, would be prohibited.

20. There are further reasons why the US argument that safeguard measures must not be applied between FTA partners because Article XIX of *GATT 1994* is not expressly mentioned in Article XXIV:8 is unconvincing.

21. In the first place, Article XIX is not the only provision allowing trade restrictive measures that is not referred to in Article XXIV:8(b). If the US reasoning was correct, then also measures under e.g. Article VI of *GATT 1994* (as supplemented, clarified and modified by the *Anti-Dumping Agreement* and the *SCM Agreement*), could never be imposed against FTA partners. Perhaps even more obviously, the omission of any reference to Article XXI of *GATT 1994* (security exceptions) in Article XXIV:8(b), in stark contrast with the reference to Article XX (general exceptions), can hardly be understood to mean that FTA partners would be precluded from relying upon such provision in case of a situation calling for national security protection involving *inter alia* FTA partners.

22. Another unreasonable result of espousing the US interpretation is hinted to in Panel's question 2. The EC's view in that respect is that, given the fact that safeguard measures adopted consistently with Article XIX may take the form of quantitative restrictions covered by Article XI of GATT 1994, it is not logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are.

23. If quantitative restrictions can be maintained on a permanent basis (such as when they are based on Article XI:2) *a fortiori* it must be possible to apply them on "emergency" grounds.

24. The same can be said for, at the very least, all the measures based on the GATT provisions listed in Article XXIV:8(b), as well as for those which take the form of increased duties: whether or not adopted on safeguard grounds, there should be no obligation to exclude FTA partners.

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[9] Section 802(1) of the NAFTA Agreement reads, in pertinent part:

"Any party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless (1) (a) imports from a Party, considered individually, account for a substantial share of total imports; and (b) imports from a party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports."

[10] This is even more the case because, if the two conditions in Sec. 802(1) are met, a NAFTA Party is entitled to include its partners' imports irrespective of whether this result in reducing liberalization below the "substantially all trade" threshold. It is not plausible that the NAFTA partners would have agreed on such a text if they were convinced that there is an absolute obligation in Article XXIV to exclude FTA partners from safeguard measures.

25. It is therefore unconvincing to conclude that the list of trade restrictive measures whose continuation between FTA partners is expressly permitted by Article XXIV:8(b) is meant to be exhaustive.

26. More fundamentally, it is not clear that the adoption of safeguard measures, by their nature temporary and extraordinary remedies aimed at facing an exceptional emergency situation,[11] amounts to re-introducing trade restrictions relevant under Article XXIV:8 of *GATT 1994*, and therefore runs counter the obligation to liberalize trade between FTA partners. As clarified by Article XIX:1 of GATT 1994, the adoption of a (GATT-consistent) safeguard measure in a form other than a modification of a tariff concession amounts to "temporarily to 'suspend the obligation in whole or in part'"[12] "to the extent and for such time as may be necessary to prevent or remedy [serious] injury."

27. It is not to be excluded that among the obligations which can temporarily be suspended on safeguards grounds is also the obligation in Article XXIV:8(b) to eliminate restrictions between FTA partners. This however is not tantamount to saying that such an obligation is violated.

28. It follows from the foregoing that, even taking Article XXIV:8(b) of *GATT 1994* in isolation, that is without relating it to the *Agreement on Safeguards*, there is no absolute obligation for an FTA Member to exclude FTA partners from the scope of its safeguard measures.

5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply to questions 5-6

29. In the EC's view the US argument is unwarranted. Footnote 1 to the *Agreement on Safeguards* is not relevant to decide on whether an FTA member is entitled to derogate from MFN by excluding FTA partners from safeguard measures it takes.

30. The fact that footnote 1 is not relevant to decide the matter before the Panel results from both its textual and contextual interpretation.

31. As to the ordinary meaning of footnote 1 to the Agreement on Safeguards, its first three sentences are expressly and exclusively concerned with the situation of customs unions. In the EC's view this is a first indication that the note is intended to deal with customs unions, and with a specific issue arising in the application of safeguard measures when customs unions are involved.

[11] Appellate Body Report, *Argentina – Footwear*, paras. 93-94.

[12] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Products*"), WT/DS98/AB/R, 14 December 1999, paras. 86, 88; Appellate Body Report, *Argentina – Footwear*, para. 93.

32. The fact that the last sentence of footnote 1 refers in general terms to the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994, which remains unaffected, has to be related to the rest of the text of the footnote, and is not modifying the general scope of the footnote.

33. This is confirmed i.a. by the Appellate Body's finding in para. 106 of *Argentina – Footwear*, which is unqualified and applies to the whole content of footnote 1. That paragraph, along with the passage of the Panel Report that the Appellate Body criticized in the previous paragraph, is worth being quoted in full:

> "105. Finally, the Panel concluded as follows:
>
> > in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union. [94]
>
> ---
>
> "[94] Panel Report, para. 8.102."
>
> 106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State". [95] On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports from all sources on the Argentine domestic industry." [emphasis added]
>
> ---
>
> "[95] We also note that footnote 1 relates to the word "Member" in Article 2.1, which is commonly understood to mean a Member of the WTO."

34. Thus, in paragraph 106 of its Report the Appellate Body understood the first sentence of footnote 1 to determine the scope of the whole footnote and drew from that first sentence a conclusion in respect of the whole footnote.

Specifically, the Appellate Body identified the subject matter of the footnote as being safeguard actions taken by customs unions (as opposed to action taken by one of their constituent members).

35. The Appellate Body's conclusion was that the whole footnote was irrelevant to the case under review, which was concerned with whether Argentina, rather than the customs union of which it is a member, could rely on the last sentence of the footnote to justify exclusion of its customs union partners from the application of the measure.

The Appellate Body considered that the fact that the safeguard action under review was not attributable to a customs union was sufficient to exclude the relevance of the footnote.

36. The issue before the Panel in the present proceedings mirrors the one before the Appellate Body in *Argentina – Footwear* and addressed in para. 106 of the Appellate Body report. As recalled, in that case, at issue was the possibility for Argentina, as a customs union member, of relying on footnote 1, to exclude a customs union partner from the reach of a safeguard measure. Similarly, in the present case the issue is whether a member of an FTA, rather than the FTA itself, can rely on the last sentence of the footnote to exclude its partners from the application of its safeguard measure.

37. If the footnote, even if referring to customs unions, was held by the Appellate Body not to be relevant to actions taken by members of customs unions, a fortiori it cannot be relevant to actions taken by members of FTAs, which are not even mentioned in that footnote.[13]

38. Furthermore, if the last sentence of footnote 1 had the general scope and meaning that the US suggests, then it would have allowed the Appellate Body to apply it to the case at issue in *Argentina – Footwear* as well.

39. That footnote 1 is not relevant to decide the matter before the Panel is further confirmed by the fact that it has been inserted in Article 2.1 of the *Agreement on Safeguards*, rather than Article 2.2, as recalled in the text of question 6.

40. The text of the footnote is, moreover, attached to a specific term in Article 2.1, notably the word "Member", as also pointed out by the Appellate Body in *Argentina – Footwear*.[14] The footnote is thus aimed at regulating a specific instance, which can only concern actions taken by some of the Members. FTAs do not have a single customs territory and a single tariff schedule, and thus cannot become a WTO Member in their own right.

41. The EC would recall that still in *Argentina – Footwear* the Appellate Body expressly recognized that the requirement in Article 2.2 of the *Agreement on Safeguards* applies to actions taken by a customs union member when it has included imports from its customs unions partners in its safeguards investigation. [15]

42. Given that the Appellate Body's conclusion in para. 112 of the *Argentina – Footwear* Report was based on the facts of Argentina's investigation, not on Argentina's membership in a customs union, it equally applies to other cases, like the one in dispute, where the parallelism between the scope of an investigation and the scope of a measure is not observed.

(ii) The measure

7. [ALL] Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury?

If the competent authority finds that increased imports have caused "serious injury or a threat thereof", how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement?

[13] That FTAs are not concerned by footnote 1 is not surprising. Unlike customs unions, FTAs do not require the establishment of a uniform external trade regime; therefore, the specific issue that is regulated in footnote 1 in respect of customs unions would unlikely arise for FTAs.

[14] As also pointed out by the Appellate Body in *Argentina – Footwear*, para. 106, footnote 95.

[15] Appellate Body Report, *Argentina – Footwear*, para. 112, supra, reply to questions 4 and 2, general remarks.

Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Reply

43. The "nature" of a safeguard measure as an extraordinary remedy against fair trade does not change depending on the conditions that must be present for its adoption to be WTO-compliant. This also applies to the specific condition of the existence of "serious injury" or of "threat of serious injury".

44. The fact that a measure is based on a finding of "serious injury" or of "threat of serious injury" can however affect the features of the measure (such as level, type or duration). In fact, each measure must be based on the specific facts of the case, and what is "necessary" to remedy *actual* "serious injury" may not be equally "necessary" to prevent "*threat* of serious injury". Likewise, the necessary "adjustment" of the domestic industry to changes may be different in cases of actual serious injury and in cases of threatened serious injury.

45. As regards the way of ensuring that a safeguard measure is "necessary" within the meaning of Article 5.1, the assessment of the "necessity" calls for a comparison between, on the one hand, the serious injury/threat thereof caused by increased imports and the adjustment required in either case, and, on the other hand, the anticipated effects of the proposed measure on import flows and on adjustment.

46. It has to be recalled that in order to make a finding of "serious injury" or of "threat of serious injury" domestic authorities must determine the relevant "serious injury" or "threat thereof" caused by increased imports – a step that is only completed after i.a. "non-attribution" to imports of injury caused by other factors is ensured.[16]

47. The determination of the "necessary" remedy is thus the determination of a remedy that will neutralize the serious injury or threat thereof caused by increased imports, as well as facilitate adjustment, and that will not exceed that objective.

48. Furthermore, concerning the question of whether choosing between a finding of present serious injury and a finding of threat of serious injury is necessary to comply with the necessity requirement contained in the first sentence of Article 5.1, in the EC's view this choice is necessary. The reason for this is, first of all, that from a logical point of view these two notions appear to be mutually exclusive. The same situation cannot at the same time constitute threat and actual serious injury.

49. More importantly, choosing between the two findings is necessary in that the safeguard response is measured by the problem to be remedied. Because a "threat of serious injury" is not as immediately detrimental as actual serious injury, the remedy sufficient and not excessive to prevent serious injury from materializing will likely be less restrictive on trade than a remedy to redress a situation of actual "serious injury". Like for diseases, preventing is better than treating and normally comes at a lower cost.

50. The different consequences between a "serious injury" and "threat of serious injury" finding were also clear to the ITC in this very case. The ITC Report accounts for the different views on injury of the various commissioners, and those who had found threat of serious injury recommended a

[16] Appellate Body Report, US – Lamb, para. 180.

different and less restrictive measure from that recommended by the commissioners who had found serious injury.[17]

51. The fact that the level and type of remedy is likely to be different in the case of serious injury and of threat of serious injury does not, however, entail that the measure changes in nature, as explained above.

8. [ALL] GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable". GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be "practicable", in the context of a tariff quota, to fix a quota representing the total amount of permitted imports?

Reply

52. Yes.

If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Reply

53. Yes, the very presence of this clause ("wherever practicable") suggests the *a contrario* inference that in the case of a tariff quota fixing a quota representing the total amount of permitted imports may not always be "practicable". This is however without prejudice to the question of whether in the present case fixing such a total amount was or was not "practicable".

9. [ALL] In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does your delegation consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Reply

54. The EC does not consider that the terms "quantitative restriction" and "quota" are synonymous. This seems to be consistent with use of those two terms elsewhere in the legal texts resulting from the Uruguay Round.

55. For example, the two terms already appear in GATT Article XI. That provision, while prohibiting any form of quantitative restriction, specifies that quotas are but one of the possible ways to effect such restrictions.

56. Furthermore, Article XIII of GATT 1994 makes clear in para. 5 that "quotas" can also be "tariff quotas", as it states that Article XIII provisions also cover tariff quotas.

57. Since tariff quotas are also covered, the reference in e.g. Article XIII:2(d) to the allocation of a "quota" must be a reference to the allocation of the "quota" part of a TRQ.

[17] ITC Report, pp. I-75 and I-87 respectively.

58. The EC would also recall that, as clarified by the Appellate Body, the various texts resulting from the Uruguay Round negotiations constitute an inseparable package of rights and obligations. Those obligations apply together. Therefore, Article XIII of GATT 1994 applies together with the Agreement on Safeguards unless it is demonstrated that there is a conflict or that it is derogated from the latter text. [18]

10. [ALL] In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years". Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Reply

59. In the paragraph of the Report referred to by the Panel,[19] the Appellate Body contrasted the obligation in the first sentence of Article 5.1 of the *Agreement on Safeguards* with the one laid down in the second sentence. In respect of the second sentence, it had just observed

> "This sentence requires a "clear justification" if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this "clear justification" has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*." [20]

60. Therefore, by noting in paragraph 99 of the Report that there is not

> "anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years",

the Appellate Body simply considered that only the second sentence of Article 5.1 requires a clear justification, at the time of the adoption of the measure, as to why a quantitative restriction below a certain threshold is necessary. Not requiring a "clear justification" in other cases does not, however, amount to say that no justification at all is required, nor that it need not be provided at the time of the decision on the application of a safeguard measure.

61. As explained above,[21] the assessment of the "necessity" of a given safeguard measure is made by comparing the "serious injury" or "threat of serious injury" found and the requirements for an orderly adjustment with the expected effect of the measure envisaged. Therefore, the necessity (or lack of necessity) of a measure may be already be evaluated by referring to the injury findings of the investigating authorities, if consistent with Article 4 of the *Agreement on Safeguards* and if

[18] Appellate Body Report, *Korea – Dairy Products*, para. 81; Appellate Body Report, *Argentina – Footwear*, para. 89; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement*"), WT/DS60/AB/R, 2 November 1998, paras. 65, 75.

[19] Appellate Body Report, *Korea – Dairy Products*, para. 99.

[20] Appellate Body Report, *Korea – Dairy Products*, para. 98.

[21] Supra, reply to question 7.

appropriately reported in the domestic measure, and to the reasoning concerning the details (including level, type, duration) of the measure.

62. Most recently in *US – Lamb*, the Appellate Body confirmed that fulfilment of the requirements of the *Agreement on Safeguards* must be reviewed by looking at the domestic measure in the following terms:

> "we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on "all pertinent issues of fact and law" in their published report. As Article XIX:1(a) of the GATT 1994 requires that "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in our view, a "pertinent issue[] of fact and law", under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments"." [emphasis added] [22]

63. Since this conclusion is based on the general language of Article 3.1 of the *Agreement on Safeguards*, it logically applies to all the "pertinent issues of fact and law", including compliance with the obligation in the first sentence of Article 5.1.

(iii) Serious injury

11. [ALL] Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Reply

64. No, they would not be always and per se inconsistent. However, they are particularly relevant in safeguard investigations, in view of the emergency nature of safeguard action.

(iv) Increased imports

12. [ALL] In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough". How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Reply

65. There is not a predetermined benchmark for deciding if imports are recent enough, but in view of the emergency nature of safeguard measures the exceptional situation justifying safeguard action must be as close as possible to the decision of such action.

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[22] Appellate Body Report, *US – Lamb*, para. 76. Still in *Korea – Dairy Products* the Appellate Body upheld the Panel's finding of a violation of Article 4 of the *Agreement on Safeguards* which was based on examination of whether certain "relevant factors" in Article 4.2(a) had or had not been reviewed in the OAI Report (Appellate Body Report, *Korea – Dairy Products*, paras. 138, 141).

66. Likewise, there is no minimum predetermined period to wait before a petition for safeguard relief may be filed with the competent authorities.

(v) Developing country exemption

13. [ALL] At para. 181, Korea asserts that "the United States did not even attempt to determine which countries qualified for this exemption". Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

Reply

67. In the EC's view Members imposing safeguard measures are required to determine in advance which developing countries should be excluded by reason of Article 9.1. In fact before imposing a measure they are required to assess import trends and to conduct a full investigation. This also applies to imports from developing countries, so that data concerning their individual and aggregate share in the trade in the investigated product also need to be available and be reviewed before the adoption of a measure.

ANNEX B-5

JAPAN'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

2. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

4. Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Is it possible that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Answers to Questions 2/4

The GATT Contracting Parties and WTO Members have addressed the scope and meaning of GATT Article XXIV:8(b) a number of times, without developing a consensus.[1] In this type of situation, the Panel should be cautious in making a ruling regarding the provision based solely on deduction from its text.

This being said, Japan has argued in the Committee on Regional Trade Agreements, citing the absence of Article XXI from the list, that the exceptions listed in Article XXIV:8(b) are illustrative so as not to negate the purpose of an RTA stipulated in Article XXIV(to facilitate trade).[2]

In reference to the specific case before the Panel, Japan draws the attention of the Panel to the following. The United States relies on Article XXIV:8(b) to assert that the North American Free Trade Agreement (NAFTA) is an FTA as defined at GATT Article XXIV:8(b) and that this, in turn, justifies the US exclusion of Mexico and Canada from its safeguard measure. Yet under such an interpretation, the United States also would be prohibited from imposing anti-dumping and countervailing duties on Mexico and Canada, because, like GATT Article XIX (providing for safeguard measure), GATT Articles VI and XVI (providing for antidumping and countervailing duties) are excluded from the list of measures excepted at GATT Article XXIV:8(b). But the United States does not do so[3] and has not provided a logical explanation of this obvious contradiction.

[1] See, e.g., WT/REG/W/37.

[2] Id.

[3] See, e.g., Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, South Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, *65 Fed. Reg. 78467-70*

5. The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Answer to Question 5

No, it does not. In *Argentina – Footwear*, the Appellate Body was concerned only with issues in the context of customs unions. The Appellate Body's finding does not address the last sentence of footnote 1.

6. If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer to Question 6

Article 2.2 of the Safeguards Agreement applies to Members implementing safeguard measures, whether or not the Member is a party to an FTA (as is the United States here) or to a customs union. Footnote 1 stipulates additional conditions applicable to customs unions acting as a single unit or on behalf of a member State. Thus, it is placed appropriately under the first paragraph that sets general conditions for safeguard measures, namely paragraph 1 of Article 2. Moreover, it is placed after "Member" because it qualifies "Member" in the context of customs unions.

(i) The measure

7. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused "serious injury or a threat thereof", how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer to Question 7

Article 4 of the Safeguards Agreement defines "serious injury" and "threat of serious injury." Circumstances relevant to either finding would vary from case to case, but the Agreement sets forth no specific criteria.

8. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable". GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be "practicable", in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may

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(15 December 2000); Continuation of Antidumping Duty Order and Countervailing Duty Order: New Steel Rail from Canada, *65 Fed. Reg. 6358 (9 February 2000) (attached as ROK Exh. 1).*

constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Answer to Question 8

The phrase "whenever practicable" in GATT Article XIII:2(a) suggests that there may be situations in which fixing the quota representing the total amount of permitted imports is not practicable. However, in such a situation, Article XIII:2(b) restricts the measures that a Member may impose to "import licenses or permits without a quota."

In direct violation of these provisions, the United States applied a tariff rate quota (TRQ) measure with no overall limit on eligibility. The US TRQ applies a higher tariff rate of 19 per cent to imports above a specific quantity of imports (9,000 short tons for each exporting country).

The provisions of Articles XIII:2(a) and XIII:5 require an "overall limit on eligibility" for any TRQ. In this regard, the US argument that the measure is not a TRQ because it lacks an overall limit on eligibility is flawed. The United States confuses the legal requirements that apply to a TRQ with the definition of TRQ. If the US argument were accepted, a Member's failure to fix the total amount of a TRQ quota automatically would convert a TRQ into a non-TRQ measure and allow the Member to escape the requirements of Articles XIII:2(a) and XIII:5.

9. In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does your delegation consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Answer to Question 9

"Quota" and "quantitative restriction" are not synonymous. As a review of GATT Article XIII indicates, "quota" allocation is one of the methods for implementing a "quantitative restriction" or a "TRQ." A quantitative restriction also may be implemented through "import licenses or permits without a quota" (GATT Article XIII:2(b)) and a TRQ may be implemented without quota allocation. Article 5.2 applies to a "quantitative restriction" and a "TRQ" if quota allocation is used.

10. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years". Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer to Question 10

The text of the second sentence of Article 5.1 of the Safeguards Agreement indicates that it relates only to a "quantitative restriction." The Appellate Body in *Korea – Dairy* did not agree with the Panel's finding that Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why

they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment within the meaning of Article 5.1.

(ii) Serious injury

11. Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Answer to Question 11

In general, improvements at the end of a period of investigation would detract from a finding of current injury. However, one must consider the characteristics of the market, such as seasonal ups and downs, and elasticity of demand relative to price. Therefore, the determination must account for all relevant product-specific variables.

(iii) Increased imports

12. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia "recent enough". How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Answer to Question 12

In *Argentina – Footwear*, the Appellate Body held that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury,'" taking into account the many characteristics of each industry.[4] Thus, a case-by-case analysis is required to evaluate whether or not an increase in imports is "recent enough." But, although as this analysis suggests, it may be difficult to set a period that in all cases is "recent enough," in *Argentina – Footwear*, the Appellate Body found that a period of several years was not sufficiently recent.[5]

(iv) Developing country exemption

13. At para. 181, Korea asserts that "the United States did not even attempt to determine which countries qualified for this exemption". Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

[4] Argentina – Safeguard Measures on Imports of Footwear, *WT/DS121/AB/R (14 December 1999) at para. 131*.

[5] Id. *at para. 130.*

Answer to Question 13

Article 9.1 of Agreement on Safeguards provides that "Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent." Because Article 9.1 says "shall not be applied," the competent authority must determine before implementing a safeguard if any developing countries should be excluded from the measure per Article 9.1 of Safeguards Agreement.

ANNEX B-6

MEXICO'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

Before replying to the panel's questions, Mexico respectfully points out that, since our arguments refer exclusively to the right to exclude free-trade area partners from the application of the safeguard measure, our replies will deal exclusively with this issue.

Q2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

Firstly, we must point out that the fact that Article XIX is not included in the list of exceptions in Article XXIV:8(b) of the GATT 1994 does not mean that its application is prohibited among members of a free-trade area, in the same way as we believe that, for example the imposition of measures under Article XXI of the GATT 1994 is likewise not prohibited.

GATT Article XXIV:8(b) provides for the elimination of duties and other restrictive regulations of commerce on substantially all – and not the entirety of – trade between the partners of a free-trade area. The general exclusion of the application of safeguard measures among NAFTA partners is in keeping with such elimination, while Article 802 of the Treaty lays down the limited circumstances in which the exclusion does not apply.

Furthermore, we believe that it is wrong to equate Article XI and Article XIX of the GATT, since they are very different in nature. Although in both cases the result could be the imposition of a quantitative restriction, the causes giving rise to them as well as the requirements established for imposing them are different. In addition, the wording of Article XIX, unlike Articles XI[1], XII[2], XIII[3], XIV[4], XV[5] and XX[6], does not refer to the imposition of restrictions but rather to the ability to deal with emergency situations through the total or partial suspension of an obligation or modification of a concession. In the case of free-trade areas, the level of obligations and of concessions granted among members of the area is different (and normally greater) than the level of concessions and obligations acquired in the multilateral context. Therefore, Article XXIV does not prejudge the rights of Members in that context, but confines itself to establishing the parameters to be complied with by free-trade areas. The partners of a free-trade area are free to decide how they will achieve their trade liberalization objectives, provided they comply with the conditions laid down in Article XXIV.

[1] Paragraphs 1 and 2.
[2] Paragraphs 2, 3 and 4.
[3] Paragraphs 1, 2 3, 4 and 5.
[4] Paragraphs 1, 2, 3, 4 and 5.
[5] Paragraphs 1, 5 and 9.
[6] Introductory paragraph and sub-paragraphs (g), (i) and (h).

Q3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue". Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

Reply

The exclusion power provided for in Article 802 of the NAFTA is a fundamental element of the set of concessions and obligations designed to facilitate trade between Canada, the United States and Mexico, as it ensures that, in the absence of very specific conditions, market access is guaranteed. Hence, it may be affirmed that if the manner in which market access would be guaranteed had not been clearly established, it would have prevented the establishment of the free-trade area.

Notwithstanding the above, we wish to point out the following: the criterion established in "Turkey – textiles", in establishing the obligation to "demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue" is in fact an obligation to demonstrate a hypothetical situation, which is impossible. Moreover, this criterion cannot be applied separately to each of the constituent elements of a free-trade area. The language of the chapeau to Article XXIV:5 provides that "the provisions of this Agreement shall not prevent … the formation … of a free-trade area". This means that what is protected is the set of provisions forming the area and not each of them separately. The establishment of a free-trade area is a delicate balance among an infinite number of economic, trade, legal, political and other factors. Accordingly, it is impossible to demonstrate that each and every one of the elements making up the free-trade area is such that if it had not been introduced, the establishment of the free-trade area would have been prevented. It is important to recall that, given the nature of free-trade areas, the benefits granted are not extended on a most-favoured-nation basis. Obviously, a Member cannot demonstrate that each and every one of the concessions therein granted is so important that its absence would have made it impossible to conclude such an agreement. Any other interpretation would impose on partners of a free-trade area additional obligations besides those laid down in GATT Article XXIV, contrary to Articles 3.2 and 19.2 of the DSU. It could also give rise to endless disputes concerning different constituent elements making up the area.

Lastly, we wish to point out that Article 802 of the North American Free Trade Agreement (NAFTA) is the Article which governs relations among the partners to the Agreement, whereas the NAFTA Implementation Act is United States domestic legislation.

Q4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Is it possible that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Reply

As stated in the reply to question 2, the partners in a free-trade area are free to decide how they will attain the objective of facilitating trade amongst themselves. Thus, Article XXIV should be interpreted in the light of the objective of "trade facilitation". In the case under consideration, the NAFTA partners agreed that they would ensure access to their markets and established very clear provisions governing the limited circumstances in which such market access could not be guaranteed.

Q5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Reply

No. The language of paragraph 106 of the Appellate Body's report states " … the ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure ´as a single unit or on behalf of a Member state` … " (footnote omitted). There is no reference to the last sentence of footnote 1.

Furthermore, in the "Argentina – footwear" case the Appellate Body found that Argentina had not invoked GATT Article XXIV as a defence[7], and therefore did not take up the discussion of that Article.

In addition, as Mexico pointed out in its oral statement, the last sentence of the footnote is not confined to Article XXIV:8(a) of the GATT (customs unions), but covers the entire paragraph (including free-trade areas). Maintaining a contrary interpretation would be tantamount to reducing Mexico's rights under the Safeguards Agreement.

Q6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply

The answer is no. The last sentence of footnote 1 states that " … nothing in this Agreement prejudges … ". This means that neither Article 2.1 nor Article 2.2 nor any other article of the Agreement on Safeguards prejudges the relationship between GATT Articles XIX and XXIV:8.

QUESTION FOR MEXICO AND CANADA FROM KOREA

Q14. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

[7] WT/DS121/AB/R, paragraph 110.

Reply

NAFTA contains the general principle that the NAFTA partners will not apply safeguard measures to each other. This general principle, and the exceptions to it, are laid down in Article 802 of the NAFTA.

ANNEX B-7

KOREA'S ANSWERS TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

(15 June 2001)

I. BOTH PARTIES

A. EXCLUSION OF CANADA AND MEXICO

Q1. Are safeguard measures taken under GATT Article XIX and the Safeguards Agreement "duties" or "other restrictive regulations of commerce" within the meaning of GATT Article XXIV:8(b)? Please explain.

Reply

1. It appears that the parenthetical list in Article XXIV:8(b) is not exhaustive of what constitutes "duties or other restrictive regulations of commerce".[1] Even if this phrase is broadly defined to include safeguards measures, the United States has admitted in this case that it eliminated restrictions for "substantially all" trade irrespective of its treatment of individual safeguards measures. Whether it did or not, the fact remains that the United States is not maintaining as an affirmative defence that Article XXIV prevents safeguard measures between FTA members. Following the reasoning of the Appellate Body in *Argentina – Footwear*, the Panel does not need to reach this issue if it finds that Footnote 1 does not apply.

2. Article XIX measures adopted in conformity with Article XIII, including the non-discrimination provisions, are expressly permitted under Article XXIV:8(b). There is an agreement between Korea and the United States in this particular case that the provision permits the application of a safeguard measure.

B. NATURE OF THE MEASURE/ARTICLE XIII

Q2. Article XIII:5 provides:

> **The provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member], and, in so far as applicable, the principles of this Article shall also extend to export restrictions.**

[1] *See Turkey – Restrictions on Imports of Textile and Clothing Products,* Report of the Appellate Body, WT/DS34/AB/R (22 October 1999). *See also* discussion regarding the difference between fiscal measures (revenue duties) and other "protective" measures and the question of whether "quantitative restrictions" are included within "other restrictive regulation of commerce." *Guide to GATT Law and Practice*, World Trade Organization and Bernan Press, 6th ed. (1995) at 820-22.

What, in your opinion, is the basis for the distinction between (1) "apply[ing] the "provisions" of Article XIII to tariff quotas, and (2) "extend[ing]" the "principles" of Article XIII to export restrictions? Does the fact that Article XIII:5 does not state that the provisions of Article XIII "shall apply" to "export restrictions" suggest that such provisions already apply to "export restrictions"?

Reply

3. Clearly, Article XIII:5 is recognizing that the nature and effect of "quotas", whether they be in the form of quotas or tariff-rate quotas ("TRQs"), are the same and require the same treatment to ensure that they are "non-discriminatory". In the case of export restrictions, since their nature is distinct, the provisions of Article XIII may not apply in their entirety, but rather "extend to" export restrictions to the extent that they are applicable. "Extend to" implies something less than "apply to". This distinction is confirmed by the use of the term "principles" with respect to export restrictions rather than the term "provisions" which "shall apply" to TRQs. One can "apply" the "provisions" to TRQs, but only the "principles" of Article XIII can be "extended" to export restrictions.

4. No, see above. Korea also notes that Article XIII serves to clarify exactly the manner in which various "permissible" quantitative restrictions under Article XI are to be applied. For this reason, it is necessary to identify there the various "forms" or "types" of quantitative restrictions and how Article XIII applies or only extends to each, including TRQs and export restrictions.

Q3. Are all quantitative restrictions quotas? If not, what is the difference between a quantitative restriction and a quota? Please explain. Are all tariff quotas quotas? Please explain.

Reply

5. All quantitative restrictions are not quotas. Article XI defines "prohibitions or restrictions" by excluding "duties, taxes or other charges". TRQs are not excluded by that definition. Article XI is very clear that "quantitative restrictions" are "quotas, import or export licences or *other measures*". Therefore, quantitative restrictions are broader than quotas, but include quotas.

6. All TRQs have a quota component. As Korea explained in its initial answer to Panel questions, "quotas" must be subject to the same non-discriminatory discipline, whether they are absolute quotas or TRQs, to avoid distorting traditional trade patterns. For tariff measures, non-discrimination can only be ensured through MFN. For quotas, non-discrimination can be ensured through the application of proportional shares.

7. For this reason, it is Article XIII that is most relevant to the interpretation of Article 5 of the Agreement on Safeguards ("SA") because both provisions regulate the non-discriminatory application of the quota portion of TRQs.

C. ARTICLE 5

Q4. At paras. 53 - 57 of its rebuttal submission, Korea claims that the US violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure was in conformity with the requirements of Article 5.1. Is this Article 3.1 / 4.2(c) claim within the Panel's terms of reference? Please explain.

Reply

8. Paragraph 3 of the terms of reference in Korea's Panel Request objects to the failure of the United States to justify the measure under Article 5 of the SA. Yes, Korea submits that it has maintained that Article 5 claims are integrally linked to Articles 3.1 and 4.2(c).[2] Paragraph 9 of Korea's Panel Request states specifically that Articles 3 and 4 of the SA have been violated because "critical confidential information" relied on in the decision-making of the United States has not been provided (*inter alia*, the basis for the President's decision-making documents or any information at all with respect to the justification of the safeguard measure). The obligation to sufficiently explain why the measure was "necessary" by reference to the evidence that existed at the time that the Presidential decision was taken is a "pertinent issue of fact and law." It also relates to the serious injury finding and the "detailed analysis of the case" required by Article 4. (As the United States noted in its response to the Panel, the Article 3 and Article 4 claims with respect to the ITC proceeding were made in Paragraph 1.)

9. Therefore, as demonstrated, Korea has properly set out its "claims" by referencing Article 3 and Article 4 of the SA.[3] Korea also elaborated that critical information, which the United States claimed was of a confidential nature, had not been provided in violation of Article 3 and Article 4 requirements.

10. Furthermore, we note that the United States has not made any claims of prejudice prior to the Panel's question, and the United States has fully responded to Korea's claims regarding Article 3.1 as they related to Article 5 since the First Substantive Meeting with the Panel.

11. As the Appellate Body held in *Thailand – Antidumping Duties on Angles*, the question of whether the claims were adequately made is in essence a requirement of due process. The question is whether the party "suffer[ed] any prejudice on account of any lack of clarity in the panel request".[4] None has been shown.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. Korea's position that NAFTA has not been demonstrated to be in compliance with Article XXIV:8 is based on the preliminary analysis of the Committee on Regional Trade Agreements

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[2] *See United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Request for the Establishment of a Panel by Korea, WT/DS202/4 (15 September 2000) ("Korea's Panel Request") at paras. 3, 9.

[3] *See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products,* Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) ("*Korea – Dairy (AB)*") at para. 123; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (9 September 1997) at para. 141-43 ("Article 6.2 of the DSU requires that *claims*, but not the *arguments*, must all be specified sufficiently . . . in order to allow the defending party . . . to know the legal basis of the complaint.")

[4] *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland,* Report of the Appellate Body, WT/DS122/AB/R (12 March 2001) at para. 95.

which is still considering the question and has not yet issued a final decision on the matter. As the Panel observed, the United States has not presented any evidence that NAFTA qualifies as an FTA under Article XXIV:8(b).

13. Regardless of the Panel's conclusion as to whether Article XXIV could hypothetically apply to NAFTA, Korea maintains that this issue is not relevant to the legal issue before the Panel because the United States cannot invoke the applicability of Article XXIV to NAFTA without Footnote 1 of the SA. As discussed extensively throughout this proceeding, Footnote 1 does not apply to the US safeguard action.[5]

B. INCREASED IMPORTS

Q2. At para 62 of its rebuttal submission, Korea asserts that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury decision." In support, Korea cites (in note 69) certain parts of the ITC Determination, Majority Views on Injury. Please indicate precisely, by quoting the relevant text, which parts of the ITC Determination Korea is referring to.

Reply

14. We apologize to the Panel because the citation in footnote 69 of the Rebuttal Submission is not correct. The correct citation is provided in Korea's Second Oral Statement at footnote 75 and at footnote 5 of the US Second Oral Statement. The pages, with the quotations, are as follows:

> I-19 (Dealing with Injury):
>
> > The much stronger financial performance . . . declined sharply in the second half of 1998, indicating that the very depressed financial condition of the domestic industry evident from the interim 1999 data extends back into mid-1998. (emphasis added)
>
> I-22 (Dealing with Causation):
>
> > *Finding*. There are two principal causes of injury in this case: . . . increase[d]…imports in 1998-99, and . . . decrease[d] . . . demand in 1998-99 . . . . Both factors significantly contributed to the domestic industry's poor health beginning in the second half of 1998. . . . Consequently, we find the statute's causation criterion is met. (emphasis added)
>
> I-28:
>
> > This prior experience suggests that the reduced level of demand would not be expected to generate the severe financial losses suffered by the industry in the second half of 1998 and the first half of 1999, and that the other factors therefore must account for this very different level of industry performance.

15. Finally, as noted in footnote 75 of the Second Oral Statement, the Separate Views on Injury specifically reference the second half of 1998 at pages I-38-41, I-43-44, and I-46. The quotations are numerous. The ITC Report is littered with these citations specifically because the period identified for threat of injury was the period beginning in the second half of 1998.

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[5] *See Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999) at para. 106.

16. We recall that the United States argued in the Second Substantive Meeting with the Parties ("Second Substantive Meeting") that all references to the condition of the US industry beginning in the second half of 1998--in both the Majority and Separate Views--were solely in response to arguments made by Respondents. As Korea noted in its reply, it is difficult to reconcile this interpretation with the fact that the Majority specifically included this analysis in their "findings" on causation. Furthermore, the basis of the threat finding was conditions beginning in the second half of 1998.

17. Again, we sincerely apologize for any inconvenience that we may have caused the Panel, and we thank the Panel for the opportunity to make corrections.

Q3. During the ITC's investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

18. First of all, Korean respondents argued throughout the ITC proceeding that the most recent period demonstrated a decline in imports.[6] However, until the Japanese arctic-grade imports were excluded in the final decision of the ITC, the import trends did not show an absolute decline commencing in the last half of 1998 (only in the first half of 1999). (This is the reason that public and confidential data trends do not match.) Therefore, this issue arose late in the proceeding. Nonetheless, the Respondents did argue that imports declined at the end of the period and Respondents argued for the exclusion of arctic pipe.

19. Second, the US legal standard for increased imports would not take into account a decline in the latter half of 1998 since under the US legal standard, a "simple increase" over the 5-year investigation period is sufficient. Moreover, as the United States repeatedly states, the ITC does not evaluate second-half 1998 data as distinguished from first-half data for purposes of examining increased imports. They only examine full-year data and compare interim period to interim period.

20. In this connection, we further note that, as the Appellate Body reasoned in *US – Lamb Meat*, "Arguments before national competent authorities may be influenced by . . . the requirements of the national laws. . . ." [7] For this reason, "a WTO member is not confined merely to rehearsing arguments that were made to the competent authorities."[8]

21. The ITC has admitted throughout this proceeding that it does not consider such arguments as relevant under US law and practice.

Q4. Regarding para. 73 of Korea's rebuttal submission, would Korea accept that there was an absolute increase in imports for the purpose of Article 2.1 if the "monthly import data" regarding the end of interim 1999 did relate to subject merchandise? Please explain.

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[6] *See Prehearing Brief of Japanese and Korean Respondents on Injury* (27 September 1999) at 8, 52 (KOR-22) and *Posthearing Brief on Injury of Japanese and Korean Respondents* (7 October 1999) at 13, 40 (KOR-25).

[7] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand*, Report of the Appellate Body, WT/DS177/AB/R (1 May 2001) ("*US – Lamb Meat (AB)*") at para. 113.

[8] *Id.*

Reply

22. No. First of all, the United States did not consider this data in the increased imports analysis it conducted.[9] The only US analysis of May and June imports trends occurs at page I-29 of the ITC Determination and relates to causation and whether imports were responding to demand conditions in the oil and gas sector. Therefore, this data was not used to show increased imports. There also was no method to demonstrate that "such" increased quantities as to cause serious injury under Article 2.1, since clearly there was no injury during the period in question. As Commissioner Crawford observed, domestic shipments increased sharply between the months of May and August 1999.[10]

23. Finally, Korea notes that the United States never cites to the source of its conclusion that Japan did not export any arctic-grade material during 1999. Korea questions why this data is not confidential, and if it is not, why isn't all the data on arctic-grade imports non-confidential as well? At the Second Substantive Meeting, the United States explained that the fact that "no imports" of arctic-grade material entered in the first half of 1999 is contained in a confidential letter which, apparently, cannot be provided to the Panel or Korea and for which no public summary was ever provided to the ITC.

24. The only party involved in this proceeding which has complete access to the confidential record--and has the ability to pick and choose between what data to provide this Panel and how it can be provided--is the United States. Put simply, if the United States is unwilling to put all data concerning imports of arctic-grade line pipe on the record, then the selective reference to import levels in one period of the investigation should be rejected.

25. Korea reiterates its concern that the disclosure of, or rather the refusal to disclose, confidential record information can be a tactical decision by a party to limit the scope and nature of the Panel's findings regarding errors. It is for this reason that Korea believes that the United States should resolve its chronic "systemic issue" concerning the treatment of confidential information. The United States has yet to satisfactorily explain why WTO Panels should be treated differently from US courts or NAFTA Panels with respect to access to confidential information. The full and complete record should be reviewable by WTO Panels just as it is reviewable by these other bodies.

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[9] *Circular Welded Carbon-Quality Line Pipe*, USITC Pub. 3261, Inv. No. TA-201-70 (December 1999) ("*ITC Determination*") at I-1-6 (KOR-6); *ITC Determination, Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* at I-7-15 (KOR-6).

[10] *ITC Determination, Crawford Dissenting Views on Injury and Addendum* at I-65, n. 44 (KOR-6).

ANNEX B-8

UNITED STATES ANSWERS TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

(15 June 2001)

I. BOTH PARTIES

A. EXCLUSION OF CANADA AND MEXICO

Q1. Are safeguard measures taken under GATT Article XIX and the Safeguards Agreement "duties" or "other restrictive regulations of commerce" within the meaning of GATT Article XXIV:8(b)? Please explain.

Reply

1. Safeguard measures can be restrictive regulations of commerce. A safeguard measure can take multiple forms. If the safeguard measure is a tariff or tariff-rate quota, it is a "duty". If the safeguard measure is a quantitative restriction, it is an "other restrictive regulation of commerce."

2. A safeguard measure need not be a duty or a restrictive regulation of commerce. While this is not an issue in this dispute, Article 5.1 of the WTO *Agreement on Safeguards* ("Safeguards Agreement" or "SGA") does not limit safeguard measures to duties (including tariff-rate quotas ("TRQs")) and quantitative restrictions. SGA Article 1 defines safeguard measures as "those measures provided for in Article XIX of GATT 1994."[1] Article XIX:1(a), in turn, authorizes a Member "to suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, a Member that satisfied the prerequisites for imposition of a safeguard measure could suspend any obligation or withdraw any concession. For example, it could impose an internal tax that would otherwise be inconsistent with Article III:2.

B. NATURE OF THE MEASURE /ARTICLE XIII

Q2. (a) Article XIII:5 provides:[2]

> **The provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member], and, in so far as applicable, the principles of this Article shall also extend to export restrictions.**

[1] Unless indicated otherwise, references to Articles numbered with Roman numerals are to GATT 1994, while references to Articles with Arabic numerals are to the Safeguards Agreement.

[2] For clarity, we have divided this question and our response into two subsections.

What, in your opinion, is the basis for the distinction between (1) "apply[ing] the "provisions" of Article XIII to tariff quotas, and (2) "extend[ing]" the "principles" of Article XIII to export restrictions?

Reply

3. The distinction arises from the nature of the provisions in question. Paragraphs 2, 3, and 4 of Article XIII address "import restrictions" and "import licences . . . issued in connection with import restrictions." Since a TRQ is a form of import restriction, those provisions can "apply" directly to TRQs by, for example, determining how to fix the overall amount subject to a lower tariff rate and allocating that amount among supplying countries.

4. However, since paragraphs 2, 3, and 4 by their terms refer to "import restrictions" or "import licences," they cannot "apply" directly to "export restrictions," which fall into an entirely different class of measures. In addition, the provisions of paragraph 2(d) dealing with Members who have a substantial interest in *supplying* the product to the imposing Member could not "apply" to an export restriction. Therefore, only the "principles" of these paragraphs, and not their literal obligations, can be "extended" to export restrictions, and then only so far as "applicable" – for example, if the restriction took the form of an export quota allocated among *consuming* Members.

(b) Does the fact that Article XIII:5 does not state that the provisions of Article XIII "shall apply" to "export restrictions" suggest that such provisions already apply to "export restrictions"?

Reply

5. No, just the contrary. The fact that Article XIII:5 states that only the "principles" of Article XIII shall be extended "so far as applicable" indicates that, except as specifically provided, all of the provisions of Article XIII do *not* apply directly to export restrictions. Article XIII:1 is one such specific provision. It explicitly refers to export restrictions and, therefore, applies to them. Article XIII:5 does not change this conclusion. In contrast, as we noted above, the paragraphs 2, 3, and 4 of Article XIII "apply" only to *import* restrictions and, therefore, not to export restrictions. Furthermore, if these provisions could somehow be interpreted to "apply" directly to export restrictions, their "principles" would already "extend" to export restrictions, and the export restriction language in Article XIII:5 would become superfluous. In accordance with the principle of effectiveness in treaty interpretation, the Panel should accordingly avoid the interpretation suggested in this segment of the question.[3]

Q3. Are all quantitative restrictions quotas? If not, what is the difference between a quantitative restriction and a quota? Please explain. Are all tariff quotas quotas? Please explain.

Reply

6. No. Article XI:1 indicates that quantitative restrictions may take the form of import licensing or "other measures". "Quantitative restriction" is a general term covering any measure that restricts the quantity of imports into or exports from a country. "Quota" is a subset of the class of quantitative restrictions, one that specifies the maximum quantity of imports into or exports from a country.

[3] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, para. 88, n. 76 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

7. Tariff quotas are never quotas. They are contingent tariffs, with different rates applicable depending on the total amount of imports during a specified period. They are not the only form of contingent tariffs. Some members impose seasonal tariffs, with the rates differing depending on the date of entry of imported goods.

C. ARTICLE 5

Q4. At paras. 53 – 57 of its rebuttal submission, Korea claims that the US violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure was in conformity with the requirements of Article 5.1. Is this Article 3.1 / 4.2(c) claim within the Panel's terms of reference? Please explain.

Reply

8. No, it is not. Korea's request for the establishment of a panel (WT/DS202/4) does not make this claim. The only references to Articles 3 or 4 appear in paragraphs 1, 2, 7, and 9 of that request, which do not provide a basis for the claim in question

- Para. 1 deals with alleged flaws in the investigation regarding increased imports, injury, threat of injury and causation. It does not claim that these flaws exist with regard to the US application of Article 5.1.

- Para. 2 deals with issues of "emergency action" and "unforeseen developments". These issues are not relevant to the requirements of Article 5.1.

- Para. 7 claims that the United States acted improperly in excluding Canada and Mexico from application of the safeguard measure. This is a substantive claim, and does not reach the procedural question of whether the United States failed to demonstrate conformity with Article 5.1 at the time it applied the measure.

- Para. 9 deals with access to confidential information and the sufficiency of public summaries. It does not refer to the requirements of Article 5.

9. At the meeting with the Panel, Korea suggested that paragraph 3 of its request constituted the basis for a claim that the United States violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure conformed with the requirements of Article 5.1. However, in its first written submission, Korea did not raise this issue as a claim under Articles 3.1 or 4.2(c). Instead, it based its claim that the United States "did not provide the required explanation" of the safeguard measure on Article 5 of the Safeguards Agreement.[4]

10. Korea itself has recognized that its claims under Article 5 do not encompass inconsistencies with Articles 3.1 and 4.2(c). Its second written submission states:

> Whether or not Article 5.1 requires an explicit finding or holding regarding the necessity of the measure under Article 5.1, Article 3.1 of the SA imposes an *independent obligation* that the investigation itself and the findings and conclusions of the competent authorities resulting from such investigation must demonstrate that the legal and factual basis for the measure.[5]

[4] First Submission of the Republic of Korea, paras. 147-151.
[5] Written Rebuttal of the Republic of Korea, para. 53 (emphasis added).

That is exactly the point. Whatever obligations arise under Articles 3.1 and 4.2(c), they are independent of Article 5 and, therefore, a claim under Article 5 in a party's panel request does not equate with a claim under Articles 3.1 or 4.2(c).[6]

11. On a related matter, questions arose at the second panel meeting as to whether Article 5.1 imposes an ongoing requirement for a Member to ensure that a measure was not applied beyond the extent necessary. The United States explained why this is not a valid interpretation of the Agreement. We would note further that Korea phrased both of its claims under Article 5 in the past tense, and addressed only the terms under which the United States imposed the measure. Therefore, any claim that actions or events subsequent to the imposition of the safeguard measure demonstrate an inconsistency with the WTO Agreement is outside the Panel's terms of reference.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. The United States addresses this issue in its response to question 2 of section III.

B. INCREASED IMPORTS

Q2. At para. 62 of its rebuttal submission, Korea asserts that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury decision". In support, Korea cites (in note 69) certain parts of the ITC Determination, Majority Views on Injury. Please indicate precisely, by quoting the relevant text, which parts of the ITC Determination Korea is referring to.

Reply

13. At the second panel meeting Korea corrected the citations in footnote 69 of its rebuttal submission, and stated that the USITC looked at 1998 as two six month periods at three points in its opinion: at pages I-19, I-22 and I-28.

14. The United States notes that the USITC was not examining 1998 as two six-month periods (as Korea asserts) at any of these three points in its opinion. Korea has merely identified the only three times in the determination that the Commissioners finding serious injury referred to either of those six-month periods for any purpose whatsoever. On page I-19 of the USITC Report, the USITC was

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[6] We note that Korea took this same position in *Korea – Dairy*:

> Article 4.2(c) states that the competent authority must publish, 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 examine. Article 5, however, contains no similar provision. The drafters must have intended to exclude the requirement to give a reasoned explanation, and such intention must be given effect.

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999, para. 20.

explaining why the financial performance of the domestic industry was much stronger in interim 1998 than in full year 1998 – that is, because the financial performance declined sharply in the second half of 1998. On page I-22 the USITC was responding to arguments raised by respondents, which were couched in terms of developments in the second half of 1998. On page I-28 the USITC merely referred to "the second half of 1998 and the first half of 1999" to pinpoint when the financial performance of the domestic industry declined; the USITC was not analyzing 1998 in two separate six-month periods. The USITC Commissioners who found serious injury were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999, as Korea repeatedly asserts. Rather, these Commissioners were discussing a continuous period beginning in mid -1998, during which the condition of the domestic industry was in decline.

15. The Commissioners finding threat of serious injury also were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999. Rather, the references cited by Korea at the second Panel meeting[7] show that these Commissioners also examined a continuous period from 1994 through mid-1999, and, based on this examination, found dramatic increases in imports and a precipitous worsening of the industry's financial condition beginning in mid-1998 and extending through interim 1999.

16. The USITC, following its standard procedure, collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998. This is clear from a review of the overall discussion of the serious injury factors in the USITC Report, and from an examination of virtually every table with numerical data in the entire USITC Report.

Q3. During the ITC's investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

17. Korea conceded at the second panel meeting that it did not ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998. The United States notes that the Korean respondents compared imports in interim 1999 with imports in interim 1998 when they discussed the issue of increased imports in their briefs to the USITC.[8]

Q4. Regarding para. 73 of Korea's rebuttal submission, would Korea accept that there was an absolute increase in imports for the purpose of Article 2.1 if the "monthly import data" regarding the end of interim 1999 did relate to subject merchandise? Please explain.

Reply

18. The United States has no comment on this question.

[7] USITC Report, pp. I-38-41, I-43-44, and I-46.

[8] *E.g.*, Prehearing Brief of the Japanese and Korean Respondents, p. 8 (attached as US Exhibit 31).

III. UNITED STATES

A. ARTICLE 5

Q1. Please explain exactly how the United States ensured, at the time of application, that the Line Pipe measure would be commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment? Please provide any supporting documentation.

Reply

19. As a preliminary matter, the United States notes that the word "commensurate" does not appear in the text of Article 5.1, but instead derives from the Appellate Body's description in *Korea – Dairy* of the obligations under that Article. That description may be useful in evaluating compliance with Article 5.1, but it is the text of the Agreement and not subsequent glosses in panel or Appellate Body reports, that define the obligations of the Members.

20. We also note that Article 5.1 obligates Members to "apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". Thus, it is the extent of the *application* of the measure – its duration, level, and other attributes – and not the measure itself, that determines conformity with Article 5.1.

21. Proclamation 7274 of 18 February 2000 states that the President imposed the line pipe safeguard "after taking into account the considerations specified in section 203(a)(2). Those include "the recommendation and report of the Commission," "the probable effectiveness of the actions . . . to facilitate positive adjustment to import competition," and "the form and amount of action . . . that would prevent or remedy the injury or threat thereof."[9] The memorandum issued in tandem with Proclamation 7274 repeats this statement, and states further that the President took the safeguard measure "in order to facilitate efforts by the domestic industry to make a positive adjustment to import competition." Thus, the President considered each of the criteria listed in Article 5.1.[10]

22. Under the cited statutory provisions, the President takes into account several additional considerations, including the short- and long-term economic and social costs of any safeguard measure, the national economic interest of the United States, and national security interests. All of these considerations could lead to a decision to apply a measure less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Through the President's consideration of all of these factors, the United States ensured that the line pipe safeguard would comply with the requirements of Article 5.1.

23. As stated in our earlier submissions, there is no other documentation demonstrating how, at the time it applied the line pipe safeguard, the United States ensured its compliance with the obligations of Article 5.1. Nor, as we have demonstrated in previous submissions, was there any requirement to produce such documentation.

B. EXCLUSION OF CANADA/MEXICO

Q2. The United States asserts that "to the extent that Articles I, XIII, or XIX can be interpreted to contemplate the application of safeguard measures from all sources,

[9] See section 203(a)(2)(A), (D), and (J) of the Trade Act of 1974, which include a cross-reference to section 202(e)(5)(i).

[10] We also note, that section 203(e)(2) of the Trade Act requires that a tariff, TRQ, or quota imposed as a safeguard measure "may be taken . . . only to the extent the cumulative impact of such action does not exceed the amount necessary to prevent or remedy the serious injury".

Article XXIV creates a limited exception" (para, 217, US first written submission). What are the conditions governing the application of the alleged "limited exception"? Please explain how the United States complied with those conditions in respect of the Line Pipe measure.

Reply

24. The conditions are those laid out in Article XXIV:

(1) The party applying the exception and the party subject to exception must be parties to an FTA that satisfies the Article XXIV:8 definition of an FTA, and

(2) The exclusion from safeguard measures must have been implemented as part of the elimination of duties and restrictive regulations of trade among the FTA parties.

The United States complied with these conditions in this case by entering into an FTA with Canada and Mexico that satisfies the definition under of Article XXIV:8. As part of the package of trade liberalizing measures under the North American Free Trade Agreement ("NAFTA"), the United States undertook the obligation to exclude Canada and Mexico from safeguard measures under certain pre-specified conditions. Since these conditions existed with regard to the line pipe safeguard, the United States excluded Canada and Mexico.

25. The Panel also asked that the United States indicate the basis for its belief that NAFTA complies with the requirements of Article XXIV. NAFTA provided for the elimination within ten years of all duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. This is the basis for our belief that, wherever the threshold established under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA exceeds that threshold.

26. With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures among themselves under certain conditions. There is also no question of NAFTA raising barriers to third countries, since none of the NAFTA Parties increased tariffs on trade with non-NAFTA measures. The NAFTA Parties also did not place other restrictive regulations of commerce on other WTO Members upon formation of the FTA.

27. Further explanation of the US views on NAFTA and its compliance with Article XXIV appear in the following documents: L/7176, WT/REG4/1 & Corr.1-2, WT/REG4/1/Add.1 & Corr.1, WT/REG4/5, and WT/REG4/6/Add.1. Since these are voluminous materials, we will not append them, but incorporate them into this submission by reference.

C. SERIOUS INJURY

Q3. Please comment on Korea's arguments regarding allegedly increased shipments beginning April 1999 (Korea's first written submission, para. 255). If shipments were increasing as of April 1999, how does the United States reconcile this increase with the ITC's determination of serious injury or threat thereof?

Reply

28. Korea states in paragraph 255 of its first written submission that shipments "began recovering strongly beginning in April 1999". We do not agree with this characterization. Although shipments did increase in the months following the first quarter of 1999, average monthly shipments in the

period April through August 1999 (the months following the first quarter for which data was provided in memorandum OINV-W-247) remained lower than in any prior year of the period investigated except 1994.[11]

29. Almost all indicia of the domestic industry's condition deteriorated sharply beginning in 1998 and continuing into interim 1999. The mere fact that shipments were increasing as of April 1999 does not negate the extensive evidence of serious injury or threat thereof that continued into 1999 and that is evident by the comparison of interim 1999 with the comparable period of 1998. And, as noted above, the increased monthly shipment levels did not reach monthly levels of previous years, except 1994. Furthermore, imports also increased after the first quarter of 1999.[12] The United States does not perceive any inconsistency that would require reconciliation.

30. Korea asserted at the second panel meeting that all other indicia of an industry's health flow from shipments. The United States does not agree with this assertion. There is nothing in the Safeguards Agreement that confers primacy on shipments as an indicator of an industry's health. Clearly, increased shipments do not in-and-of-themselves translate into improved financial performance for the domestic industry. For example, shipment levels could increase merely because firms are disposing of excess inventories. Or, imports may also increase -- as they did here – and thus maintain their growing market share and have injurious price effects that harm the domestic industry regardless of the volume of sales.

Q4. At para. 35 of its rebuttal submission, the US refers to certain data regarding shipment levels. According to the US, these shipment levels "are only approximate, because the shipment data in the USITC memorandum are presented in the form of bar charts, and not precise monthly numbers". Please provide the precise numbers used to prepare the bar charts in the relevant USITC memorandum.

Reply

31. These numbers are provided in US Exhibit -3, USITC Memorandum INV-W-247, on the last two pages, in charts entitled "Net Shipments of welded OCTG products by AISI reporting companies, by month, 1994-1999" and "Net Shipments of welded line pipe, 16 inches and under, by AISI reporting companies, 1994-1999, by month".

Q5. At para. 38 of its rebuttal submission, the US asserts that the "statement [at page II-26 of the USITC Report regarding collective operating leverage] is not associated with the performance of other pipe products". If that is the case, what is that statement associated with? Furthermore, why does the relevant section of the Staff Report begin with the observation that "[i]n addition to welded line pipe, producers manufacture and sell other products"? What is the basis on which the USITC Report found "the presence of some form of collective operating leverage"?

Reply

32. As we explained in para. 98 of our first written submission, "operating leverage" refers to the ability of a firm to increase profitability by an amount that is more than proportionate to the increase in sales volume. This is achieved by spreading fixed costs over a larger volume of products.

[11] *See* OINV-W-247, table entitled "Net Shipments of welded line pipe, 16 inches and under, by AISI reporting companies, by month, 1994-1999" (US Exhibit -3).

[12] *Id.*

33. "Collective operating leverage" refers to the combined pattern of change in profitability reported by US line pipe producers. It is "collective" in that it reflects the operating leverages of all of the line pipe facilities that comprise the US line pipe industry. The statement on page II-26 of the Report was based solely on the observation that line pipe profitability in 1997 increased at a faster rate than the increase in sales of line pipe. The Report also noted that in 1998, line pipe profitability declined at a faster rate than the decline in sales revenues; that is, operating leverage works in both directions. The term "collective" was chosen because, while costs structures are unique to each company, when combined the financial results indicate that operating leverage was present. Using the term "collective" also was intended to indicate to the reader that, individually, the level of operating leverage would differ from company to company.

34. The Panel asks why the relevant section of the Report begins with the observation (on p. II-25 of the Report) that line pipe producers make other pipe products (in the same facilities where line pipe is produced). This observation that companies generally produced other products was intended to provide additional background. The subsequent narrative and financial tables referred exclusively to line pipe. The statement regarding collective operating leverage (at the end of the section) was referring specifically to line pipe, not to line pipe and other products produced in the same facilities. This is clear if one considers the text of the Report on p. II-26 that immediately follows the reference to "collective operating leverage." The remainder of that paragraph gives examples of collective operating leverage, which are taken *exclusively* from the financial data in Table 9 on p. II-27, which is limited to the results of operations on welded line pipe.

35. With regard to the last part of the Panel's question, the statement regarding "collective operating leverage" was based on the observation that line pipe profitability increased and decreased more than proportionately as compared to changes in revenue. The presence of operating leverage is clearly demonstrated by this pattern and is not contingent, or even related to, the initial observation that other products are produced in the same facilities.

Q6. Why did the ITC "specifically address[] Korea's arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry" by checking allocation methodologies, if "Korea's argument with respect to the domestic industry's profitability data rests entirely on a faulty premise"? Why didn't the ITC specifically address Korea's arguments by pointing out this faulty premise, rather than referring to allocation methodologies?

Reply

36. The discussion of allocation methodologies in the USITC Report and the observation in the US written submission that Korea relied on a faulty premise were responses to two different, albeit related, assertions. In paragraph 95 of our first written submission, we were addressing the USITC's consideration of arguments raised by the Korean respondents to the *USITC during the injury investigation*. Those respondents had argued that "factory overhead and SG&A were allocated based on declining production for all products, including OCTG and seamless," and that "these increased allocated costs have reduced the profits for the welded pipe industry". Respondents cautioned that "the difficulties resulting from declining production of other products, however, must not be attributed to the declines in welded pipe production".[13] The USITC considered this argument and explained that it was not misattributing difficulties resulting from production of other products, since the increases in per-unit allocated overhead and SG&A resulting from declines in the production of other products were not mistakenly or disproportionately attributed to line pipe.[14]

[13] Japanese and Korean respondents' prehearing brief, dated September 24, 1999, at 49 (US Exhibit 31).

[14] USITC Report, p. I-31.

37. In paragraph 96 of our first written submission, we were addressing a related argument made by Korea raised *in this dispute*. That is, Korea has argued to the Panel that OTGC shipments fell disproportionately to shipments of line pipe and therefore that a disproportionate share of fixed costs were attributed to line pipe. In support of this statement, Korea relied solely on a statement by Commissioner Crawford in her dissenting views, which, as we demonstrated in our written submission, misread AISI data presented in USITC staff memorandum INV-W-247 (US Exhibit -3). In fact, those data showed the line pipe and OCTG shipments declined at similar times and to similar degrees. Therefore, Korea's argument that a disportionate share of costs was attributed to line pipe was based on the faulty premise that OCTG shipments fell disproportionately to line pipe shipments.

Q7. Were Geneva Steel's line pipe production facilities also used to produce non-pipe products? Please explain.

Reply

38. There is no information on the record which directly addresses this question. However, the record suggests that most, if not all, of Geneva's line pipe production facilities were not used to produce non-pipe products.

39. A Geneva Steel executive testified at the USITC injury hearing that the company has three main finished products: cut-to-length plate, hot-rolled sheet, and line pipe. Geneva does not produce any tubular products other than line pipe. The USITC Report (at p. II-7) describes the manufacturing process for welded line pipe. Most of the manufacturing equipment described (the tube mill, welding equipment, a tool to remove the outside flash resulting from the pressure during welding, and sizing rolls to shape the tube to accurate diameters) would appear to be used only for line pipe production. The only equipment which might *theoretically* have been used by Geneva to produce its other products are the cutting tools and heat treatment machinery.

Q8. What impact did the charge booked for the closure of Geneva Steel's blast furnace have on industry operating income, both in absolute terms and relative to net sales? What would industry operating income have been without that charge?

Reply

40. We are not aware that Geneva Steel booked a charge for the temporary closure of its blast furnace, or when any such charge might even have been booked (we note that the blast furnace was closed between December 1998 and September 1999). There is no reference in Commissioner Crawford's discussion of this issue in her dissenting views (p. I-63 of the Report) to any such charge, or to any effect that it might have had on the industry's operating income. Commissioner Crawford merely referenced "the negative effects that these actions [that is, the closure of the blast furnace and Geneva's bankruptcy] have had on the company's cost structure," but she did not specify or even provide a footnote in her dissenting views indicating what, if any, these 'effects" might have been.

Q9. Did the ITC confirm or verify the Geneva Steel executive's oral testimony regarding the importance of Geneva Steel's line pipe operations from an overall margin perspective, and the 50 per cent decrease in line pipe sales between 1997 and 1998? Did the Geneva Steel executive provide any evidence/documentation in support of that testimony? How much of Geneva Steel's hot-rolled steel production was used to make line pipe?

Reply

41. We note that the Geneva executive, like all witnesses at USITC hearing, testified under oath. US law provides for criminal penalties for those who testify untruthfully in these circumstances, and witnesses before the ITC are made aware of these penalties. We are not aware that the Geneva executive provided documentation to support his testimony. Witnesses are not required to do so; as we have noted they testify to the ITC under oath. Information on how much of Geneva Steel's hot-rolled steel production was used to make line pipe is not in the record.

D. UNFORESEEN DEVELOPMENTS

Q10. In US - Lamb Meat, the Appellate Body found that "as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied." Please indicate where the United States made the required demonstration of unforeseen developments. Please provide any supporting documentation, and give specific references.

Reply

42. As the United States pointed out in its first written statement, Korea has conceded that certain conditions leading up to the increase in imports were unexpected. (para. 230) Therefore, it has not made a *prima facie* case of action inconsistent with the unforeseen developments text in Article XIX. Under *Japan – Varietals*, a panel is not permitted to construct a claim that Korea has failed to make.[15]

E. THE NATURE OF THE MEASURE /GATT ARTICLE XIII

Q11. With reference to para. 204 of the United States' first written submission, does the United States consider that GATT Article XIII does not "relate to" the application of safeguard measures? Please explain.

Reply

43. The question refers to the US quotation of language from *Argentina – Footwear*, in which the Appellate Body found that Article XIX "relate[s] to the same thing" as the Safeguards Agreement, "namely application by Members of safeguard measures". The Appellate Body based this conclusion on the numerous references to Article XIX in the Safeguards Agreement. There are no such references to Article XIII. Moreover, as we have pointed out, the Safeguards Agreement adopts certain provisions of Article XIII, but not the others. Therefore, the remaining provisions of Article XIII do not "relate to" application of a safeguard measure in the sense used by the Appellate Body in *Argentina – Footwear*.

44. The Panel asked whether, in light of this view, the United States considers that the last sentence of Article XIII:2(d) applies to safeguard measures. That sentence states that

> No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been

[15] *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129 ("[P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it".).

> allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

This sentence was not incorporated into Article 5.2(a) of the Safeguards Agreement, even though the preceding two sentences of Article XIII:2(d) were incorporated verbatim.

45. In accordance with our analysis of the other provisions of Article XIII, the fact that the Safeguards Agreement incorporates the first two sentences of Article XIII:2(d), but not the last sentence, indicates that the last sentence does not apply to safeguard measures. However, the omission of that sentence does not leave Members free to prevent other Members from fully using their share of a safeguard quota. If a Member imposes a safeguard quota and applies it at a level necessary to prevent or remedy serious injury and to facilitate adjustment, any additional conditions or formalities it applies to limit the use of the quota would likely result in application of the measure beyond the extent necessary. Therefore, a measure prohibited by the last sentence of Article XIII:2(d) would likely also be prohibited by Article 5.1.

46. Although it is always hazardous to attempt to ascertain the intent of the negotiators from the written text, this analysis suggests that the last sentence of Article XIII:2(d) may have been excluded from Article 5.2(a) because it was redundant. With Article 5.1 already prohibiting application of a safeguard measure beyond the extent necessary, there is no need for an additional prohibition on the application of conditions or formalities that would prevent full use of the quota.

Q12. At para. 193 of its first written submission, the United States submits that "[i]f TRQs were by their very nature 'quantitative restrictions' or 'quotas,' the tariff quota language in Article XIII would be superfluous". Does the United States consider that "export restrictions" within the meaning of GATT Article XIII:5 are "prohibition[s] or restriction[s] … on the exportation of any product" within the meaning of Article XIII:1? Please explain. If they are, is the reference to "export restrictions" in Article XIII:5 superfluous? Please explain.

Reply

47. Yes, export restrictions are prohibitions or restrictions on the exportation of a product within the meaning of Art. XIII:1. However, the reference to "export restrictions" in Article XIII:5 is not superfluous. Article XIII contains other provisions in addition to paragraph 1. Paragraphs 2, 3, and 4 by their terms apply only to import restrictions. Thus, the reference in paragraph 5 to "export restrictions" was necessary if the "principles" of these additional paragraphs were to "extend" to export restrictions. We refer the Panel to our answers to questions 2 (a) and (b) for further discussion of this issue.

IV. ADDITIONAL QUESTIONS POSED ORALLY BY THE PANEL AT THE SECOND SUBSTANTIVE MEETING

The Panel asked for confirmation of whether the Japanese respondents indicated that there were no exports of Arctic-grade line pipe to the United States in interim 1999.

48. As explained at the Panel's second meeting, the Japanese respondents were asked to provide information concerning exports of Arctic-grade and alloy line pipe during the USITC's period of investigation. These respondents provided information on exports of alloy line pipe in 1999, but did not provide information on exports of Arctic-grade line pipe. From this, it can be inferred that there were no exports of Arctic-grade line pipe from Japan in 1999. We regret that we are unable to provide the Panel with the letter confirming this information because counsel for the Japanese respondents designated it as business confidential. It was provided at the request of the USITC staff and was treated as a supplement to the Japanese producers' questionnaire responses, as it provided

additional data of the type collected in questionnaire responses. Thus, a public version of the letter was not filed with the USITC.

The Panel asked how the USITC instructed US line pipe producers to report their production capacity.

49. A blank copy of the USITC's questionnaire to US line pipe producers is attached as US Exhibit - 32. The producers were asked (on p. 6, Question II-10) to report their "average production capability" for each full year of the period investigated and for the two interim periods. "Average production capability" is defined (on p. 6 of the General Information section of the questionnaire). The producers were asked (on p. 4, Question II-4) whether they produced other products using the same equipment and machinery used to produce line pipe; and, if so, to explain their basis for allocating capacity data.

The Panel asked whether the USITC questionnaires were sent to purchasers of line pipe before the issue of the extent to which dual-stenciled line pipe from Korea was sold for standard pipe applications was raised. The Panel also asked how the USITC identified purchasers who were to receive questionnaires. Finally, the Panel asked whether these purchasers were distributors or end-users of line pipe.

50. It is correct that the USITC sent questionnaires to purchasers of line pipe well before the "dual-stenciled" issue was raised. The petition leading to the USITC's investigation was filed on 30 June 1999. Questionnaires were sent to purchasers on 2 August 1999, with a request that responses be submitted by 19 August 1999. The "dual-stenciled" issue appears first to have been raised by Korean respondents on 24 September 1999, in their pre-hearing brief to the USITC.

51. Prior to sending out questionnaires, the USITC staff contacted petitioners and all known importers. The USITC requested that petitioners collectively identify (through counsel) their top 25 customers and that each known importer identify its top ten customers. The USITC sent purchaser questionnaires to each purchaser as identified. As is standard in most investigations, the producer and importer questionnaires also asked these firms to identify their top customers. In this investigation, USITC staff reviewed the responses to those questions to confirm its previous identification of the main purchasers.

52. The USITC received responses from 40 identified purchasers of line pipe, 31 of which reported purchasing since 1994 and therefore completed the purchaser questionnaire.[16] Of these 31 purchasers, 18 were distributors, 12 were end users, and one was both a distributor and an end user.

The Panel asked whether in paragraphs 31-34 of its oral statement, the USITC is referring to the Commissioners who found serious injury or those who found threat?

53. The analysis presented in paragraphs 31-34 represents the views of all the Commissioners who issued affirmative determinations, regardless of whether the basis was serious injury or threat. Those paragraphs respond to Korea's summary assertion in paragraphs 108 and 109 of its second written submission that the USITC had not responded to arguments Korea initially made in its first written submission, concerning (i) the entry of two new producers in the industry and (ii) statements by USITC Commissioners in their views on remedy to the effect that conditions in the oil and gas industries were improving. Paragraph 34 of the oral statement refutes Korea's challenge to the US observation that announced attempts to increase prices are not the same as actual price increases.

[16] USITC Report, p. II-48, n 111.

54. Korea originally raised these three arguments in reference only to the findings of the Commissioners who found serious injury.[17] In its second oral statement, the United States refuted Korea's arguments as originally raised. However, the US statement on these issues applies equally to the findings of the Commissioners who found threat.

55. With respect to the two new producers, our reference to information contained in the USITC staff report would have been considered by all Commissioners. The threat Commissioners as well as the serious injury Commissioners found that capital investments in the line pipe industry involve long-lead times. (Serious injury: Report at I-20, n.122; threat Commissioners at I-42.) Also, the threat Commissioners recognized the added industrywide production capacity that resulted from the addition of these producers; but they found that there was a significant decline in capacity utilization irrespective of the added capacity.[18]

56. As to the price increase announcements, the threat Commissioners specifically noted that any such price increases were to have taken effect contemporaneously with the imposition of antidumping duties or effective dates of suspension agreements covering hot-rolled steel. They stated that they were persuaded that, to the extent any such announced price increases may have "stuck" in the marketplace, they are attributable in significant part to anticipated increases in raw material costs.[19]

It is not clear whether the United States considers the competent authorities' determination to be one finding serious injury or one finding "serious injury or threat".

57. As the United States explained in its first written submission (paragraphs 53, 56, 57), the findings and conclusions of the five Commissioners who reached affirmative determination constitute the determination of the competent authority under Article 4 that "increased imports have caused or are threatening to cause serious injury to a domestic industry." The determination is an affirmative determination for the purposes of both US law and the WTO Safeguards Agreement. We previously advised the Panel that the SGA only distinguishes between threat and present injury for a single narrow definitional purpose, that is not relevant here. There is no requirement under either SGA (or US law) to characterize the determination as primarily present serious injury or primarily threat of serious injury, as long as the Commissioners reaching an affirmative determination properly evaluated the relevant Article 4.2 factors and explained their findings and reasoned conclusions in accordance with Articles 3.1 and Articles 4.2(c).

The Panel asked for an explanation of how US law distinguishes between the "determination of the Commission" and "separate views".

58. The US safeguards statute requires the USITC to submit to the President a report of each safeguards investigation undertaken "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[20] In order to meet the domestic law report requirements, the USITC's reports contain much more information than that which is required by the Safeguards Agreement. For example, the US statute, but not the Safeguards Agreement, requires the USITC to include in its report the dissenting views by members on the injury question. The statute, again in contrast to the Agreement, also requires the USITC to include in the report its remedy recommendation and the separate views by any members on remedy.

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[17] Korea's first submission at paras. 250, 259, 261, 262.

[18] USITC Report, p. I-40, n 21 (Views of Chairman Bragg and Commissioner Askey).

[19] USITC Report, p. I-48, n 88 (Views of Chairman Bragg and Commissioner Askey).

[20] Section 202(f) and, *by reference*, section 202(b)(1)(A) of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2252 (b)(1)(A), (f) (US Exhibit -1).

59. Specifically, section 202(f)(2) of the US safeguards statute provides:

> The Commission shall include in the report [to the President] the following:
>
> (A) The determination made under subsection (b) [whether increased imports are a substantial cause of serious injury or threat thereof to the domestic industry], and an explanation of the basis for that determination.
>
> (B) If the determination under subsection (b) is affirmative, the recommendations for action made under subsection (e) and an explanation of the basis for each recommendation.
>
> (C) Any dissenting or separate views by members of the Commission regarding the determination and any recommendation referred to in subparagraphs (A) and (B).
>
> (D) The findings required to be included in the report under subsection (c)(2) [the results of the Commission's examination of factors other than imports which may be a cause of serious injury, or threat of serious injury, to the domestic industry].
> * * * [21]

60. Under subparagraph (A) of the US statute, the USITC must include in the Report to the President both "the determination" and "an explanation of the basis for that determination". In all USITC reports on safeguards investigations, the *determination* precedes the explanation, and the latter is contained in the *Views* of the Commissioners who agreed with the determination. For example, in the *Line Pipe* investigation, the *determination* is set out at pages I-3-I-5 of the USITC Report. The determination states that the Commission, and specifically Chairman Bragg, Vice Chairman Miller, and Commissioners Hillman, Koplan and Askey determined that line pipe is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the domestic industry producing a like or directly competitive article. In other words, the determination indicates that these five Commissioners reached an affirmative determination, which is the only *determination* made by the competent authorities. The required findings and explanation of the basis for the affirmative determination (under both US law and Article 3.1 of the Safeguards Agreement) are set out in the respective *Views* of those Commissioners voting in the affirmative.

61. It appears that the mention in section 202(f)(2)(C) to "any dissenting or separate views by members of the Commission regarding the determination and any recommendation referred to in subparagraphs (A) and (B)" is intended to refer to "any dissenting views by members of the Commission regarding *the* determination referred to in subparagraph (A) [*i.e.*, the injury determination]" and to "separate views by members of the Commission regarding any recommendation referred to in subparagraph (B) [*i.e.*, recommendations for action]." This becomes clear when subparagraph(f)(2)(C) is read in the context of subparagraph (e)(6), which states that–

> Only those members of the Commission *who agreed to the affirmative determination* under subsection (b) are eligible to vote on the recommendation . . . .Members of the Commission *who did not agree to the affirmative determination* may submit, in the report required under subsection (f), *separate views* regarding what action, if any, should be taken under section 203. (Emphasis added)

[21] The remaining items required to be included in the report to the President relate to the industry's adjustment plan and to the likely effects of the remedy action recommended by the Commission.

Thus, in referring to *separate* views, subparagraph (e)(6) cross-references to subparagraph (f)(2)(C). These are the only two references in the statute to *separate* views. This suggests that *separate* views as used in subparagraph (f)(2)(C) refers to *views* on remedy.

62. While the two commissioners who reached their affirmative determination in *Line Pipe* on the basis of threat of serious injury labeled their explanation as *Separate Views*, those views form part of the basis for the USITC's affirmative determination.[22] They are not "separate views" as that term is used in Section 202(f)(2)(C). In fact, other related statutory provisions further demonstrate that the findings and conclusions contained in the Views of Chairman Bragg and Commissioner Askey form part of the basis for the USITC's affirmative determination on the question of serious injury or threat thereof.

63. Section 330 (d)(1) of the Tariff Act of 1930, as amended, provides that, if the commissioners voting on the serious injury question in a safeguards investigation "are *equally divided* with respect to that determination, then the determination agreed upon by *either* group of Commissioners may be considered by the President as *the* determination of the Commission." (Emphasis added). The use of the terms "equally divided" and "either" demonstrates that the law contemplates only two generic types of determinations by the USITC–either an affirmative determination or a negative determination. This is further emphasized by the incorporation of the possibilities of present serious injury and threat of serious injury into one definition for the purposes of deciding whether the USITC's *determination* is affirmative or negative.[23] When the vote is equally divided, the President is not given the choice of which of the two determinations to act on, but rather he must choose which group of Commissioners' determination constitutes the determination of the Commission. Thus, in all instances, including an equally split vote, US law provides for only one operative determination of the competent authorities.

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[22] In this regard, we note that there is no formal Commission rule as to how particular Commissioners label their views.

[23] Sections 330(d)(1)(A) and (d)(3), 19 U.S.C. §1330 (d)(1)(A) and (d)(3)(US Exhibit -2).

ANNEX C

Parties' Comments on Other Parties' Questions

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ANNEX C-1

KOREA'S COMMENTS ON QUESTIONS FROM THE PANEL TO THE UNITED STATES

(7 May 2001)

(i) The measure

1. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused "serious injury or a threat thereof," how does that authority ensure that the resultant safeguard measure is "necessary to prevent or remedy serious injury" within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer

See Korea's answer to Panel's Question 8 to the Republic of Korea.

2. At para. 184 of its first written submission, the United States asserts that "the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9,000 ton exemption." Would this mean that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9,000-short-ton exemption?

Answer

Obviously, there is a natural limit to the imports which will be subject to the lower rate of duty because only a limited number of countries make and supply line pipe to the US market. The ITC identified only seven significant suppliers other than Canada and Mexico.[1] Based on this assumption, the expected limitation on the quota amount would be approximately 63,000 tons at the normal rate of duty. As shown in Exhibit 49, total in-quota imports of line pipe during the first full quota year equalled 64,067 tons, while total imports from all subject suppliers (except Mexico and Canada) totaled 78,671 tons.[2] Therefore, there is a maximum level of imports that would be likely to enter at the normal rate of duty. This information was available to the ITC and the President.

[1] See e.g., *ITC Determination, Staff Report*, Table 3 at II-15 (KOR-6); *see also ITC Determination, Bragg and Askey Views on* Remedy, I-89, n.11 (KOR-6) (noting that there are eight countries that constitute the principal sources of line pipe imports into the United States, as well as Venezuela). Moreover, the US President's announcement contained a list of all of the countries in the world capable of producing line pipe. Most had never supplied line pipe to the United States and have not under the *US* President's measure.

[2] See Exhibit 49 (Chart 1: US Imports of Line Pipe (1999-2000); Chart 2: US Imports of Line Pipe (March 2000-February 2001) (updated from previously submitted KOR-29) (KOR-49).

3. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed "wherever practicable." GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quotas. Would this suggest that there may be situations in which it may not be "practicable," in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no "overall limit on eligibility" (para. 185, US first written submission)?

Answer

The decision as to whether a measure is a tariff-rate quota (TRQ) cannot depend on whether it has been properly constructed and implemented by a Member. Otherwise a Member could evade each requirement of Article XIII of the GATT 1994 by failing to comply with all the requirements of Article XIII. That, in fact, appears to be the US defence to date – the United States asserts that the measure cannot be a TRQ because the United States has not met the requirement of a quota by establishing a total quota amount. The fact that the United States has violated its obligation cannot constitute proof that the obligation does not exist.

As the question suggests, Korea agrees with the Panel that not all TRQs require an overall limit, because, as the Panel properly notes, Article XIII:2(a) of the GATT 1994 provides "wherever practicable." For example, import licenses are contemplated as an alternative to a total quota.[3]

4. In Section F.2.b of its first written submission, the United States argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does the United States consider that the terms "quantitative restriction" and "quota" (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term "quota" (Article 5.2) not refer to the quota element of a TRQ?

Answer

See Korea's answer to Panel's Question 9 to the Republic of Korea.

5. In Korea – Dairy, the Appellate Body stated that it does "not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years." Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is "necessary" (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer

See Korea's answer to Panel's Question 10 to the Republic of Korea.

6. In their oral presentation the United States asserted that the President's decision on the safeguard measure relied on the same data and information as the ITC recommendation. Can the United States also confirm that there were no other documents prepared after the ITC's

[3] Article XIII.2(b) of the GATT 1994.

recommendation that formed the basis for the President's decision on the measure even if those documents relied on the same data and information before the ITC?

Answer

See US letter, dated 23 April 2001, conceding that such documents exist, but refusing to provide them to the Panel.[4] It appears that the US explanation is that such documents are confidential[5] and their rationale for not giving them to the Panel is that those documents are not released to other reviewing bodies. However, Korea notes that the United States also refuses to give data that is released to other reviewing bodies.[6] Moreover, it is now unclear in light of the US response to this question, how much the measure taken by the President relies on the ITC memoranda. It appears that the United States is now saying that the measure can and must be evaluated exclusively on the basis of the Presidential Proclamation and published memorandum, which "form the entirety of the explanation of the decision to impose ... the measure." [7] Neither the proclamation nor the measure provide any explanation or rationale for the measure. The United States appears to take the position that the measure is unreviewable by the Panel.

(ii) Serious injury

7. At para. 267 of its first written submission, the United States submits that "any problems experienced by Geneva resulted in part from the difficulties it experienced in line pipe sales ... ." What "part," or proportion, of Geneva Steel's "difficulties" could be directly attributed to its line pipe operations? Please explain, and provide supporting documentation.

Answer

In its letter dated 23 April 2001, the United States answers as follows:

It was not necessary for the USITC or Geneva Steel to apportion the difficulties reflected in its data because the USITC collected financial information from Geneva Steel (and 14 other US line producers) *specifically regarding their line pipe operations.* As noted in the USITC Report, Geneva Steel did not produce other products in the facilities where line pipe was made.

It is further clear from the record before the USITC that declines in line pipe operations had a significant overall effect on Geneva Steel's operations. At the hearing in the injury phase of the USITC investigation an executive from Geneva Steel confirmed that line pipe "is an essential part of our business from an overall margin perspective," and that Geneva lost half of its volume of line pipe sales between 1997 and 1998.[8]

The US statement is not responsive to the question posed by the Panel for the very reasons observed by Commissioner Crawford.[9] Specifically:

(a) The United States asserts that "Geneva did not produce other products in the facilities where line pipe was made." But, this is a reference to a passage of the ITC Staff

[4] Letter Fr: United States Re: Panel's Request for Information (23 April 2001) at 3 ("US 23 April Letter").

[5] The Panel should ask the United States whether it is relying on Article 3.2 of the SA as its rationale for not providing the documents. If not, the United States needs to cite to some other authority.

[6] See Korea First Written Submission at paras. 87-92.

[7] US 23 April Letter, Response to Question 6 at (i).

[8] *Id.*, Response to Question 7 at (ii)(citation omitted)(emphasis in original).

[9] See generally ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

Report referring to other pipe products. The contrast is to other line pipe producers which also produced OCTG, standard and structural pipe.[10] Geneva did produce other finished steel products--plate and hot-rolled coil.

(b) As Commissioner Crawford correctly observed, the problem was that Geneva closed one of its blast furnaces and attributed the shutdown to the line pipe market.[11]

(c) Missing from the US response to the Panel, but not missed by Commissioner Crawford, is that the finished steel products produced from the blast furnaces of Geneva are hot-rolled steel and carbon plate--not line pipe.[12] Hot-rolled steel and carbon plate are finished steel products themselves and are "other product[s]" being produced in the facilities where welded line pipe is manufactured.[13] Only some of that hot-rolled and plate production is used for the production of line pipe.

(d) Thus, one cannot conclude that the shutdown of the blast furnace and its impact on the financial condition of Geneva was properly attributed to line pipe because Geneva produced no other "pipe" product on its line pipe-making line. Moreover, that's not the point. The point is that the shutdown of its blast furnace should have been attributed to conditions in Geneva's primary markets of hot-rolled and plate.[14] Indeed, Geneva has been an active participant in unfair trade cases against imported plate and hot-rolled coil. Commissioner Crawford's conclusion was not only logical, but also correct. It also demonstrates why Commissioner Crawford observed that it was incorrect to attribute the shutdown of the blast furnace to imports of line pipe.

In addition, Korea notes that the only public record reference relied on by the United States to establish the source of Geneva Steel's problems is the ITC testimony of Mr. Johnsen, Executive Vice President and General Counsel of Geneva Steel.[15] Mr. Johnsen only stated that line pipe was "an essential part of our business," but this does not answer the question as to whether the bankruptcy can be attributed to the production of line pipe.[16] Given such self-serving testimony, this issue required a more thorough analysis. There is certainly no denial there that Geneva's primary business is hot-rolled sheet and cut-to-length plate[17] or that a "blast furnace" is not used to produce pipe.

This uncritical acceptance of assertions by the domestic industry witnesses contrasts sharply with the ITC's treatment of the dual-stencilled line pipe issue. In the latter case, the ITC states that Respondent's evidence could not be considered because Respondents failed to precisely quantify the amount of dual-stencilled line pipe sold as standard pipe.

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[10] See ITC Determination, Staff Report at II-25 (KOR-6).

[11] See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6); ITC Determination, Staff Report at II-9, n.65 (KOR-6); see also US First Written Submission at para. 103.

[12] See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

[13] See ITC Determination, Staff Report at II-25 (KOR-6).

[14] See ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

[15] See US First Written Submission at para. 103. We note that in making a reference regarding Geneva Steel, in Footnote 106 of their submission (found in para. 103), the United States cites to pages 32-33 of the Transcript of the Hearing on Injury. There is no reference to Geneva Steel on either of those pages. The correct cite is to pages 51-52. See Injury Transcript at pp. 32-33 (KOR-50) and pp. 51-52 (KOR-7) (Testimony of Mr. Johnsen, Executive Vice President and General Counsel, Geneva Steel).

[16] According to the United States, the decline in the line pipe business "played a major role in the decision to shutdown one of its blast furnaces and in the company's bankruptcy." US First Written Submission at para. 103.

[17] See Injury Transcript at pp. 51-52 (KOR-7); see also ITC Determination, Crawford Dissenting Views on Injury at I-63 (KOR-6).

Finally, it is also not clear how the costs of the temporary shutdown and the bankruptcy have been allocated to line pipe. Korea's position is that none of those costs should have been attributed to line pipe. Since "some" costs were attributed, the ITC should have examined closely how such costs were allocated, given that Geneva's primary business was not line pipe. The US answer--*i.e.*, that we collected data "specifically regarding their line pipe operations"--begs the question: how were these general costs allocated to line pipe?

8. Commissioner Crawford found that the Lone Star's allocation of extraordinary charges had a "marked impact on SG&A for the company and for the industry as a whole, reducing the level of operating income to $10.8 million in 1998." Did the remaining Commissioners address this specific finding by Commissioner Crawford? If so, how? What would the level of operating income have been absent the allocation of this extraordinary charge?

Answer

With respect specifically to Lone Star and the impact of those allocations on the financial condition of the industry, we note that in its letter of 23 April, the United States indirectly concedes that the other Commissioners failed to address the issues observed by Commissioner Crawford.[18] The significance of this allocation is discussed at length in Korea's Written Rebuttal.

9. At footnote 75 of the ITC's determination (page I-16), reference is made to data at page II-31 of the staff report. What is the equivalent reference in the non-confidential version of the staff report? In note 75, reference is also made to the "two of the largest firms." Does this reference include Geneva Steel and/or Lone Star Steel?

Answer

"Two of the largest firms" refers to Lone Star and California Steel (CSI), which were the two US producers verified by the ITC.[19]

The ITC report is riddled with issues regarding the allocation of costs. For dual- and triple-stencilled line pipe, there are also issues regarding the allocation of revenues.[20] As has been seen in the case of Lone Star, these allocations can have a significant impact. The ITC's analysis of these issues was far too cursory. (We expect that the data at II-31 of the ITC Staff Report is confidential.)

Moreover, while the ITC majority stated that there was insufficient evidence of more than a "relatively small" shift from OCTG to line pipe,[21] it was the duty of the ITC to fully investigate this issue in accordance with its obligations under Articles 3.1 and 4.2(b) of the SA.[22] Furthermore, the ITC conclusions on this point about whether producers can shift between products are contradictory, because, in the remedy recommendation, the ITC majority notes that producers can further increase their line pipe production by shifting production away from other products like OCTG.[23]

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[18] US 23 April Letter, Response to Question 8 at (ii) and (iii).

[19] See ITC Determination, Staff Report at II-25 (KOR-6).

[20] US 23 April Letter, Response to Question 7 at (ii) n.2 (citing Staff Report at II-25) ("Any allocations that had to be made by the US line pipe producers in order to report financial data specific to their line pipe operations were based on their sales of end products or on other acceptable allocation methodologies." See USITC Report at p. I-31 (explaining that "increases in per-unit overhead and SG&A were allocated ... in proportion to their sales of end products or based on other acceptable allocation methodologies.")) (KOR-6).

[21] See ITC Determination, Majority Views on Injury at I-30-31 (KOR-6).

[22] United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R (22 December 2000) ("*US – Wheat Gluten (AB)*") at paras. 54-55.

[23] See ITC Determination, Majority Views on Remedy at I-78 (KOR-6).

10. Under the US system for imposing safeguard measures, what are the "competent authorities" within the meaning of Article 3.1 of the Safeguards Agreement? Do they include the President of the United States? If not, why not? In the present case, please specify precisely where the "reasoned conclusions" – within the meaning of Article 3.1 – are to be found. Do they include the conclusions of the President of the United States?

Answer

US law is very clear that the "competent authorities" for purposes of US safeguard investigations include the ITC and the President.[24] Each has specific statutory functions for determining serious injury and recommending and imposing remedies. Korea sees no basis to conclude that, within the meaning of Article 3.1 of the SA, findings and conclusions by the "competent authorities" on "all pertinent issues of fact and law" in an "investigation" would not include the findings and conclusions of the President.

11. With regard to note 21 to the US first written submission, what is the relevance of the US statement that "capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguards Agreement ... ." Does the United States consider that the Panel is precluded from making any findings regarding the ITC's treatment of capacity and capital expenditure, simply because they are not mentioned in Article 4.2(a)?

Answer

Korea believes that the answer to this question is that all relevant factors of an objective and quantifiable nature have to be examined by the authorities in accordance with Article 4.2(a) of the SA. In this case, Korea actually raised some significant issues on those factors. Moreover, Korea believes that an annualized capacity increase of 25 per cent between 1998 and 1999[25] is objective, quantifiable, and relevant since the dramatic capacity expansion coincided with the drop in domestic demand and falling prices.

12. Leaving aside the factual circumstances of the present case, does the United States consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Answer

Yes, it would be inconsistent with a finding of present serious injury because the industry must be suffering serious injury at the "end of the period." Although Korea does not believe that in all cases an improvement in the domestic industry performance would prevent a finding of present serious injury, the competent authorities would have to explain how such a finding of serious injury could still be made under such conditions. If the improvement were significant enough, as in this case, so that the industry was no longer facing an emergency situation and was objectively expected to continue its recovery given the overall conditions of competition, then a finding of serious injury caused by increased imports would be precluded.

13. At para. 134 of its first written submission, the United States asserts that "Korean respondents failed to place on the record objective and quantifiable information as to the extent

[24] See 19 USC. § 2252 (KOR-1).

[25] See ITC Determination, Staff Report at II-22, Table 5 (KOR-6); see Exhibit 48A (Welded Line Pipe – Domestic Industry Capacity, Apparent Consumption and Export Shipments). (KOR-48A).

to which imports from Korea of dual stencilled line pipe were used in standard pipe applications." Did the USITC seek such information for itself?

Answer

In *US – Wheat Gluten*, the Appellate Body held that Article 3.1 of the SA requires that the "authorities charged with conducting ... an "investigation" – must actively seek out pertinent information … [W]here the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an 'other factor,' they must investigate fully that 'other factor,' so that they can fulfil their obligations ... under Article 4.2(a) of the SA."[26]

This issue on dual-stencilled line pipe was raised and discussed by the Korean Respondents during the ITC investigation on several occasions. The fact that there had been several years of litigation over the proper classification of such pipe strongly indicated that the effect might be very significant.[27] The ITC should have investigated the extent and proper quantification of dual-stencilled line pipe if it was not satisfied with the evidence presented by the Korean Respondents. That evidence included: (i) an affidavit and direct testimony by an individual, Mr. Smith, with 35 years of experience in the industry;[28] (ii) a confidential affidavit by a distributor with equivalent experience who confirmed the estimate of Mr. Smith that 70-80 per cent of the dual-stencilled line pipe imported into the West Coast is sold for standard pipe applications;[29] and (iii) the actual export data, by mill, by specification and by region, which supported the affidavits.[30]

14. Did the ITC undertake any quantitative analysis (such as a regression analysis, and/or elasticity analysis, for example) in support of its qualitative analysis regarding the impact of other factors such as the oil and gas crisis, and declines in the domestic industry exports?

Answer

No. The ITC's legal analysis of causation, specifically the investigation of the effects of "other factors," clearly was insufficient and not in compliance with Article 4.2(b) of the SA. The ITC did not attempt to identify and isolate the effects of other factors such as the oil and gas crisis. They certainly were not "quantified" in any manner. Yet, the United States says they "weighed" the relative impact of each factor (one by one). However, as elaborated in Korea's Written Rebuttal, the United States relied almost exclusively on a two-period comparison for its causation or "weighing" analysis. Regardless of the hypothetical integrity of such an analysis, that actual comparison was riddled with flawed facts and assumptions.

15. In para. 104 of its first submission the United States responds to Korea's argument that the industry was not injured as shown by an increase in capital expenditure during the POI. Would the United States also comment on Korea's argument made in Para 250 of its first submission that during the POI two new producers began operations in 1998 and 1999?

[26] See US – Wheat Gluten (AB) at paras. 53 and 55.

[27] See Exhibit 53 (Posthearing Brief on Injury of Japanese and Korean Respondents (7 October 1999) (Exh. 13) (attaching the description of the factual background to this dispute in the US Court of Appeals for the Federal Circuit. The implications of that issue were discussed in both the pre-hearing brief and post-hearing brief (KOR-53).

[28] See Prehearing Brief, Exh. 13 (affidavit of Mr. Ed Smith) (KOR-53).

[29] See Posthearing Brief, Exh. 2 (KOR-25).

[30] See *id.*, Exh. 12 (KOR-53).

Answer

Korea believes that this is very relevant evidence confirming that the industry was not in a state of significant overall impairment. Producers do not enter an industry that promises no financial return.[31]

16. In para. 109 of its first submission the United States explains that the $25 – $30 price increase referred to by Korea could just as likely compensate for rising raw material costs following the imposition of anti-dumping duties on hot-rolled steel. Were all imports of hot-rolled steel affected by the anti-dumping measure? What was the coverage of the US measure or measures on hot-rolled steel? Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures? Furthermore, at para. 22 of its first written submission, the United States refers to a "decline in the price of hot-rolled carbon steel." Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.

Answer

The antidumping investigation of hot-rolled steel covered imports from Japan, Russia and Brazil only. Imports from Russia and Brazil are covered by suspension agreements while imports from Japan are covered by an antidumping order.[32]

There were a number of other suppliers of hot-rolled coil that were not covered by the antidumping case. According to US Census Bureau statistics, there were over 40 exporters of hot-rolled steel to the United States, including major suppliers such as Korea, Canada, Taiwan, France, the Netherlands, etc.[33]

Finally, with respect to raw material costs and the conflict between the US assertions concerning rising raw material costs at paragraph 109 of its First Written Submission and declining raw material costs at paragraph 22 of its First Written Submission, the data before the Commission clearly confirms that raw material prices were at an all-time low at the end of the POI – in part explaining why line pipe prices had declined. During the period of January-June 1999, raw material prices had declined to $244/ton compared to $276/ton during the January-June 1998 period and $290/ton for 1998 as a whole.[34]

Finally, as noted in Korea's submission, announced line pipe price increases totaled $80/ton by the time of the ITC decision.[35]

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[31] Prudential and Northwest Pipe are the two producers who entered the market in 1999. See ITC Determination, Crawford Dissenting Views on Injury, p. I-61, n.26; see e.g., Prehearing Injury Brief at 13-14, Exh. 4 (KOR-56) (Prudential press release, dated 22 September 1999, stating: "As a result of improvements in demand and pricing, we expect to break even or show a slight profit in our third quarter results, with anticipation of further improvement in the fourth quarter."); see also Korean Respondents' Posthearing Brief on Remedy, p. 35, Exh. 11 (KOR-56)(Northwest Pipe press release, dated 19 October 1999, stating: "We have seen definite improvement in demand and pricing, and we expect to see further improvement in the fourth quarter…").

[32] See ITC Determination, Separate Views on Injury at I-48 n.88 (KOR-6).

[33] See Exhibit 54 (US Imports of Hot-Rolled Steel Products) (KOR-54).

[34] See ITC Determination, Staff Report at II-28, Table 10 (KOR-6).

[35] See ITC Determination, Crawford Dissenting Views on Injury at I-69, n.68 (KOR-6); Posthearing Brief on Injury, Exhibit 1 (KOR-25); Korea's Statement Regarding the United States Request For A Preliminary Ruling (WT/DS202)(11-12 April 2001) at p. 2.

(iii) Exclusion of Canada and Mexico

17. According to the United States, the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Why does the United States consider that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Answer

Korea considers that the US position on this point is inconsistent and illogical. We assume this position by the United States is necessitated by the fact that the NAFTA exception is applied on a case-by-case basis. It seems to be the US position that Article XXIV of the GATT 1994 does not address the issue. For this reason, Korea does not believe that the United States is relying on Article XXIV:8 as a defence.

Article XXIV:8(b) of the GATT 1994 has a meaning. Either Article XIX measures are permitted between FTA Members or they are not. The fact that Article XIX does not appear in Article XXIV:8 is not dispositive, as the Appellate Body held in *Turkey – Textiles*.[36]

18. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Answer

See Korea's answer to Panel's Question 16 to the Republic of Korea.

19. In Turkey – Textiles (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue." In this regard, please explain how the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act. If the formation of NAFTA would have been prevented but for the safeguards exemption, why are NAFTA members not automatically excluded from safeguard measures imposed by other NAFTA members?

Answer:

It is not clear to Korea that the United States is relying on Article XXIV of the GATT 1994 as a "defence" in this case. The United States seems to center its entire argument on the language of Footnote 1 to Article 2.1 of the SA, which does not apply to the US safeguard measure.

In fact, Korea believes that Article XXIV of the GATT 1994 cannot provide a defence when the NAFTA explicitly provides that safeguards are to be applied on a case-by-case basis.

[36] Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R (22 October 1999) at para. 64.

20. The United States argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State.'" Does the United States consider that the Appellate Body's finding does not apply to the last sentence of footnote 1? Please explain.

Answer

It is impossible to read the Appellate Body opinion as providing that the last sentence of Footnote 1 is separate from the rest of Footnote 1 and not covered by the Appellate Body's interpretation that "the footnote" – *i.e.*, not parts thereof – "only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State.'" [37] The language of the opinion is quite definitive. The only issue the Appellate Body did not address is whether Article XXIV of the GATT 1994 – independent of Footnote 1 – provided Argentina with a defence to a violation of any other provision of GATT 1994, because Argentina did not appeal that issue. We note that the United States does not appear to be relying on Article XXIV as a defence.

21. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer

See Korea's answer to Panel's Question 15 to the Republic of Korea.

(iv) Unforeseen developments

22. At para. 230 of its first written submission, the United States asserts that the collapse in oil prices was not expected. At what point in time is the United States referring to in making this statement? In other words, when was the collapse in oil prices not expected, or unforeseen?

Answer:

First, Korea notes that the United States made no attempt in its decision to comply with its obligation to identify "unforeseen developments." Moreover, the Appellate Body has identified that "'emergency actions' 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."[38] To suggest that a "boom/bust" cycle is not expected in an industry historically characterized by "boom/bust" cycles defies the meaning of "unexpected." Not only are these cycles expected in this industry, but the capital investment cycles of this industry clearly demonstrate that this industry is aware of these cycles and invests accordingly.[39]

[37] Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999) ("*Argentina – Footwear (AB)*") at paras. 106-109 (emphasis added).

[38] *Argentina – Footwear (AB)* at para. 93 (emphasis added).

[39] See generally Korea First Written Submission, paras. 31-33, 246-51; ITC Determination, Crawford Dissenting Views on Injury at I-62 n.33 (KOR-6).

(v) Causal link

23. Did the ITC demonstrate that the oil and gas crisis was not a more important cause of injury than increased imports, as it claimed to, or did the ITC simply demonstrate that the oil and gas crisis did not account for the totality of the injury suffered by the domestic industry? In other words, did the United States simply demonstrate that the industry would still have suffered injury, irrespective of the crisis in the oil and gas industry? If so, is this sufficient to distinguish the injurious effects of the increased imports from the injurious effects of the oil and gas crisis? Please explain.

Answer

Irrespective of whether it would be a sufficient analysis, Korea does not believe that the United States demonstrated that the industry would still have suffered injury irrespective of the crisis in oil and gas. The United States never performed such an analysis nor addressed this question. It only examined whether imports were a greater cause of injury than that single cause, standing alone.[40]

The focus and sequence of the US evaluation of "other factors" is inconsistent with Article 4.2(b) of the SA. The ITC begins with an analysis of the combined effects of other factors plus imports and determines whether they together cause "injury." [41] If so, then the ITC examines whether "the impact of increased imports is as great or greater than the effect of the downturn in demand" [42] or any other independent cause. This analysis is backwards and it does not isolate the effects of other factors.

Article 4.2(b) of the SA clearly requires that imports cause "*serious* injury." Other factors also can simply be the cause of "injury" in accordance with Article 4.2(b). This language strongly supports the view that the injury from other factors must be specifically isolated before the serious injury from imports is evaluated.[43]

The ITC Majority engaged in a two-period analysis to evaluate causation. They compared the period of 1994-1996 with the period of 1998 and the first half 1999. However, they began with an incorrect factual finding with respect to imports. As the Panel observed at the meeting of the parties, the percentage increase in imports between 1996 and 1997 and the percentage increase between 1997 and 1998 were very comparable, and 1997 was the industry's best year. The ITC nonetheless simplistically concluded that the effect of the imports was much greater than the effect of the oil and gas crisis since the presence of imports was the only significant difference facing the industry in 1998/99 and 1994-96.

The ITC Majority also ignored the other significant differences. First, the ITC assumed that the effects of the oil and gas crisis could be measured in their totality by reference to the level of apparent consumption in 1999. They then looked exclusively at the annualized level of consumption in 1999 and found that it was not significantly below that for the period of 1994-1996. This analysis ignored the very significant fact that there was a 30 per cent decline in apparent consumption from the

[40] See ITC Determination, Majority Views on Injury at I-22 (KOR-6). The Separate Views on Injury concluded that the scale tipped the other way and reached the contrary conclusion with respect to the question of present injury--*i.e.*, they determined that the oil and gas crisis was the greater cause of present injury, but imports were the greater cause of threat. *See ITC Determination, Separate Views on Injury* at I-37, I-44 (KOR 6).

[41] See *ITC Determination, Majority Views on Injury* at I-22 (KOR-6).

[42] *Id*.

[43] See *US – Wheat Gluten (AB)* at paras. 68-69.

first half of 1998.[44] Such a significant drop in consumption could be expected to produce significant injurious effects. No similar drop in consumption had been experienced in the previous periods.[45] Furthermore, that decline coincided with a 25 per cent increase in domestic capacity on an annualized basis due to significant new capacity coming on stream[46] (US producers were projecting an increase in demand).[47] Export markets had also dried-up due to the decline in oil and gas demand worldwide.

Thus, the ITC failed to properly identify and isolate the effects of other "differences" between those two periods, including increased capacity, declining export markets and domestic consumption.[48] The oil and gas crisis was the underlying cause that produced all these other effects and their confluence caused an industry decline. The combined effects of all these factors so dilute the effects of imports that imports no longer had a genuine and "substantial" relationship to the serious injury.

24. Is a determination that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry sufficient to demonstrate a genuine and substantial relationship of cause and effect between the increased imports and the serious injury suffered by the domestic industry? Does such a determination ensure that none of the injurious effects caused by the crisis in the oil and gas industry have been attributed to increased imports? Please explain.

Answer

No, it cannot since Article 4.2(c) of the SA only requires that "other factors" cause "injury" (Imports must cause "serious injury.") By definition, other factors may not account for the totality of serious injury.

As noted above, the ITC analysis is backwards and does not properly isolate the effects of other factors. Nor does the US causation standard even allow the ITC to measure the effect of each factor. Rather, the US methodology is simply to weigh imports against each individual cause. Hypothetically, under the US standard, if there are 10 causes, including imports, each contributing 10 per cent of the "injury," the ITC could determine that imports are the substantial cause of serious injury because imports are "not less than any other single cause." Yet, imports in this scenario could not be found to bear a "genuine and substantial" relationship to serious injury since in the absence of these other factors, serious injury may not have occurred.[49] This standard does not comply with the requirements of Article XIX of the GATT 1994 or Article 4.2(b) of the SA.

25. Did the ITC find that injury was caused by "other factors" in addition to the decline in the oil and gas industry? If so, how did the ITC ascertain that the injurious effects of all these "other factors" together did not preclude the conclusion that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury?

[44] The United States indexed data shows that apparent consumption declined almost 30 per cent between first half of 1998 and second half of 1999. *See US 16 February Letter*.
[45] See *id.*.
[46] See KOR-48A.
[47] See KOR-56.
[48] See KOR-48A.
[49] See Restatement (Second) of Torts § 433 cmt. e. (1965)(KOR-58).

Answer

See answers to Questions 23 and 24 above. Moreover, we note that the ITC did not properly investigate the extent to which producers had shifted between the production of OCTG and line pipe.[50] The United States had an obligation to conduct a more thorough analysis of the degree to which the collapse in the market for OCTG resulted in a shift to line pipe production and distorted the financial results of the line pipe industry.[51]

(vi) Developing country exemption

26. Does the Line Pipe measure "appl[y]" (within the meaning of Article 9.1 of the Safeguards Agreement) to developing countries?

Answer

There is no question that the safeguard measure would apply to developing countries if they exported in excess of the 9,000 short tons. The 9,000 short tons is an arbitrary limit that does not reflect the terms of Article 9 of the SA. The language of Article 9 suggests that the determination of whether a developing country is "in" or "out" should be made at the time the measure is imposed so that it can be determined whether the measure applies to them or not. The 9,000-short-ton limit is arbitrary also because it must be constantly reconstructed based on current import levels. This is particularly the case when Mexico and Canada are excluded so that import levels will vary.

27. With regard to para. 227 of the US first written submission, does the 9,000-short-ton exemption guarantee that developing country Members accounting for 3 per cent or less of total subject line pipe imports into the United States will not be subject to the Line Pipe measure? What if the volume of subject line pipe imports (especially from Canada and Mexico) increases to such an extent that a developing country Member could export more than 9,000 short tons to the United States, and still remain at or below the 3 per cent threshold?

Answer

No, it does not guarantee that developing country Members will not be subject to the line pipe measure. The measure is a TRQ, with a quota of 9,000 short tons plus a 19 per cent duty. The TRQ applies equally to developing countries. Were a developing country to export 10,000 short tons to the US market, 1,000 tons would be subject to a 19 per cent tariff. Thus, the United States has failed to exempt developing countries. With respect to the US claim that 9,000 short tons represents the 3 per cent limit, Korea observes that 9,000 short tons is far in excess of 3 per cent of current import levels and could be below future levels. If developing countries are not exempted, they are also denied their preference under Article 9 of the SA because the overall limit has not been set by the United States in this case. There is no way of determining what level of imports 3 per cent represents.

(vii) Increased imports

28. In *Argentina – Footwear,* the Appellate Body found that the increase in imports must be *inter alia* "recent enough." How "recent" should the increase in imports be, relative to the date of the competent authority's decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition

[50] See *US – Wheat Gluten (AB)* at para. 55; see also KOR-48C (The Percentage Relationship Between Net Shipments of Line Pipe and Net Shipments of OCTG).

[51] See *US – Wheat Gluten(AB)* at para. 55.

before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Answer

See Korea's answer to Panel's Question 3 to the Republic of Korea.

29. The United States argues in para. 66 of its first submission that a comparison of "mismatched" interim periods could create distortions because of seasonal changes in market conditions. Does the United States, therefore, believe that line pipe is a seasonal product? If line pipe is not a seasonal product why is it necessary to compare "matched" interim periods, as opposed to the immediately preceding interim period?

Answer

The ITC record contains no evidence that line pipe is a seasonal product.

ANNEX C-2

THE REPUBLIC OF KOREA'S COMMENTS ON UNITED STATES' RESPONSE TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

1. The Panel extended to the Parties the opportunity to respond to the submissions of 15 June 2001. Before proceeding, Korea notes that it provided its responses to the Panel's questions and to the positions of the United States as they were expressed by the US representatives at the Second Meeting with the Parties ("Second Panel Meeting"). Very little has been added by the United States through the written response. Therefore, rather than repeating our points and arguments, Korea will largely confine itself to commenting on new material provided in the US response.

Questions for All

2. Question 4, paragraphs 8-11 of the United States Responses to Questions from the Panel at the Second Meeting with the Parties ('Second US Response"). Korea notes that the United States has made no claim of prejudice because, of course, it could not do so. As noted in paragraph 11 of Korea's Second Response to Questions,[1] the Appellate Body held in *Thailand – Antidumping on Angles* that the question is whether a party "suffer[ed] any prejudice on account of any lack of clarity in the panel request."[2] None has been claimed here nor shown to exist.

3. As Korea properly identified in paragraph 9 of the "Panel Request,"[3] critical information on which the United States relied in its decision-making has not been provided to Korea. Korea's claim in paragraph 9 is clearly separate from its Article 3 and 4 claims made in relation to the ITC phase of the investigation in paragraph 1 of its Panel Request.[4] The nature of the measure and "how" it was determined to be limited to the extent necessary to remedy the injury are the most basic critical information. To date, the US response has been limited to the scant information contained in the Presidential Proclamation.

4. This issue regarding the lack of critical information regarding the measure has been central to this case. In its letter of 30 January 2001, to the Panel, Korea requested the Panel to seek information pursuant to its authority under Article13.1 of the DSU, including with respect to the measure.

5. The United States has responded to the Panel that the obligation to explain the basis of the action – as required by Articles 3.1 and 4.2(c) of the SA – does not extend to the Article 5.1 obligations. Korea has disagreed from the outset. The issue has been raised and fully addressed by both parties. There is no basis to allege prejudice.

6. Regarding the ongoing obligation of Article 5.1, the United States takes issue with the phraseology used for the claims contained in Korea's panel request. The United States cites to the "tense" in which particular verbs appear in the Panel Request as proof of what is in or out of the Panel

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[1] *Korea's Responses to Questions to the Parties from the Panel and Korea's Initial Comments on Responses of the United States during the Second Substantive Meeting of the Parties*, (15 June 2001).

[2] *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R (12 March 2001) at para. 95.

[3] *See United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea ("US – Safeguard Measures on Line Pipe")*, Request for the Establishment of a Panel by Korea ("Panel Request"), WTD/DS202/4 (15 September 2000) at para. 9.

[4] *See US – Safeguard Measures on Line Pipe*, Panel Request, at para. 1.

Request. Such an allegation is clearly at odds with the Appellate Body precedents and ignores the distinction made by the Appellate Body between arguments and claims.[5]

Questions for the United States

7. Question 1, paragraph 23 of the Second US Response. The United States now states that "there is no other documentation demonstrating how, at the time it applied the line pipe safeguard, the United States ensured compliance with the obligations of Article 5.1."

8. In the *United States' Response to Questions from the Panel and Korea*, dated 7 May 2001, the United States conceded, at paragraphs 26-30, that there are additional documents prepared during the Presidential decision making. It is the position of the United States, however, that they will not be released to the Panel.

9. Question 6, paragraph 37 of the Second US Response. The US seems to be arguing over whether the allocation methodology is only somewhat distortive (because the declines for both line pipe and OCTG were similar) or very distortive because OCTG declined much more precipitously than line pipe. (Korea has demonstrated that, in fact, the latter was the case.) In either case, the failure to properly separate out the effect of the declines due to OCTG was an error and overstated the declines in the line pipe industry indicators. The ITC never conducted such an analysis but rather simply defended the methodology as "verified" by ITC staff. Korea believes that the Panel should conclude that the database before the ITC could not form the basis for a serious injury or threat decision because of the significant distortions in the data and the failure to properly isolate the "like product" (see also Korea's Response in paragraph 21).

10. Moreover, we disagree with the U.S. observation that Commissioner Crawford "misread AISI data." Korea Exhibit 48-C, using the AISI monthly shipment data relied on by the ITC and included in the U.S. Exhibit 3, demonstrates that domestic shipments of OCTG declined more sharply in 1998 and 1999 compared to domestic shipments of line pipe.[6] The graph is correct and demonstrates that costs allocated on the basis of a company's sales of OCTG and line pipe will result in an over-allocation of costs to line pipe simply because of the more precipitous collapse in OCTG sales during that period.

11. Question 8, paragraph 40. Korea believes that a proper analysis of Geneva Steel was never performed. Moreover, the US did not answer the Panel's question concerning what the industry's operating income would have been without the costs associated with Geneva Steel's closing of its blast furnace and attendant bankruptcy.

12. Question 10, paragraph 42 of the Second US Response. The United States repeats its accusation that Korea has "conceded" that certain conditions were unexpected. Korea does not and has not conceded that the United States has met its obligation with respect to "unforeseen developments".

13. As noted at paragraphs 147-149 of Korea's Written Rebuttal, the "unforeseen development" must be the cause of the increase in imports.[7] The oil and gas crisis, which Korea agrees caused the

[5] *See Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) at para. 123; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (9 September 1997) at paras. 141-43 ("Article 6.2 of the DSU requires that *claims*, but not the *arguments*, must all be specified sufficiently ... in order to allow the defending party ... to know the legal basis of the complaint.")

[6] *See* Exhibit 48C (KOR-48C) and *Second US Response* at para. 31.

[7] *Written Rebuttal of Korea* (7 May 2001) at paras. 147-49.

temporary decline in the industry indicators, did not cause imports to increase. Indeed, it caused imports to decline as well. That, of course, is the point.

14. Korea made its claim with respect to unforeseen developments in paragraph 2 of the "Panel Request"[8] and the United States does not deny that it failed to make a finding of unforeseen developments in its determination in violation of Article XIX.[9]

15. Other Questions, Capacity: paragraph 49 of the Second US Response. The United States refers to the ITC questionnaire, which defined average production capability as follows:

> *Average production capability*. The level of production that your establishment(s) could reasonably have expected to attain during the specified periods. Assume normal operating conditions (i.e., using equipment and machinery in place and ready to operate; normal operating levels (hours per week/weeks per year) and time for downtime, maintenance, repair, and cleanup; and a typical or representative product mix).[10]

16. The above definition does not impose a uniform methodology on domestic producers. To the contrary, the actual allocation methodology is at the discretion of each producer and explained in the confidential questionnaire responses. The ITC determination makes no mention of the closing of facilities in the second half of 1998. Yet, according to the ITC at Table 5 in its determination, domestic capacity in 1998 and 1999 was as follows:

1st half 1998	**2nd half 1998**	**1st half 1999**
656,714	480,668*	708,952
* 1,137,382 (1998 capacity) - 656,714 (1st half 1998) = 480,668		

Source: ITC Report, Table 5, at II-22, KOR-6.

17. It is difficult to believe that 176,046 tons were removed from the domestic industry in the second half of 1998 – but was not noted by the ITC – and then jumped by 228,284 tons (47.5 per cent) in the first half of 1999. That makes no sense, given the nature of the industry in question. Thus, it is appropriate to annualize 1999 data to get an accurate picture of the degree to which capacity increased between 1998 and 1999 – i.e., 25 per cent. Capacity could not increase by 8 per cent between the first half of 1998 and 1999, as alleged by the US. Nor, could it have increased by 47.5 per cent, which is the alleged amount of increase between the second half of 1998 and the first half of 1999. It increased by 25 per cent between 1998 and 1999, partly due to the inauguration of new plants. That increase in capacity was responsible for "leading" prices down.

18. Other Dual-Stencil Line Pipe Questions, paragraphs 50-52 of the Second US Response. The United States suggests that the issue of dual-stencil line pipe was a new issue that was first raised in the Respondent's Pre-Hearing briefs.

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[8] *See U.S. – Safeguard Measures on Line Pipe*, Panel Request, at para. 2.

[9] *See United States - Safeguard Measures on Imports on Fresh, Chilled or Frozen Lamb Meat from New Zealand*, Report of the Appellate Body, WT/DS177/AB/R (1 May 2001) at para. 74.

[10] *General Information, Instructions, and Definitions for Commission Questionnaires*, Circular Welded Carbon Quality Line Pipe, Inv. No. TA-201-70 at 6.

19. The fact is that the issue of the usage of dual-stencil pipe had been well-known to the ITC even before the beginning of the investigation on the instant case. Thus, in its Pre-Hearing Staff Report, the ITC noted as follows concerning dual and triple stencilling by US producers.

> In some instances, the assignment of sales values and costs to welded line pipe and standard pipe was complicated by dual (or triple) stenciling. For example, the triple stenciled welded line pipe and standard pipe sold by *** in 1994 were physically the same product. Under these circumstances, according to company officials, the product's end use is the only practical way to distinguish between welded line pipe and standard pipe.[11]

20. We note that the ITC appears to be treating dual/triple stencilled line pipe produced by domestic producers as line pipe or standard pipe depending on their usage. We further note that the ITC, irrespective of such a prior knowledge, did not ask purchasers to identify what percentage of their sales of dual/triple stencilled pipe were used respectively for standard or line pipes. An incidental point to be made here is ITC's differential treatment of witnesses for petitioners and for respondents. The ITC completely ignored the witness for Korean respondents, whose testimony was also under oath, and whose testimony was further supported by an additional confidential affidavit[12] and actual imports of dual stencil pipe by port.[13].

21. Moreover, it appears that dual-stencilled or triple-stencilled line pipe was not always treated as "line pipe" by the US domestic industry itself. For the purposes of assigning costs and sales, it seems that the US industry based allocations between standard pipe and line pipe based on "end use" of those pipes. Korea finds that this is another distortion in the sales and cost data since the ITC treated all dual-stencilled or triple-stencilled line pipe as "line pipe" in terms of imports. This further highlights the problem with the methodology the ITC used to allocate the cost data.

22. Finally, the ITC routinely follows up and requests information additional to that in the original questionnaires. As the US admits in its response to Panel questions, the ITC specifically requested additional data from the Japanese producers in the case of arctic grade and alloy line pipe, which it treated as "a supplement to the Japanese producers' questionnaire responses."[14] Obviously, that same procedure was not followed with respect to the dual-stencil line pipe issue.

23. Other Questions. The determination of the "competent authorities" and the views of the Commission, Paragraphs 57-63 of the Second US Response.

24. It appears to be the position of the US that the "competent authorities" encompass only the ITC and only those Commissioners that made an affirmative decision on which a safeguard measure can be based.

25. There is no support in the SA for such a narrow reading, and the obligations of the SA are not dependent on the structure of decision-making process in the United States or any other Member State. First, "competent authorities" is clearly a term used to refer to those entities entrusted with the responsibility for safeguards actions. The composition of that entity can not change depending upon the determinations made from one case to another. According to the US theory, the "competent authorities" in the US could be three Commissioners in one case (in case of a 3-3 "affirmative decision") and all six in a unanimous decision. There is no support for such a theory. The SA is

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[11] *Prehearing Staff Report,* Circular Welded Carbon-Quality Line Pipe, Inv. No. TA-201-70 (21 September 1999) at p. I-25; identical language in *ITC Determination, Staff Report* at II-25 (KOR-6).

[12] *See Posthearing Brief of Japanese and Korean Respondents* at Exh. 2 (KOR-25).

[13] *See id.* at Exh. 12 (KOR-62).

[14] *Second US Response* para. 48.

framed in terms of the entity – not individual members of the ITC. Similarly, under the US theory, the President is not encompassed in the "competent authorities," even though the President is clearly an entity which finally decides whether to take a safeguard measure.